

CHAPTER II

THE CONCEPT OF CONTRACT

A. Contract in Civil Code

The Civil Code is a Dutch heritage legislation which is codified. The long period of Dutch colonialism has affected the implementation of the civil code in Indonesia. The need of being adjusted toward the Indonesian society before its implementation is a must since the differences on its cultural backdrops. Since it was legalized by the King of the Dutch at May 16, 1846 through *staatsblad* 1847-23, Civil Code has been stated as the law since May 1, 1848. After Indonesian independence in 1945, Civil Code is still applied under the Article II of transitional legislation of Undang-undang Dasar 1945 (UUD)¹. It states “All state’s agencies and regulations are still applicable as long as has not been realed the newest version of the law based on UUD 1945”. Therefore, the Civil Code is still applied as the law in Indonesia recently before it is replaced with the newest version of law. The Civil Code is one of the main sources of the law for the contract in the form of regulation.

¹The name of legal foundation used in Indonesia

The third book of the Civil Code describes the point related to the contract. *First*, the regulations of civil obligation are the regulations of the obligation in general. *Second*, the regulations of obligation which arise from either the conditions required for the validity of the contract, the effect of the contract, or the interpretation of contract. *Third*, the regulations of contract termination. *Fourth*, the regulations of a particular contract which are often referred as *nominaat contract*.²

1. Definition of Contract

Contract in foreign law is known as several terms such *overeenkomst* in Dutch, *contract* or *agreement* in English, *contract* or *convention* in French, *pacte* or *conventie* or *contractus* in Latin, *kontrak* or *vertrag* in German.³ In the Indonesian law, it is recognized as *perjanjian*. These terms can be found in the Civil Code. It is described in article 1313 of the Civil Code about the definition of *perjanjian*; it states that *perjanjian* is an action to which one or more individuals bind themselves to one another. Meanwhile, Abdulkadir Mohammed argues the contrast definition of it. He believed that it is an agreement in which two or more people bind themselves to each other to do something which is related to wealth.⁴

From the definition above, it can be concluded that there are three interrelated core words in a *perjanjian*: "agreement", "contract" and "obligation".

²Munir Fuady, *Hukum Kontrak (Dari Sudut Pandang Hukum Bisnis) buku ketiga*, (Bandung: PT Citra Aditya Bakti, 2007), p 13.

³F.X. Suhardana, p 7.

⁴Abdulkadir Muhammad, *Hukum Perdata Indonesia*, (Jakarta: Penerbit Citra Aditya Bhakti, 1990) p 255.

Some jurists place the contract as the development of agreements. This written agreement is called as contract. Meanwhile, Ahmadi miru argues that there are differences between contract and obligation. The contract is concrete event and observable subject, either written or unwritten, while obligation is non-concrete and cannot be observed because it is only a result of the contract.⁵

2. Form of Contract

Form of contract is diverse when it is seen from different viewpoints. In general, the contract consists of two kinds: reciprocal contract and unilateral contract. Reciprocal contract is an agreement in which each party holds the status as "having the right" and "having the obligation", or contract which determines the rights and the obligations on both sides. Meanwhile, unilateral contract is a contract which determines the obligations on one side, and the rights to another one.

Based on the name, the contract is divided into *nominaat*, *innominaat*, and mixture contract. The contract which is recognized in the Civil Code is *nominaat* contract. *Innominaat* contract is a contract that develops in the community after the Civil Code has been codified. Mixture contract is a contract development of contract *nominaat* or integration between the two *nominat* contracts into a contract.

The type of contract is divided into private deed and authentic deed. Private deed is made by the parties without the help of the official. This is made merely for the benefit of the parties. Meanwhile, authentic deed is made by the

⁵Ahmadi Miru, *Hukum Kontrak*, p 31- 32.

official who is given the authority to do so by the authorities under the provision set, either with help or without help from interested parties who record what is requested to publish in it by the interested parties.⁶

3. Contract Principles

Many principles are known in the contract, but there are four principles that are most widely used as a guideline. These principles are as follows:

a. The principle of freedom in contract

This principle is one of the major principles and important in the agreement. Sutan Remi Syahdeini defines the freedom in contract as a freedom of the parties who involve in an agreement to be able to formulate and to approve the clause of the agreement without the intervention from other parties.⁷ The terms of freedom of contract cannot be found in the Civil Code. However, the jurists has admitted that the definition of this principle is implicit in Article 1338, paragraph 2 which states, “all valid agreement is applicable as law to the individuals who have drafted it”. The scope of this principle includes drafting or not drafting agreement, drafting contract with anyone, determining content of the clauses, the requirements, and the implementation of the agreement, either written or verbal. This is a basic principle which guarantees the freedom of contract drafter.

