CHAPTER III

RECONSTRUCTION OF STANDARD CONTRACT CLAUSE

AT BTN SHARIA

The clarity of sentence in the contract drafting is important. This interest is due to the Law which does not require the uncertainty of contract. Article 1342 of Civil Code states " if the wording of an agreement is clear, deviation from it by way of interpretation is not permitted". Then, article suggests that the contract should be made clearly. Thereby, it provides legal certainty. It is similar to the principle of *luzum* which is included as one of the Sharia Contract Law principles. This principle states that should be unchanged in the contract. Its purpose is to avoid speculation. Thus, the contract must be made with the clear purpose and calculation that do not require the interpretation which lead to multiple interpretations.

The clarity of urgency clause of contract makes the researcher map the analysis in this chapter into two principle issues. *First*, the forms of Islamic contract clause which has been applied as the initial construction of a standard contract clause. *Second*, the ideal concept form of standard contract as the result in the reconstruction of standard contract clause on Sharia Contract Law.

A. Substance of Standard Contract Clause

The researcher divides the construction theory to analyze the two branches of subject matter about standard contract clause substance. The first construction theory is the theory of freedom. The theory of freedom consists of *laissez faire* theory by Adam Smith and the theory of economic freedom by Imam Yahya ibn Umar. These theories are the foundations of freedom in contract drafting. Thus, the researcher does not change the form of clauses that has been applied, but it only gives the interpretation. Meanwhile, for the second problem branch, the researcher uses utilitarianism theory. It states that the good is useful, beneficial and profitable, while the bad is unuseful, unbeneficial and unprofitable. Then, this theory serves to find advantages and disadvantages of standard contract clause which has been applied.

1. Anatomy and Interpretation Clause

The researcher deciphers the substance of applicable contract clause based on the contract anatomy. It is used to facilitate understanding about the arragement of standard contract clause interpretation with the following analysis:

1. The opening

This contract is opened with the term "Bismillâhirrahmânirrahîm" and the term "Dengan nama Allah Yang Maha Pengasih lagi Maha Penyayang" (In the name of Allah, Most gracious, Most Merciful) as the meaning explanation in Indonesian. But, the opening sentence with the term "Bismillâhirrahmânirrahîm" is not absolute. It depends on the policy of contract drafter. In the convensional contract principle, the principle of

freedom contract becomes foundation of freedom in determining the body of contract clause, and it can be interpreted that there is no prohibition for inclusion of the term "Bismillâhirrahmânirrahîm" in the contract. Moreover, the principle of good willingness as restrictions of the principle of freedom contract. It is also implied in the inclusion of the sentence "Bismillâhirrahmânirrahîm".

KHES also includes the principle of *al-hurriyah* or freedom. It has similar meaning as the principle of freedom contract. But, it is only the explicit meaning in Civil Code. Meanwhile, KHES makes this principle implicit by specifying in Article 21 letter L. The principle application of 'amanah (prudence) and good willingness is also stated in the opening of this standard contract. The reason is when the contract is opened with the name of the God, and then surely the parties have good willingness in contract drafting with mature, precise, and careful considerations until avoiding bad actions that can harm the parties.

2. The title

The title of this contract is "Akad Pembukaan Rekening Tabungan Batara Syariah Berdasarkan Prinsip Mudharabah" (The contract of opening savings account based on Mudharabah principle). The function of this title is to assist in understanding of the contract content and it is the reflection of the applicable provisions in contract. This title contains 9 (nine) words. It is a long title. Then, If the title is rediscovered and written repeatedly in contract,

it must be abbreviation in practically. it is used to avoid ambiguity in understanding of agreementas based on Article 1342 - 1351 of Civil Code.

This contract is implicit of consensualism principle. Article 1320 states "in order to be valid, an agreement must satisfy the following four condition: there must be consent of the individuals who are bound thereby, there must be capacity to enter into an obligation, there must be specific subject matter, there must be a permitted cause ", and its conclusion is that in the contract drafting there must be an agreement among the parties, either form of contract, provision of parties' capacity, and related matters. One application of the agreement is to determine the contract title. After they agree in the contract title determination, then automatically it consists of the *pacta sunt servanda* principle which binds the parties. It is based on Article 1338 paraghrap 1 which states, " all valid agreements apply to individuals who have concluded them as law ". Finally, the contract title determines the drafting of contract clause.

The contract title of "Akad Pembukaan Rekening Tabungan Batara Syariah Berdasarkan Prinsip Mudharabah" (The Contract of Opening Savings Account Batara Sharia Based on Mudharabah Principle) includes of *tijara*h. It has exchange or commercial concept. Then, from the contract title, it is obtained a clear description that the parties would take profit in this contract. It binds among the parties in the contract. In KHES, *Ikhtiyâri* principle (voluntary) is closely related to the drafting of contract title because the parties are free to choose what they use in the contract. Therefore, the

contract drafting based on the willingness of each parties without any pressure.

3. The comparison

The comparison mentions the parties which face each other. The parties can act for and on behalf of their own, for others, and for corporation. In this contract, they write their identities. The first party is Customer/ Account Holder. It is written about the customer's choice of act and his legal status as owner of the funds or *shâhibul mâl*. He is called as "*Pemegang Rekening*". The second party is the Bank, Bank Batara, who acts on behalf of corporation. It is also included of the statement that Bank as fund manager or *mudlârib* and it is called as "*Bank*".

Although one of the contract principle is freedom of contract, it does not mean that the parties are free to mention or not about their identities in the contract, because it is the important part of anatomy which provides the explanation about the legitimative requirement of subjective contracts. It explains about identity and capacity of the parties. Here, the principle of good willingness has been applied. With the existence of this principle, then the subject of consensualism and *pacta sunt servanda* principle become clear.