⁶Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia*, (Yogyakarta: Penerbit Liberty, 1979), p. 108- 110.

⁷Sutan Remy Syahdeini, *Kebebasan Berkontrak*, p. 9.

b. The principle of consensualism

This principle is the foundation of contract agreement because there is no contract without the agreement. In the Article 1320, paragraph 1, it states “In order to be valid, an agreement must satisfy the following four conditions: *first*, there must a consent of the individuals who are bound thereby. *Second*, there must be capacity to enter into an obligation. *Third*, there must be a specific subject matter. *Fourth*, there must be permitted cause (*sebab halal*)”. The conclusion of this principle is that contract should contain an agreement between two parties.

c. The principle of *Pacta sunt servanda*

This principle states that the agreement is binding the contract drafter. In Article 1338, paragraph 1 and 2, it states:

“All legally executed agreements shall bind the individuals. They cannot be revoked otherwise by mutual agreement, or pursuant to reasons which are legally declared to be sufficient.”

When an agreement becomes a contract, it also becomes stronger in its binding because a contract contains the promises which must be fulfilled, and it binds the parties as the law.

d. The principle of good willingness

In Article 1338, paragraph 3, it states, “ an agreement should be executed in good willingness”. Therefore, it restricts the previous paragraph which explains the freedom of contract, consensualism and *pacta sunt servanda* principles. Its restriction as the supervisor of those principles, then it is

important in the contract. Hence, the written agreement among the parties must be based on the principle of good willingness.

Based on those principles, it produces the requirements as the restrictions which determines the validity of contract agreement. if one of these requirements is not filled, then the agreement becomes invalid.

4. Legitimate Requirements of Contract

There are four legitimate requirements according to article 1320, such as: *first*, there must be approval between the individuals who bind themselves in the agreement. *Second*, there must be a capacity of the individuals to conclude an agreement. *Third*, there must be a specific subject. *Fourth*, there must be a permitted cause. Those conditions are usually abbreviated as agreement, capacity, specific subject, and permitted cause, with the following description:

a. Agreement

The agreement is an absolute requirement in the contract drafting because it is the reason of the contract. However, the agreement still allows the fault of willingness. The result of this faulty is the termination of contract from the aggrieved party. In article 1321 and article 1449, it mentions about the fault of willingness, such as the oversight or the blunder, the coercion, and the fraud. Then, Ahmadi miru also adds the abuse of willingness to it.⁸

⁸ Ahmadi Miru, Hukum Kontrak dan Perancangan Kontrak, p. 18.

b. Capacity

In the Article 1330, it states that the incompetent individuals in the agreements, they are: the immature, the individual under guardianship, and the married women who are regulated by the law. In the limitation of age, the person is considered that he is incompetent to perform the contract before 21 years old, unless he has married before 21 years or older. But, he is also said incompetent, if he has dumb, insane and wasteful.⁹

The problem of capacity is close to the identity and the status of parties which is written in the contract. The status of parties are classified in three kinds. *First*, it is for individual name. *Second*, it is by individual name, but for interests of others. *Third*, it is for interests of others. He is called as authority holder.

c. Specific subject

The specific subject in the contract is called as achievement. It is the goods, the expertise, or the power. Moreover, it is also in form of handing or giving something, performing, and not performing.

d. Permitted cause

The aim of legal (halal) has different meaning with the concept of halal in Sharia. It means the justification of law, the public order, the custom, the propriety and the the decency.¹⁰

⁹Ahmadi Miru, Hukum Kontrak dan Perancangan Kontrak, h. 29.

¹⁰I Ketut Artadi and I Dewa Nyoman Rai Asmara Putra, *Implementasi Ketentuan- ketentuan Hukum Perjanjian dalam Perancangan Kontrak*, (Bali: Udayana University Press, 2010), p. 51-59.

5. Termination of Contract

The contract requirements is greatly affect for the process because it undeniably can lead to void (*nietig*) or to terminate. There are two reasons of voidness, such as: *first*, the violation of legitimate requirements with the breaking of agreement and provisions of the parties capacity (Civil Code, Article 1320, paragraph 1 and 2). These result in annulment of agreement (*vernietigbaarheid*). *Second*, the violation of objective requirements with the violation of specific subject and permitted cause (Civil Code, Article 1320, paragraph 3 and 4). These result in annulment by law.¹¹

B. Contract in Sharia Contract Law

Qur'an and Hadith are main sources of law in Sharia Contract Law. Sharia Contract Law has primacy in its application. It is always executed based on Islamic principles. The Elements of Islamic principles are the development of mu'amalah. It is based on Quran and Hadith. The majority of muslim population in Indonesia is one factor of legislation appearance based on Islamic principles, for example, the arising of Law No. 3 of 2006 on Religious Courts, Law No. 19 of 2008 on State Sharia Securities (SBSN), State Gazette of Indonesia Republic 2008 Number 70 extra State Gazette 4852, Law No. 21 of 2008 on Islamic Banking, and many other related regulations. This the reason why Islamic Economics Law Compilation (KHES) is arisen with the issuance of the Indonesia's highest court Regulation No. 2 of 2008 on the Compilation of Islamic Economics Law on

¹¹I Ketut Artadi and I Dewa Nyoman Rai Asmara Putra, *Implementasi Ketentuan*, p. 62.

September 10, 2008. Then, starting from this time, the judges in the religious court make Compilation of Islamic Economics Islamic Economics Law as a guide in performing the basic tasks of judicial authority in the field of dispute. Afterwards, it becomes as the source of sharia contract law.

6. Definition of *Aqad*

Contract in Sharia Contract law is called as *aqad*. In the etymological meaning, *aqad* is العَقْدَة which means “the connection” or العَهْد which means “the appointments, the messages” or العَقْد which means “the agreement or the obligation”. In the terminological meaning, *aqad* is the obligation set by *ijâb qabûl*. It is based on Islamic prohibition. In Article 20 of KHES, it states “*aqad* is deal in an agreement between two or more parties to perform and/ or not to perform”.¹² It is stated in al-Quran surah al-Maidah verse 1:

يَا أَيُّهَا الَّذِينَ ءَامَنُوا أَوفُوا بِالْعُقُودِ

O ye who believe! fulfil (all) obligations...¹³

The general word is used in sharia business transaction is “*aqad*” , it means that *aqad* has the holding capacity to the parties. Meanwhile, “*al-‘ahdu*” means an agreement or a statement of a person to perform or not and it has no relation to do with the willingness of other parties. Ensiklopedi Hukum Islam¹⁴

¹²Rachmat Syafei, *Fiqih Muamalah*, (Bandung: CV Pustaka Setia, 2001), p. 43.

¹³ The English Translation of Quran Application by Yusuf Ali.

¹⁴The name of Islamic Law Encyclopaedia.

states that *aqad* is equated with obligation and agreement. *Ijâb* (the binding statement) and *qabûl* (the declaration of acception statement) must be conformed with the willingness of *syarî'at* because it affects on the object of agreement. Meanwhile, the definition of “be conformed to the willingness of *syarî'at*” is all obligations which are not allowed to disagree with the willingness of *syarî'at*.¹⁵ When the *aqad* contains an element *maitsir* (speculation or gambling), *Gharâr* (trickery), *riba* (interest), *bâthil* (crime), *risywah* (bribe) and the *harâm* (proscribed) object, then it has disagreed with the willingness of *syarî'at*.

7. Form of Aqad

There are two types of *Aqad* form: *tijârah* or commercial contract and *tabarru'* or virtue contract. Those contract have different concept in *aqad*. The *aqad* concept of *tijârah* is the exchange, which in essence, it is the commercial contract. Therefore, the parties are able to take the transaction advantage. Otherwise, in *tabarru'* concept does not contain the element of exchange because it only has two elements: the pure element of deposit and the confidence.¹⁶

In implementation, it is verbal, written, or gesture. In the contract, it has interlocking relationships. *First*, the verbal form. It is the reason of the arising of the parties agreement. *Second*, the written form. It is the evidence of the parties agreement. *Third*, the gesture form. It is described as contract signature in the

¹⁵H.R. Daeng Naja, *Aqad Bank Syariah*, (Yogyakarta: Pustaka Yustisia, 2011), p. 19.

¹⁶Irma Devita Purnamasari and Suswinarno, *Aqad Syariah*, (Bandung: Mizan pustaka, 2011), p. 12.

clause. This gesture indicates that the parties agree to the provisions contained in the contract.

From the other side of the contract binding or not, the scholars divide into two types. *First*, the contract binds the parties in the contract, then they can not cancel the contract without permission from other parties. This concept is contained of *tijârah*. *Second*, the contract not binds the parties in the contract. This concept is contained of *tabarru'*.¹⁷

8. *Aqad* Principles

There are 13 principles of *aqad* in sharia contract law. These principles become the foundation to sharia contract drafting, it is described as follows:

- a. *Ikhtiyâri*/ voluntary. It is done by the willingness of the parties to avoid the necessity of pressure among the parties.
- b. ‘Amanah/ keeping promises. It means that each *aqad* should be binding and it should be kept by the parties.
- c. *Ikhtiyâti*/ Prudential. It means that every contract drafting should be careful considered, it is also done with properly and carefully.
- d. Luzum/ unchanged. It means that every contract drafting should have clearly purpose and calculations in order to avoid speculation.
- e. Mutual benefit. It means that each contract has to meet the interests among the parties to avoid the manipulation which adverse one of parties.