Article 21 letter g of KHES, it confirms that the transparant principle in the contract. It is needed as the public accountability of the parties, and it depens on the parties concerned. For this reason, the writing of comparision is required in the contract. When both parties have the clear identity, capacity,

and authority, it has been applying the principle of good willingness definitely.

4. The Explanation

The explanation in this contract contains the deal statement among the parties before entering the standard contract clause. It states "Bank dan Pemegang Rekening sepakat untuk membuat, mematuhi, dan melaksanakan Akad ini dengan ketentuan- ketentuan sebagai berikut:..." (Bank and Customer agree to make, to obey, and to implement this contract with the following clauses below:...) It means that Bank and Customer agree to make, to obey, and to implement the agreement which is written in the contract. It is the symbol of ijâb qabûl between the parties. Therefore, it becomes the pillar requirement that has the absolute element in the contract. If the pillar requirement is fasad or broke, it becomes the termination of aqad.

The deal statement of the parties based on the consensualism principle. Although the statement is made standard by the Bank, but it is useful to express the agreement among the parties about the clauses in it. It is the reason of *pacta sunt servand* because they are considered to draft the agreement by approving the statement willingness.

The principle of 'amanah (keeping promises) should be applied in the description of this statement willingness, because every aqad is binding and it should be fulfilled by the parties in accordance with the agreement that has been agreed. Likewise with the principle of *Taswiyyah* (equality) because the

¹Article 21 letter b of KHES.

explanation contains statement willingness. Then, it must be balanced between them because it implies for the rights and the obligations.

5. The content of *agad*.

The beginning of standard contract clause. It states "Pemegang Rekening bermaksud menyimpan dana pada Bank dalam bentuk Tabungan Batara Syariah berdasarkan Prinsip Al-Mudlârabah Al-Muthlaqah" (Customer intends to save fund in Bank with Savings Batara Sharia based on Al-Mudlârabah Al-Muthlaqah principle). This is the background of the opening contract in savings account. It is called as recital of contract.

The recital is the important part in a contract because it describes the background of contract drafting. In general contract anatomy, this part is included in the head of contract. Upon consideration of the recital, then Bank states its ability to utilize, to manage, and to administrate the saving on behalf of the Customer. This point appears the rights and the obligations. Bank reserves the right of the funds which is saved by Customer and obliges to utilize, to manage, and to administrate in form of accounts. Meanwhile, Customer reserves the right of the funds result which is managed by the Bank, then customer is obliged to provide fund in deposit.

The principle of freedom contract/ *al- hurriyyah* is described in this recital because it describes about the freedom of whom and how the technicians of the contract. In addition by the recital, the principle of *luzum* (unchanged) has been applied because it has the meaning that each contract should be clear in purpose and calculation until it avoids the speculation.

Meanwhile, every technician of contract which is applied in the recitals should contains mutual benefit principle because it must meet the interests of the parties. But, it is limited by the principle of ability because each contract must be accordance with the parties' ability. Then, it does not become an excessive burden for the parties.²

The second content of contract. It defines the principles used, *Al-Mudlârabah Al-Muthlaqah*. Here is the element esensialia. It describes that *Al-Mudlârabah Al-Muthlaqah* does not have restrictions for Bank to use the funds raised, until it is closed by Customer. Then, it becomes contract termination. The provision of contract termination is the written noticed by Customer to Bank. The closing of savings account is contract termination of subjective provision because it is expired by the parties.

The principle of consensualism in this contract is described as the parties' agreement which use *Al-Mudlârabah Al-Muthlaqah* principle. Therefore, *pacta sunt servanda* principle becomes the binding of them in accordance with the provisions of *Al-Mudlârabah Al-Muthlaqah*. The clear explanation about its technicians is the overview of the principles of transparancy³ and it is limited by the permitted cause (*sebab halal*) principle⁴. The permitted cause restriction allows every contract as long as it does not disagree with the law and it is not something that is forbidden.

²Article 21, letter h of KHES.

³Article 21, letter g of KHES.

⁴Article 21, letter k of KHES.

The third content of contract. It contains the right and the obligation of each parties which is expressed in achievement. The achievement is an agreement of profit sharing which is obtained by Bank from the management of Customer funds. The provision of profit sharing according to the results of Bank calculation at the end of each calendar month. It is based on the average balance of each month with the comparison of strata balance from profit sharing which has been determined by the Bank. Then, the consensualism principle raises the principle of *pacta sunt servanda* in this profit sharing. It is also based on the mutual benefit principle which serves to meet the interests of the parties. Therefore, the parties are free from manipulation.

These principles are influential for the result (*nisbah*) of profit sharing which is obtained by the parties. Furthermore, the empty columns which are located in Customer and Bank results are contained of *Taisîr* (simplicity) and *Al-hurriyyah* principles because it gives freedom and facilitates the parties to determine the percentage of profit sharing. It is done to reach an agreement easily. It also contains an additional clause (*misscellanous clausule*). It is kind of transitional provision. It states "Nisbah bagi hasil sewaktu-waktu dapat berubah". Perubahan akan diinformasikan diseluruh Kantor Cabang BTN syariah" (the result of profit sharing might change at any time. The changes will be communicated through out BTN Sharia Branch Official).

In this sentence, there are restrictions and juridical disclaimers of Bank.

Actually, according to the law, the responsibility should be imposed of it.

This statement is certainly contrast with the principle of transparency and

Taswiyyah. Where the transparency principle prioritizes the openness of the parties as their responsibilities, and also *Taswiyyah* which emphasizes equality between the parties. Therefore, both parties have the right to contribute in the determination of profit sharing result.

The fourth content of contract. It contains the provisions of contract termination. This clause is only the subjective termination. It states "Apabila Pemegang Rekening meninggal dunia, maka yang dapat menarik dan menutup saldo rekening adalah ahli waris" (the withdrawal and the closing of account balances are represented by heirs when customer passed away). Then, It is interpreted that the heirs cannot represent in deposit facility. It is similar to the interpretation of representating the closing of accounts by the heirs. Thus, it is interpreted that people nearby who is not an heir cannot represent the Customer. The proof of heirs can be done by showing authentic evidence related, such as family card.

This clause only contains the principle of freedom contract because the parties are free to designate who represent his account holder when he passed away, he is his heir. But, the heirs do not have relation with the principle of consensualism, *pacta sunt servanda*, or good willingness principles, because he is only designated as the third party and he does not draft the contract. This clause contains the principle of *Al-hurriyyah*, *Taisîr* (simplicity), and permitted cause. The principle of *Taisîr* is used to facilitate the transfer of Customers' assets by designating the heirs. It is definitely in accordance with

the sharia provisions. It is similar to the explanation of the principle of permitted cause.

The fifth content of contract. It states "Pemegang Rekening dengan ini menyatakan setuju dan terikat pada Syarat-syarat Umum Pembukaan Rekening, dan Ketentuan-ketentuan Tabungan Batara Syariah sebagaimana tercantum dalam Buku Tabungan Batara Syariah" (customer agrees in the general terms of opening account, and provisions contained in savings book of Batara Syariah). This statement contains the aksidentalia element. The general terms of opening account and the provisions in savings book are the elements which are draft by the contract drafter, in this case is the Bank.

The statement contains the principle of 'amanah (keeping promises). It is special nature, because it is only intended to the Customer. It makes the principle of pacta sunt servanda only binds the Customer. The general terms which have purpose in the deal statement of customer is drafted separately with this contract. It is similar to the provisions which are contained in the savings book.

The researcher assumes that its separation results in legal ambiguities. Whereas, article 1342- 1351 of Civil Code statement is to avoid ambiguity in understanding of agreement. The researcher argues, in the separation event of certain clause in a contract, that the functions of separate clause is only as a confirmation and it is not a different clause. This vagueness is contrast with the principles of transparancy, because it is needed as accountability of the

parties. Moreover, the emphasis to customer is also contrast with the principle of *Taswiyyah* because his position as the weak party.

The sixth contents of contract. It states "Pemegang Rekening dan Bank sepakat dan mengikatkan diri pada peraturan dan perundang- undangan yang berlaku sepanjang tidak bertentangan dengan prinsip syariah" (Customer and Bank agree to bind with regulation and law as long as does not contrast with the sharia principles.). This clause is applied for Customer and the Bank. They must obey the rules and the law as long as it is not contradict with the sharia principles. Then, it has been clear that the consensualism principle contained it. The element which is contained in this statement is the naturalia element. It is regulated in the law. Although the contract drafter does not mention it in the contract clause, automatically, they remain to obey. Then, it contains the principle of *Taswiyyah*, because both parties equally binding on the laws governing. It is regarding on the Regulation of Indonesia Bank (PBI) No.3/10/PBI/2001 dated June 18, 2001, and No.3/23/PBI/2001 dated December 13, 2001 on Application of Know Your Customer Principle and defer to the law Number 21 of 2008 on Islamic Banking.

6. The closing

the closing states that the clause is drafted by consensus agreement (musyawarah mufakat) and it becomes valid since it is signed. The consensus agreement is the discussion about agreement among the parties in contract drafting. After they agree, they must sign the contract. These Clauses are not applicable if either party does not sign the contract. After signing, clauses

which are contained in the contract become valid and binding on both parties. Therefore, the three general principle is contained in this statement: the principle of consensualism, *pacta sunt servanda*, and good willingness.

In the sharia contract, this statement is application of the principle of permitted cause. In general, the permitted cause is not to violate the Sharia law, the clarity object, and also the pleasure between them. The pleasure is reached after the consensus agreement. Therefore, the consensus agreement contains the principle of *Ikhtiyâri* (voluntary), because both parties execute the contract based on the each willingness.

7. The time and the place of *agad*.

There are several placements of the time, the day, the date, the month, and the year in the contract. *First*, it is located in the opening of contract. It becomes the description of contract drafting. *Second*, it is located in the closing of contract. It becomes the description of contract signing. Then, it is interpreted as the commencement of contract. In the closing, it is divided into two different time, such as when the first party signs the contract and when the second party signs it also. If there is a difference in its signing, thus the contract becomes binding at the last date of contract signed.

This clause only has one placement of time and place. Those are located in the end draft of contract because the contract entitled "Akad Pembukaan Rekening Tabungan Batara Syariah Berdasarkan Prinsip Al-Mudharabah" (The Contract of Opening Savings Account Batara Sharia Based on Mudharabah Principle) is standard contract clauses. It is printed lot sheets and

it is used in the needs, and then it only requires the date of contract commencement. This writing is regarding on the principle of freedom contract (*al-hurriyyah*), because the parties are given the freedom to put the time and the date. The date is a guideline of contract commencement which is bound both parties (*pacta sunt servanda*). Then, the principle of *luzum* can be applied for its clear of the purpose and the time period calculation.

8. The Signatures of parties.

The Signatures of parties is the closing part of contract. When the contract has been signed by the parties, it is not important whether the parties have read or not, but they automatically bind themselves. It is also applied to the blind, the illiterate, or the people who do not understand the language used in the contract. Then, the contract party should be able to save themselves by getting people who helped them in the contract.