¹⁷Muhammad, *Model-Model Aqad Pembiayaan Di Bank Syariah (Panduan Teknis Pembuatan Aqad/ Perjanjian Pada Bank Syariah)*, (Yogyakarta: UII Press, 2009), p. 30- 31.

- f. *Taswiyyah*/ equity / equality. It means that the position of the parties in a contract is equal. Hence, this equality implies to the balances of the rights and the obligations.
- g. Transparency. It is the need of the open accountability of parties.
- h. Ability. It means that each *aqad* should be in accordance with the ability of the parties, in order not to burden the parties.
- i. Taisîr/ simplicity. It means that each contract is done by giving each ease. Hence, the parties perform the contract in accordance with the agreement.
- j. Good willingness. it is to avoid bad actions that damage one of party or another.
- k. Permitted cause. It means that each contract is allowed as long as disagree with the law and it is not forbidden. The quality of permitted cause in general do not violate the sharia law, should be equally good pleasure, and should be clear or not vague. Hence, This does not give rise to mislead vague of interpretations in the application.¹⁸
- l. *Al-hurriyyah*/ freedom of contract. It means that each party has the freedom in the contract drafting. It includes of determining the contract object, the requirements of the rights and the obligations, or resolving disputes. But this freedom is restricted by the *syarâ'* law.¹⁹ It is stated in hadith:

وَالْمُسْلِمُونَ عَلَى شُرُوطِهِمْ إِلَّا شَرْطًا حَرَّمَ حَالًا أَوْ أَحَلَّ حَرَامًا

¹⁸Ahmadi Miru, *Hukum Kontrak Bernuansa Syariah*, (Jakarta: Raja Grafindo Persada, 2012), p. 45.

¹⁹Burhanuddin S, *Hukum Kontrak Syariah*, (Yogyakarta: BPFE, 2009), p. 42.

“The Muslims must fulfill the terms they has agreed, as long as it does not forbid something lawful or justify something unlawful”.(Bukhari)²⁰

m. *Al-kitâbah/* written. It means that each contract has an interest to be able to approve. It is stated in al- Quran, sura Al-Baqarah,verse 282:

يَا أَيُّهَا الَّذِينَ ءَامَنُوا إِذَا تَدَايَنْتُمْ بِدَيْنٍ إِلَى أَجَلٍ مُّسَمًّى
فَاكْتُبُوهُ

*“O ye who believe! when ye deal with each other, in transactions involving future obligations In a fixed period of time, reduce them to writing let a scribe write down...”*²¹

9. Legitimate Requirements of *Aqad*

The requirement is the guide of validity of a contract in the Sharia Contract Law. These requirements are *ijâb qabûl*, the contract parties, the object of contract, and the purpose of contract. Those four conditions narrowed into three terms. *First*, the pillar terms: *ijâb qabûl*. It is an absolute element in the agreement. The reasearcher concluded that the context of *ijâb qabûl* in a contract is written in the content of the contract: the rights and the obligations. *Second*, the subjective terms, namely the contract parties. It is said as subjective terms, because the parties are the major factors in the contract drafting. The parties should be someone who is capable of doing the legal action. They are also called as *ahliyyah*. in Article 2, paragraph 1 of KHES, it provides the limitation of age

²⁰ This hadith is narrated by Bukhari, the chapter of Sulhu: 3594 in LAWAID hadith application.

²¹ The English Translation of Quran Application by Yusuf Ali.

that the lowest age is eighteen (18) years old or he ever married. Quote the opinion of Ahmad Azhar Bashir, in a book which is written by Daeng Naja, he said that it is more appropriate if the restriction is not just about the age, but it also contained of *rusyd* factor (maturity reasoning).²² *Third*, the objective terms: the object of *aqad* and the purpose of *aqad*. The requirements of the contract object covers the truly goods when the contract takes place, the justifying by *syari'at*, the goods can be determined and known, the goods can be submitted at the time of contract occurs, the useful goods. Hence, the requirements of the contract purpose are arisen when the contract is held. It is continued until the end of contract execution, and it is justified by *syari'at*.