The legal scholars agree that the contract signature is the symbol of agreement in contract.⁶ It is the implementation of the principle of consensualism and *pacta sunt servanda*. It is also based on the principle of trust ('*amanah*) because it is the party's evidence that they dispose to do the achievement as agreed.

The contract anatomy above contains the principle of writing (*Al-kitâbah*). It also contains the specific principles. Here is the classification of principles which are contained in each anatomies:

⁵Sutan Remy Syahdeini, Kebebasan Berkontrak, p. 79-82.

5

⁶Daeng Naja, Contract Drafting, p. 30.

Table 2: Comparison of Anatomy Contract

No	The Anatomy T		The Conventional Principle	The Sharia Principle
1	The opening		The principle of freedom of contractThe principle of good willingness	 The principle of al- Hurriyah The principle of Ikhtiyâti The principle of good willingness
2	The title of contract	TAS NAM	 The principle of Consensualism The principle of Pacta Sunt Servanda 	• The principle of Ikhtiyâri
3	The comparision	51	• The principle of good willingness	The principle of TransparancyThe principle of good willingness
4	The content of aqad	First	• The principle of freedom of contract	 The principle of Al-hurriyyah The principle of Luzum The Principle of Mutual Benefit The principle of ability
		Second Third	 The principle of Consensualism The principle of Consensualism The principle of Pacta Sunt Servanda 	 The principle of Mutual Benefit The principle of Mutual Benefit The principle of Taisîr The principle of Al-hurriyyah
		Fourth	• The principle of freedom of contract	 The principle of Al-hurriyyah The principle of Taisîr The principle of Sebab Halal
		Fifth	The principle of ConsensualismThe principle of Pacta Sunt	• The principle of keeping promises ('amanah)

			Servanda	
		Sixth	 The principle of 	 The principle of
			Consensualism	Taswiyyah
			 The principle of 	 The principle of
	The closing		Consensualism	halal cause
			 The principle of 	 The principle of
5			Pacta Sunt	Ikhtiyâri
			Servanda	
			 The principle of 	
			good willingness	
			 The principle of 	 The principle of
6	CATI		freedom of contract	Al-hurriyyah
	Time andplace		 The principle of 	 The principle of
	1 P- MA MI		Pacta Sunt	Luzum
			Servanda	
			• The principle of	 The principle of
	70		Consensualism	keeping promises
7	The signature		• The principle of	('amanah)
	2 2		Pa <mark>c</mark> ta <mark>S</mark> unt	
			Se <mark>rvanda</mark>	

2. Advantages and Disadvantages Clause

Utilitarianism theory is an ethical understanding which states that good is useful, beneficial, and profitable. Otherwise, bad is unuseful, unbeneficial, and unprofitable. Then, good and bad of behavior and actions are determined in the side of useful, beneficial, and profitable or not.⁷ In this research, everything which is beneficial and profitable for the parties are clasified as its advantage. Otherwise, everything that can adverse the contract parties are classified as its disadvantage. Therefore, an action should be taken in the disadvantage, either replacement or deletion of clause.

a. The advantage of standard contract clause

⁷http://id.wikipedia.org/wiki/Utilitarianisme, it is accessed onOctober 10, 2013.

There are two advantages in this standard contract clause, with the following explanation:

1) The contract clause is simple and easy to understand.

Munir Fuady explains about the characteristics of the contractual language.

One of them is written in language that is too exaggerated. Frequently, the

language of contract is too long and wordly, then it is impressedly exaggerate.

The language should be used when the length is indeed necessary and have

clear goals. Its purpose is to emphasize or to detail the meaning of the

sentence concerned. For example, the description for whom such parties to

act.⁸ But, this contract is simple and straightforward until the reader can

understand easily and quickly.

This is accordance with the principle of good willingness which becomes a restriction to clarify the principle of freedom contract in the contract drafting. It also raises the principle of mutual benefit, then the contract can satisfy the interests of the parties and avoid manipulation caused by the clauses that are too long and elusive.

2) The definition of complex term.

In these contract clauses, there are foreign words or complex terms that

require explanation. However, this explanation has been obtained from the

⁸Munir Fuady, *Hukum Kontrak (Dari Sudut Pandang Hukum Bisnis) Buku Pertama*, (Bandung, PT Citra Aditya Bakti, 1999), p. 8.

clauses indirectly without requiring separated article for the definition. Those terms are:

The principle of *Al-Mudlârabah Al-Muthlagah*.

The definition of *Al-Mudlârabah Al-Muthlagah* is that handing over one's capital to entrepreneur without restriction. The second point in the content of akad is described clearly about the technicians of that principle. It states "Berdasarkan prinsip ini, tidak ada pembatasan bagi Bank dalam menggunakan dana yang dihimp<mark>u</mark>n, sa<mark>m</mark>pai ditutupnya rekening Tabungan Batara Syariah oleh Pemegang Rekening" (Based on this principle, there is no restriction for Bank to use the funds raised. The use of the funds raised can be ended if Customer closes the savings account). Its closing should be written in notification and addressed to the Bank.

b) Shâhibul mâl.

In fiqh mu'amalah, shâhibul mâl is defined as the owner of the funds/ capitals. This contract clause states clearly that shâhibul mâl is customer of account holder.

c) Mudlârib.

In figh mu'amalah, Mudlârib is defined as the fund manager. This contract clause states clearly that *Mudlârib* is the Bank.

⁹Rachmat Syafei, *Fiqih Muamalah*, p.227.