10. Termination of *Aqad*

Termination of the *aqad* under Islamic law due to incomplete of the pillar terms and the subjective terms, while the objective terms follow both of terms. The explanation of these things are:

- a. It is due to the pillar terms with the expiry of contract. Normally, in a pre-determined contract determined when a contract ends. Then, if it has passed the time of limit specified, it also ends the agreement and the provisions of the objective terms.
- b. It is due to the subjective terms, they are:
 - 1) The contract is canceled by the parties, If the contract is not binding.

Otherwise, there are several points of the binding contract reason, such as:

First, one of the party in default on contract. *Second*, one of the party has

²²H.R. Daeng Naja, *Aqad Bank Syariah*, p. 24.

known the error of the object (*error in objecto*) or the subject (*error in persona*) in contract. *Third*, the achievement of contract has reached completely.

- 2) When one of the party has passed away. This applies for the obligation which performed something, but not to give anything. Unless there are other provisions contained in the contract. For example, the obligations and the rights of the parties can be transferred to heirs.²³

C. Concept of Standard Contract

11. Definition of Standard Contract

Standard contract is a written contract by one party, and then it is printed in a form. Then the another party only has to fill it without the change of the clause. Civil Code and KHES are not specifically to regulate the form of contract. Its looseness often results in the exoneration clause. The exoneration clause is a clause that eliminates or limits the legally liability of either party in an agreement.²⁴ It is also called as the *eksemsi* clause. Munir fuady gives the definition of the *eksemsi* clause, "It is a clause in the contract to absolve or to limit the liability of either party in the default event .Whereas according to the law, it should be the responsibility of him."²⁵

²³Daeng Naja, *Aqad Bank*, p. 23- 26.

²⁴Much. Nurachmad, *Buku Pintar Memahami dan Membuat Surat Perjanjian*, (Jakarta: Visimedia, 2010), p. 24.

²⁵Munir Fuady, *Hukum Kontrak*, p. 98.

Besides the exoneration or the *eksepsi* clause, there are also some basic rules that must be met until the clause in standard contract be valid and binding. Its rule is the signature. Therefore, if the contract has signed by the parties, it becomes unimportant whether the parties have read the clause in the contract or not. Then the signature automatically binds both of them. This also applies to a blind, an illiterate, or a person who does not understand the language used in the agreement. Hence, the people should be able to save themselves by getting people who helped in the agreement.²⁶ It is used for the repeatedly contract in drafting. Its function is to facilitate the efficiency of contract drafting process.

12. Element of Standard Contract Clause

There are three basic elements of a contract in a standard contract clause: *esensialia*, *naturalia*, and *aksidentalialia*,²⁷ with the following explanation:

a. The *esensialia* element

It is an important element that should exist in the contract because it is the essence of the contract and no contract without the agreement of the essence. For the example: the essence of sale and purchase contract is goods and price. Then, no purchase agreement in the absence of goods and price.

b. The *naturalia* element

It is an element that has regulated in the law. It means even the parties does not mention it in the contract clause, it is automatically bound themselves.

²⁶Sutan Remy Syahdeini, *Kebebasan Berkontrak*, p. 79- 82.

²⁷Ahmadi Miru, *Hukum Kontrak dan Perancangan Kontrak*, p 31- 32.

c. The aksidentalial element

It is an element that has been made by the parties. For example: the determination fine if one of them defaults in the determination of the law until the dispute comes up between them.

Finally based on these elements, it rises the construction of a standard contract.

13. Anatomy of Standard Contract

The anatomy is structure which is contained in the agreement. This anatomy becomes the basic guideline for the contract drafting. But, when we go back to the beginning of understanding that the law does not clearly regulate how the form of the contract. Hence, many experts also offer a wide range of standard contract anatomy. In general, there are three important parts in the standard contracts: the head of contract, the body of contract, and the closing of contract²⁸.

a. The Head of contract. It consists of:

1) The title of contract

Title contracts described with a few words about the types of contract. For example: leasing, sale and purchase, etc. However, if it is difficult to describe the title in a few words, and it should be written in a longword or repeatedly written. Then for it's practically, it is drafted acronym. For example: the title of "The Cooperation Agreement of The Motorcycle Engine Factory with The Engine Distributor", it can be shortened to "the

²⁸I Ketut Artadi and I Dewa Nyoman Rai Asmara Putra, *Implementasi Ketentuan*, p. 85.

agreement". It is based on Article 1342 - 1351 of Civil Code which states that the function of acronym is to avoid the ambiguity in understanding of agreement.

2) The Number of Contract

The number of Contract is given by the competent authority to make such contracts.