This is based on the principle of good willingness. By the terms complex explanations, it avoids the parties from multi-interpretation. It is also in accordance with the principle of 'amanah (circumspection) because each contract must be done with careful consideration.

b. Disadvantage of standard contract clause

There are disadvantages of standard contract clause with the following explanation below:

The first point in clause states "Pemegang Rekening bermaksud untuk menyimpan dana dengan prinsip al-mudharabah al-muthlaqah" (Customer intends to saves funds with the principle of Al-Mudlârabah Al-Muthlaqah). The reseacher argues that there is disagreement on the interpretation of "menyimpan dana" and "Al-Mudlârabah Al-Muthlaqah". It is the different concept in the contract. In the word "menyimpan dana" contains tabaru' concept. Meanwhile, Al-Mudlârabah Al-Muthlaqah contains tijârah concept.

"Menyimpan dana" is interpreted as fund deposit. It is close to the concept of wadia'ah (deposit) in the tabaru'. This wadia'ah concept is applied in wadi'ah yad dlamanah. It is the storage model of funds which is used by Bank as the receiver of deposit with requirements. When Customer needs it, and then Bank has much time to restore/ to pay deposit. However, since this is a tabarru' concept, then it is not allowed to take profit.

The principle which is used in this contract is *Al-Mudlârabah Al-Muthlaqah*. Therefore, the parties of contract are called as *shâhibul mâl* or

investor and *mudlârib* or capital manager. Hence, the researcher argues that the sentence "*menyimpan dana* (saving funds)" has different interpretation from the sentence "*menanam modal* (invest)". The sentence "*menyimpan dana*" is more inclined to protect the funds or the assets. Meanwhile, the sentence "*menanam modal*" is more inclined to the development of such funds or capitals. It is contrast with the principle of *luzum* because there are the changes between the principles which are used in the contract and the practice princple in the contract. These changes naturally rise to different consequences in practice.

2) Before entering to the contract clauses, there are mutual agreements between customer and the Bank. It states "Bank dan Pemegang Rekening sepakat untuk membuat, mematuhi, dan melaksanakan akad dengan ketentuan-ketentuan sebagai berikut..." (Bank and Customer agree to draft, to obey, to implement contract with following clauses below:...). It means that both parties agree to draft, to obey, and to implement the principle with the provisions of the points in the contract. Otherwise, the fifth point of clauses states "Pemegang Rekening dengan ini setuju dan terikat pada Syarat- syarat Umum Pembukaan Rekening, dan ketentuan-ketentuan Tabungan Batara Syariah sebagaimana tercantum dalam Buku tabungan Batara Syariah" (Customer agrees and he is bound in general terms of the account opening, and the provisions written in the book of Sharia Batara Savings).

Both of these statements are contradictive because the first statement states that the two parties agree to be bound by same clause, while the second statement states that only customerwho bounds general terms of the account opening, and the provisions written in the book of Sharia Batara Savings. This situation is contrast with the principle of *Taswiyyah* (equality) because the specific clause will burden the Customer.

If we look at the subjective legitimation of contract requirements, the contract parties. This contract is based on the principle of *mudlârabah*. It means that there are *al-aqidain* or both contract parties: *mudlârib* and *shâhibul mâl*. Bank as *mudlârib* and Customer as *shâhibul mâl*. Article 20 of KHES defines *aqad* as the deal of agreement between two or more parties to perform and/ or not perform certain legal act. It means that the clause should not be bound on one party, but both parties.

Recital/ premisse/ background of aqad is placed in content of aqad. The recital of this contract is Customer who saves funds in a Bank and then those funds are managed by the Bank. Although there is no law that requires a form of contract structure, but the researcher argues that the recital has an absolute element and it also has urgency as guideline of clauses which bind both parties. For the urgency of clarity and guidance clause in this contract, it should be placed separately with the clauses contained in the contract contents and it is written before the content of contract. The existence of the systematic sequence implies of the principle of *Taisîr* (simplicity) with the reason to give easily understanding to the parties in the contract.

The third point states "Nisbah bagi hasil sewaktu- waktu dapat berubah. Perubahan nisbah akan diinfomasikan diseluruh kantor cabang BTN

Syariah". This statement contains the principle of *luzum* (unchanged). It means that the agreed subject in the begining of contract should not be changed. But, the changes can be made when there is an agreement between the parties and it shall be formulated by consensus agreement (*musyawarah mufakat*). Moreover, the *nisbah* in the contract is expressed in percentage. It means that the profit sharing adjusts to percentage which is agreed in beginning of contract.

The second statement is regarding on the information which is notified to all branches. This statement is contrast with the principles of transparancy because this principle is the guideline of the parties' responsibility. Then, when there is a change, the information must be also addressed directly to Customer with the help of the branch officials.

3) In contract, the rights and the obligations are related to esensialia, naturalia, or aksidentalia elements, it should be made sequentially. However, the elements in this contract are not in sequence. Esensiali element is contained in the second contents of contract. The contract contents contains the clause which defines the used principles, *Al-Mudlârabah Al-Muthlaqah*. Naturalia element is contained in the sixth contents of contract. It states that both parties agree to bind themselves by the applicable rules and regulations as long as it is not contrast with the Islamic principles. Meanwhile, aksidentalia element is contained in the second contents of contract. It states that customer agrees to bind himself by the general terms of the opening account and provisions of savings. Thus, these elements should be changed to be

sequentially, because it facilitates the understanding of the parties in the contract and applies the principle of *Taisîr*.

From the analysis above, it can be concluded that the advantages and disadvantages of standard contract clauses which are going to be applicable as follows:

Table 3: Advantages and Disadvantages of Standard Contract Clause

Advantage	Disadvantage	
• It is Simple and easy to understand.	• There is the unification of concept	
• There is definiton or explanation of	of contract interpretation from two	
the complicated term.	different contract.	
	• There is an imbalance of	
	obligations of the Account Holder.	
	• Recital not located in the head	
	contract.	
	• There is a unilateral policy of	
	changes in the profit sharing ratio.	
	• The elements of contract applied	
	r <mark>andomly</mark> .	

B. Ideal Concept of Standard Contract Clause

The urgency of the principle of *Al-kitâbah* (written) in an agreement is written in Quran, surah Al-Baqarah verse 282. This verse is the foundation of thinking to formulate the ideal concept of standard contract clauses based on Sharia Contract Law. At the end of the results, it formulates a concept that does not leave the Civil Code as the applicable source of Contract Law and it is also collaborated with the provisions of KHES as the source of Sharia Contract Law.

Although in the contract drafting is not required in certain format but the determination of ideal concept in standard clauses also has its own urgency. Its urgency is to become the ideal guidelines of contract, either in sharia or

conventional of standard contract. This is because of three basic stages in contract drafting of highly related. *First, pra contractual* (negotiation) is a stage before the parties are bound themselves in contract and it serves to reach their agreements. *Second, contractual* is the final stage of an agreement. *Third, post contractual* is the stage after the fulfillment of agreement. ¹⁰

3. Reconstruction measurements

Reconstruction measurements begin with the interpretation of contract regarding on Article 1342-1351 of Civil Code and the principles of Sharia Contract Law. The descriptions of these measures with the following explanation below:

a. Determination of the contract consistency

The first clause describes that Customer intends to save funds in a Bank based on the principle of *Al-Mudlârabah Al-Muthlaqah*. Both different concept makes the reseacher has two options of interpretation. It functions for clarity of interpretation in contract. In accordance with the rules of interpretation, when there are two definitions in contract, then it must be chosen the understanding that allows it to hold promise instead of chosing the understanding that allows it not to hold promise or it should be chosen the most appropriated in understanding of the agreement nature.¹¹

Both options are described as follow: the first, it is changed with the sentence "Pemegang Rekening menyimpan dana pada Bank dalam bentuk

¹⁰Much. Nurachmad, *Buku Pintar*, h. 19.

¹¹Article 1344 and 1345 of Civil Code.

Tabungan Batara Syariah berdasarkan prinsip al-wadi'ah yad adh-dh'amanah" (Customer saves fund in Bank by The Savings Batara Sharia based on the principle of al-wadi'ah yad adh-dlamanah). The second, it is changed with the sentence "Pemegang Rekening menanam dana atau modal pada Bank dalam bentuk Tabungan Batara Syariah berdasarkan prinsip al-mudharabah al- muthlaqah" (Customer invests fund or capital to Bank by The Savings Batara Sharia based on the principle of wadi'ah yad dlamanah). The function of the sentence changes is the implementation of the principle of permitted cause because the terms of this principle is the clarity of contract. Thus, it does not lead to the vague of interpretation which leads to misunderstand the application.

This interpretation is also adjusted to the willingness theory (*wils theorie*) which states that when there is a discrepancy between "what desired" and "what stated in the contract", then the applicable one is "what desired in the contract", while "what stated in the contract" is not applicable. However, this theory collaborates with the statement theory (*verklarings theorie*) which has the opposite meaning. It states that when there is a discrepancy between "what desired in the contract" and "what stated in the contract", then the applicable one is "what stated in the contract". Therefore, the researcher interprets that this clause in accordance with the willingness of the parties and then it is confirmed by the clear statement. The clear and the

¹² Much. Nurachmad, *Buku Pintar*, p.17.

appropriate statement with the right will make this clause no longer at opportunity with the principle of *luzum* in Sharia Contract Law.

b. Replacing the contrary clause.

The fifth clause states that "Pemegang Rekening dengan ini menyatakan setuju dan terikat pada Syarat-syarat Umum Pembukaan Rekening dan ketentuan-ketentuan Tabungan Batara Syariah sebagaimana tercantum dalam buku Tabungan Batara Syariah" (Customer agrees and bound by the general terms of the opening account and provisions contained in savings book of Batara Sharia). To prevent the contrary of mutual agreements which is stated in the beginning contents of contract, it should be applicable to both parties. Afterwards, the general terms of the opening account and the provisions which are contained in savings book of Batara Sharia should be agreed among the parties.

The balanced clause is supported by the theory of trust. It states that not every statement leads to a contract, and the statement which leads a contract is only the trusted statement. ¹³ The trusted statement is certainly related to the principle of trust in Sharia Contract Law. It binds two parties. Then, it should be fulfilled themselves.

Based on the principle or mutual benefit, these clauses should avoid manipulation that can be detrimental to the party. Finally, this clause also

¹³ Much. Nurachmad, *Buku Pintar*, p. 17.

becomes the application of the *Taswiyyah* principle (equality) which emphasizes the equality of the parties in the contract. This equality which implies a balance of rights and obligations.

c. Replacing the recital according to the general anatomy.

Recital is placed before the content of *aqad* because the recital is the background of the contract. Recital contains in the statement "bahwa Pemegang Rekening bermaksud untuk menyimpan dana dengan cara membuka rekening tabungan dan Bank bersedia sebagai pengelola dana tersebut" (that Customer intends to save funds in Bank with the opening of savings account and Bank is disposed as the funds manager). It is placed in the first content of *aqad*, and then it needs the changes.