3) The Opening of Contract

The opening of contract describes time and place of the agreement. Although the essence of the agreement is conducted anytime and anywhere (Article 1338 of the Civil Code), but an agreement is indicated by the defects if it is done at unreasonable time and place. This unreasonable conditions lead to the annulment of agreement.

4) Full name and official position

It is applied to the authentic act that should be made by an authorized official to show that the parties present indeed and the officials as their witnesses. Usually it uses the editorial, "telah hadir dihadapan saya (.....), disaksikan oleh saya" (the party has come to me..., the party is witnessed by me...). This provision is based on Article 1868 of Civil Code which states "an authentic deed is one which has been drafted up in a legal format, by or before public official who are authorized to do so at the location where this takes place. "

5) Comparison

Comparison is derived from Dutch, *Comparant* or *Comparatie*. In English, It is described with the explanation “the parties face each other”, or “the parties faced the authorized official”. The comparison happens for individual, other person (giving authority), corporation (based on legislation), and corporation based on authority.²⁹ In the contract form, it is usually written by the identity of the parties.

6) Remarks

The remarks for the authentic deed are written in the statement that the letter of the agreement is made by the authority of contract official.

7) Recital contract

Recital is the important part in contract. Recital describes background of the contract drafting. Recital consists of three parts: the recital of achievement, object contract, and agreement.

b. The body of contract is an element which contains the rights and the obligations. The body of contract consists of:

- 1) The provision that describes types of agreements typically. It is contained in Article 1 of the contract to provide the confirmation whether it is conditional contract, promptness contract, joint liability contract, or contracts under penalty. Meanwhile, other forms outlined in the contract concerning the scope of contract.
- 2) The definition describes the meaning of terms which are used in contract. It is ought to written in the beginning article of contract or second article. The

²⁹R. Soeroso, *Perjanjian di Bawah Tangan (Pedoman Praktis Pembuatan dan Aplikasi Hukum)*, (Jakarta: Sinar Grafika, 2010), p. 57.

purpose of definition is to avoid multiple interpretations or misinterpretation.

- 3) The right and the obligation which are related to the *esensialia* element, the *naturalia* element, or the *aksidentalialia* element of the agreement are assigned sequentially thereafter on Article. This is the culmination of a contract core because it also shows the economic value of a transaction. In addition, the procedures of the rights and obligations of the parties also contains certainty in the implementation, and also authority to claim damage since the event of a dispute. Compensation is the certainty of promises and the implementation of promises in a comparison contract is fair and reasonable.
- 4) The exoneration clause is clause which is normally included in standard contracts. This clause is an additional clause which publishes that one of party avoids to fulfill the obligations in an agreement.
- 5) Circumstances force/ *Force majeure*/ *Overmacht* is a condition that occurs suddenly beyond the parties' calculations. Thus, the condition liberates the parties which concerned with the obligation to make achievements. This is based on Article 1245 of the Civil Code which states:

“The debtor needs not compensate for costs, damages or interest, if an act or God or an accident prevented him for giving or doing an obligation, or because of such reasons he committed a prohibited act .”

- 6) Termination of the agreement and its legal consequence. The termination must be conducted based on the parties' agreement. In practice, termination of the contract specified in its contract. It becomes void or rescind as a result of violation of the binding legislation.

- 7) In general, the pattern of dispute resolution is divided into two types: litigation and non-litigation. In practice, it is specified in the draft of contract which is created and written briefly and clearly.
 - 8) The choice of law is a derivation of the dispute settlement pattern. it determines which law is used by the parties to resolve the dispute. For example, selected from which the object is situated or where the contract is drafted.
 - 9) The guarantee of truth identity is statement of the truth identities of the parties. The function of this guarantee is to provide the recognition that their identity is not false. This is used for legal validity and legal enforceability.³⁰
- c. The closing of contract consists of:
- 1) The assertion about the people who attend in the contract drafting, either the parties or the witnesses.
 - 2) The confirmation of reading a contract by the competent authority.
 - 3) The differences between the place, the time, the day, and the date in the closing and the opening contract. The reason is to distinguish the condition of contract drafting and contract signing.
 - 4) The description of presence or absence of the change in the contract.
 - 5) The assertion about the signing of contract which contains the signatures of the parties.
 - 6) The confirmation of the contract sheet in the form of copy for the parties with the same sound.

³⁰F.X Suhardana, *Contract Drafting*, (Yogyakarta: Universitas Atma Jaya, 2009), p. 78.