The recital placement changes are based on the theory of statement (*verklaring theorie*) which emphasis more on textual statement in the contract. Therefore, the Recital placement changes do not lead to ambiguities in the contract interpretation. This contract drafting is based on the principle of *Al-hurriyyah*, but the principles of *luzum*, mutual benefit, and ability should also be considered. Finally, the proper placement of contract recital, the contract becomes clear and avoidable from the speculation (the principle of *luzum*). The clarity of understanding in the contract clause accommodates to meet the interests among the parties (the principle of mutual benefit). It is in accordance with the ability of the parties (the principle of ability).

d. Removing the clause which is considered unclear and damageous to the parties.

The last of the third clause states that "Nisbah bagi hasil sewaktu-waktu dapat berubah. Perubahan nisbah akan diinformasikan di seluruh Kantor Cabang BTN Syariah" (The profit sharing ratio can be changed at any time. The change will be informed throughout the BTN Sharia Branch Office). It is a contract ambiguity. Besides that, it is contrast with the principles of transparancy. It is also contrast with the purpose of the law or the rule of law. Actually, the ratio of the percentage in the beginning of the contract does not burden the parties when the process of fund management incurred loses. It is caused because of sharia principles using the profit sharing rather than Bank interest. Therefore, it is not necessary to change the profit sharing ratio.

This interpretation is based on the theory of statement (*verklarings theorie*). It states that when there is the discrepancy between "what desired in the contract" and "what stated in the contract", then the applicable one is "what stated in the contract". The researcher interprets the clause must be valid and unchange as the percentage written of profit sharing ratio in the beginning of contract. When the theory of willingness (*wils theorie*) is used, then one of party can manipulate the profit sharing ratio. Therefore, what has been written or stated in the contract clause is considered as true. But, this profit sharing ratio must be based on the principle of mutual benefit which meets the interests of parties without the manipulation inside.

e. Replacing the clause according to its sequence element.

The elements which is contained in the contract must be sequential. The first is the element of esensiali. This is the most important element that must exist in the contract because it is the essence of the contract and no contract without the essence. The second is the element of naturalia. This is the element that has been regulated in the law. Therefore, althought the contract drafter does not mention the contract clause in detail, but they remain subject to the laws that are bound. The third is the element of aksidentalia. This element is the element that is being made by the contract drafter.

The second and the third point of clause are included in the element of esensiali. It states type of contract, principle, and profit sharing agreements. The sixth point is included in the element of naturalia. It states that customer and Bank agree to bind themselves with the applicable rules and regulations as long as it is not contrast with Islamic principles. Meanwhile, the fourth and fifth points are included in the element of aksidentalia. The fourth point describes the condition when Customer passed away, then the person who can use withdrawal and close the account balance is only his heir. The fifth point describes about the customer's agreement which is bound themselves in the general terms of opening account and provisions contained in savings book of Batara Sharia. It can be concluded that the sequence of elements in the points is random. Thus, it requires the changes in the sequence to be coherent.

The sequence changes of the elements are based on the theory of statement (*verklarings theorie*) which have meaning: "when there is the

discrepancy between "what desired in the contract" and "what stated in the contract", then the applicable one is "what stated in the contract". The sequence changes of the elements is the application of the principle of *Taisîr* because it means that the contract should provide facilities to the parties in contract drafting. One of them is the facility to understand the elements which are contained in the standard contract clause.

The three theories which become the branches of the reconstruction theory above strongly support the reconstruction measurement of this standard contract clause, either the theory of willingness (wils theorie), statement (verklarings theorie), or trust (vertrouwen theory). In the theory of willingness (wils theorie), it states that when there is controversy between the statement and the willingness, then the applicable one is the willingness. Therefore, all unclearly clauses is interpreted according to the willingness of the parties. Then, it is changed by drafting the clear statement in clause. Otherwise, in the theory of statement (verklarings theorie), it states that when there is controversy between the statement and the willingness, then the applicable one is the statement. Hence, all clauses must be stated as clear as possible. It is done to avoid the different interpretations of willingness. In other case, the principle of trust (vertrouwen theory) also states that not every statement leads to a contract. The statement raises the contract only the credible statement. But, the researcher argues that the trusted statement in this theory is the clear of written statement which is agreed among the parties. Thereby, the guideline of reconstruction on standard clause is able to accommodate all the relevant areas of positive law. Then, there is no

logical contradiction in it, and also it is able to provide the clear and the simple description. Finally, this standard clause reconstruction contracts have same main purpose as *maslahah*.

4. Form of Standard Contract Clause

Based on the description above, the form of standard contract clauses in BTN Syariah should be rearranged with the contract form below:

Bismillâhirrahmânirrahîm Dengan nama Allah Yang Maha Pengasih Lagi Maha Penyayang

AKAD PEMBUK<mark>a</mark>an <mark>rekening tabunga</mark>n batara syariah berdasarkan prinsip mudlarabah

r ai	ng bertandatangan di bawan ini:
I.	Nama :
	No. KTP/SIM/Paspor*:
	Alamat :
	Dalam hal ini bertindak:
	1. Untuk diri sendiri;
	2. Selakusesuai dengandari dan oleh karenanya bertindak untuk dan atas namabertempat tinggal didari dan dengan demikian sah mewakili*
	Sebagai Penanam modal (Shâhibul mâl), selanjutnya disebut Pemegang
	Rekening.
II.	Nama :
	Jabatan :Kantor Cabang Syariah
	PT. Bank Tabungan Negara (Persero) di
	Dalam hal ini bertindak untuk dan atas nama PT. Bank Tabungan Negara
	(Persero), berkedudukan di Jakarta, bertindak selaku Pengelola modal
	(Mudlârib) selanjutnya disebut Bank.
Par	a pihak dalam perjanjian ini menerangkan terlebih dahulu:
1.	Bahwa Pemegang Rekening dengan ini bermaksud untuk menanam modal
	pada Bank dalam bentuk Tabungan Batara Syariah.
	☐ Tabungan Batara Syariah.