The anatomy above is slightly different from the anatomy of standard contract clause that uses the sharia *aqad*. In general, the anatomy of the sharia contract scheme are as follows³¹ :

a. The opening

The clause is began with the sentence *Bismillâhirrahmânirrahîm* and Quran verses that according to type of contract. However, it is not absolute. It depends on the policy of contract drafter.

b. The head of contract

The head of contract includes the title, the number, the day and the date of *aqad*/ contract execution, and also the name of official contract. The title contract has a basis function in a contract, it helps the understanding of contents in the contract and reflection of the applicable provisions in the contract.

c. The comparison

The comparison mentions the contract parties. The capability of the parties should be explicit, with or without specific approval, because it is the authority key of the contract drafter.

d. The Premisse

Premisse contained *aqad*'s background.

e. The content of *aqad*

The content of *aqad* is various and it depends on the needs of parties in the contract drafting:

³¹Irma Devita Purnamasari and Suswinarno, *Aqad Syariah*, p. 19.

- 1) The definition. It is not absolute and it only includes in the contract when it is needed. The definition includes of the object value, the object goal, the margin, or profit.
 - 2) The customer's statement regarding on the legal status is requirement which must be met (conditional precedent).
 - 3) The guarantee clause is the imposition of guarantee according to positive law and insurance guarantees. Basically, it is not a must. However, it is used in order to fulfill the customer's promise for Bank.³²
 - 4) The negligence events of Customer decides the agreement.
- f. The dispute settlement
- The dispute settlement is conducted by consensus. In this case, if there is no way out, the parties may choose arbitration for dispute settlement in the Sharia Arbitration or litigation in the Islamic Court.
- g. The additional clause
- It is called as misscellaneous clausule.
- h. The final word
- It mentions of the completion and the execution of signing contract and its witnesses.

It has been concluded that the most striking difference between the conventional and the Islamic anatomy of standard clause in general, it is described as follows:

³²Irma Devita Purnamasari and Suswinarno, *Aqad Syariah*, h. 13.

- a. The sentence of *Bismillâhirrahmânirrahîm* as the opening of the sharia contract clause which is not existed in the conventional standard contract.
- b. The writing of the day and the date in the conventional standard contract as the opening of contract.

But, one thing that cannot be lost from the standard clause is the *eksemsi*/ the exoneration/ the additional clause. In the review of standard clause there are opinions. Sein suggests that it is *de fictie van will of vertrouwen* or the willingness fiction or the trust.³³ It means that the willingness of both parties is the made-up agreement. But, another opinion says that the affixing signature on the contract is the agreement symbol³⁴, because there is no contract without the risk consideration from the parties who has signed.

D. Concept of Reconstruction

14. Definition of Reconstruction

Reconstruction is derived from two words, they are “re” with the meaning of “remake” or “rearrange”; and “construction” with the meaning of “building” or “initial form”. Marbun argues that reconstruction is to return something into original place, to draft or to draft back from the existing materials and it is rearranged as the existing or the initial occurrence.³⁵ Thus, in this reasearch, the

³³Daeng Naja, *Contract Drafting (Seri Keterampilan Merancang Kontrak)*, (Bandung, Citra Aditya Bakti, 2006), p. 225.

³⁴Daeng Naja, *Contract Drafting*, p. 30.

³⁵B.N. Marbun, *Kamus Politik*, (Jakarta: Pustaka Sinar Harapan, 1996), p. 469.

researcher does not directly describes the two concepts which are related to each other: the concept of construction and the concept of reconstruction.

15. Construction Theory

The construction concept used the initial anatomy of contract clause that is researched. Basically, all of the contract is back to the general provision by the underlying principles. Therefore, sharia standard contract as similar as conventional standard contract since no violation of the sharia principles. The interpretation of this standard clause construction uses several theories, they are:

a. The theory of freedom.

In the conventional theory, there is *laissez faire* theory initiated by Adam Smith. This theory leads to the free trade which is triggered by the physiocrats.³⁶ Meanwhile, in the Islamic theory, there is theory of economic freedom initiated by Imam Yahya ibn Umar. He supports economic freedom, and it includes of ownership freedom.³⁷ These theories are the foundations for freedom theories in the contract drafting.

b. The theory of Utilitarianism.

This theory is an ethical understanding which states that good is useful, beneficial, and profitable. Otherwise, the evil or bad is useless, unbeneficial, and unprofitable. Therefore, the good and the bad behavior or action are

³⁶He is nationality scottish philosopher who became a pioneer of modern economic system of capitalism.

³⁷Azyumardi Azra, *Sejarah Pemikiran Ekonomi Islam*, (Depok: Gramata Publishing, 2010) p 160-161

determined of whether it is useful, beneficial, and profitable or not.³⁸ Then, all things are useful and beneficial to all parties are classified as the advantages of standard contract clause. Otherwise, everything that can be detrimental for the parties are classified as the disadvantages. In side of the disadvantages must be conducted by replacement or deletion of the clause.

The analysis explanation of the standard contract construction above becomes the main materials of reconstruction, because there is no reconstruction without an initial construction would requires revision.

16. Reconstruction Theory

It begins from the contract interpretation. The contract interpretation serves to understand about the variety interpretations of contract. These differences would make the difference of understanding of each contract anatomy in standard clause. Article 1342 to 1351 of the Civil Code regulates the interpretation of a contract with some basic restrictions, it is described as follows:

- a. If the words in a contract are clear, the parties may not deviate from the agreement by interpretation.
- b. If the words in a contract has various meanings, it must be preceded by the approach of intent understanding from the parties with the upholding of its word meanings (*an sich*).
- c. If an agreement has two meanings, it must be chosen the most enable understanding to hold the promise. Then, it is not held.

³⁸<http://id.wikipedia.org/wiki/Utilitarianisme>, it is accessed on October 10, 2013.

- d. If an agreement has two meanings, it should be chosen the most appropriate definition of its nature.
- e. If an agreement has two meanings, it should be interpreted according to the place custom of the contract drafting.
- f. The provisions are always to use in the custom should be considered including to the agreement, although it is not expressed.
- g. All appointments which are made in an article should be related to the other articles and the entire agreement.
- h. If any doubt in the contract clause exist, it should be interpreted as the prejudicing of the requested party/ the invited parties, and it should be profit able for the requested party/ invited parties to contract and not vice versa.
- i. If the words in the contract have a lot of definitions, then these words are only interpreted in accordance with the conditions when it is contracted.
- j. If an agreement describes the obligation, it is considered to reduce or to limit its power of the law in the unmentioned subject in the agreement.³⁹

The principal of limitation regarding on some theories of the legal experts.

There are:

- a. The theory of willingness (*wils theorie*)

This theory suggests that the discrepancy between what desires are and what states in the contract are. Then the effect is what desires are. Then, another is not applicable.

³⁹Much. Nurachmad, *Buku Pintar*, p. 17.

b. The theory of statement (*verklarings theorie*)

This theory suggests that the discrepancy between what desires are and what states in the contract are. Then the effect is what states are. Then, another is not applicable.

c. The theory of trust (*vertrouwen theory*)

This theory suggests that not every statement leads to contract. The statement raises to contract only the credible one.⁴⁰

Actually, those theories have same main purpose, *maslahah*. Imam Ash-Syatibi formulates a *maslahah* theory as a concept which makes the nature or the strength of goods or services to meet the needs of human life. Thus, it is only reached by maintaining the five basic elements of life: the religion, the life, the mind, the lineage and the wealth.⁴¹

Karla C. Shippey JD gives tips to clarify the clause in drafting or reading of contract. In this case, the researcher interprets as facilitating method for clause interpretation. It is described as follows:

- a. Checking the vague clause in its understanding. Then, rearrange the clause with more definitive statement or remove the entire clause. The clause removing must be reasonable by identifying the rights and the obligations which are considered to be material or substance of the clause.

⁴⁰F.X Suhardana, *Contract Drafting*, p. 44.

⁴¹Azyumardi Azra, *Sejarah Pemikiran*, p. 258.

- b. Reading the literal meaning of clause without reading the implied meaning or making the assumption of purpose behind the clause. One thing should be affirmed, it is the true meaning of clause.
- c. Simplifying the complicated provisions by cutting the long sentences, or removing unnecessary conjunctions, or reducing the combined verbs and nouns which are not required.
- d. Writing in simple language. If they (the contact parties) do not understand the sound of the contract, the contract drafter is expected not to use the scientific law of language or the language which is rarely heard.
- e. Checking the clause of limitation. If there is no provision regarding on time limitation, then the time limitation is interpreted as it is reasonable. Although this interpretation is still vague.
- f. Using the correct grammar and it should be related among the clauses. The punctuation marks must be true and correct.
- g. Looking for the words that have meanings, change or define it.

Furthermore, the tips above should be balanced with the requirements of reconstruction. Scholten argues that there are three terms in the reconstruction of the law:

- a. Reconstruction should be able to cover the entire field of positive law is concerned.
- b. There should be no logical contradiction in it.

- c. Reconstruction should qualify beauty or not a made-up thing. It also should provide clear and simple description.⁴²

Those provisions result in the reconstruction which is able to accommodate the entire field concerned. Then, there is no logical contradiction in it. Finally, it provides clear and simple description.



⁴²Satjipto Rahardjo, *Ilmu Hukum*, p. 103- 104.