2. Bahwa Bank memberikan fasilitas penanaman modal dalam bentuk *syirkah*/ kerjasama berdasarkan Prinsip *Al-Mudlârabah Al-Muthlaqah*.

Bank dan Pemegang Rekening sepakat untuk membuat, mematuhi dan melaksanakan Akad ini dengan ketentuan- ketentuan sebagai berikut:

- 1. Pemegang Rekening menyetorkan modal kepada Bank, dan dengan ini Bank menyatakan bersedia memanfaatkan dan mengelola serta mengadministrasikannya dalam bentuk rekening Tabungan Batara Syariah pada Bank atas nama Pemegang Rekening.
- 2. Bahwa modal yang disetorkan oleh Pemegang Rekening tersebut dikelola oleh Bank untuk digunakan dan diambil manfaatnya sesuai dengan Prinsip *Al-Mudlârabah Al-Muthlaqah*. Berdasarkan prinsip ini tidak ada pembatasan bagi Bank dalam menggunakan modal yang dihimpun, sampai dengan ditutupnya rekening Tabungan Batara Syariah oleh Pemegang Rekening dan berakhirnya akad, yang akan diberitahukan secara tertulis oleh Pemegang Rekening kepada Bank.
- 3. Pemegang Rekening dan Bank sepakat untuk berbagi hasil atas keuntungan yang diperoleh Bank atas pengelolaan Bank dalam bentuk Tabungan Batara Syariah berdasarkan prinsip Al-Mudlârabah Al-Muthlaqah, sesuai dengan hasil perhitungan Bank setiap akhir bulan kalender bersangkutan berdasarkan rata-rata saldo setiap bulan dengan strata saldo perbandingan bagi hasil sebagai berikut:

NO	SALDO	NISBAH		
NO		SALDO		BANK
1	Rp.0	s.d Rp. 99.999		
2	Rp.100.000	s.d Rp. 10.000.000		
3	Rp.10.000.001	s.d Rp. 100.000.000		
4	Rp.100.000.001	s.d Rp. 1.000.000.000		
5	Rp.1.000.000.00)1 s <mark>.d Rp. ke atas</mark>		

Nisbah bagi hasil tidak dapat berubah dan sesuai dengan kesepakatan pada awal akad.

- 4. Pemegang Rekening dan Bank sepakat dan mengikatkan diri pada peraturan dan perundang-undangan yang berlaku sepanjang tidak bertentangan dengan prinsip Syariah.
- 5. Pemegang Rekening dan Bank sepakat dan mengikatkan diri pada Syaratsyarat Umum Pembukaan Rekening, dan ketentuan-ketentuan Tabungan Batara Syariah sebagaimana tercantum dalam Buku Tabungan Batara Syariah.
- 6. Apabila Pemegang Rekening meninggal dunia, maka yang dapat menarik dan menutup saldo rekening adalah Ahli Waris.

Demikian Akad Tabungan Batara Syariah berdasarkan Prinsip *Al-Mudlârabah Al-Muthlaqah* ini dibuat secara musyawarat mufakat dan berlaku sejak tanggal ditandatangani.

.....

BANK PEMEGANG REKENING (.....) (.....) *)Coret yang tidak perlu. To facilitate the understanding of the contract clause above, the researcher translates its standard contact clause into English. The translation as below: Bismillâhirrahmânirrahîm In the name of Allah, Most Gracious, Most Merciful. THE CONTRACT OF OPENING SAVING ACCOUNT BASED ON **MUDLARABAH PRINCIPLE** The undersigned: Name No. KTP/SIM/Passport*: Address the party in this case acts for: 1. own behalf; 2. as.........according to......for and on behalf of...... reside in.....then represent valid of.....* as the investor (Shâhibul mâl), hereinafter called as "Customer". II. Name Position :..... Sharia Branch Office of PT. Bank Tabungan Negara (Persero) in...... In this case, the party acts for and behalf of PT. Bank Tabungan Negara (Persero) in Jakarta, as the manager of funds (Mudlârib) hereinafter called as "Bank". The parties in previous of this contract state:

1. That customer intends to invest in Bank with Batara Sharia Saving based on

That Bank facilitates investment by syirkah/ cooperation based on the

Al-Mudlârabah Al-Muthlaqah principle.

☐ The Savings of Batara Syariah.

principle of Al-Mudlârabah Al-Muthlagah.

.....

Bank and Customer agree to draft, to obey, and to implement this contract with the following clauses below:

- 1. Customer invest his funds to the Bank and automatically Bank states disposed to use, to manage, and to administer it in the form of saving's account Batara Sharia in Bank behalf on Customer.
- 2. That the investment funds by Customer are managed by Bank to use and to take its benefit based on the principle of *Al-Mudlârabah Al-Muthlaqah*. It has not restriction for Bank to use funds in this principle, as long as close the savings account Batara Sharia by Customer and finally, termination of aqad will be notified in writing by Customer to Bank.
- 3. Customer and Bank agree to share profit which is obtained by Bank management in the form of savings Batara Sharia based on the principle of *Al-Mudlârabah Al-Muthlaqah*. It according to the results of Bank calculation at the end of each calendar month, it is based on the average balance of each month with the comparison of strata balance from profit sharing as follows:

NO	BALANCE		NISBAH	
NO			CUSTOMER	BANK
1	Rp.0	s.d Rp. 99.999		
2	Rp.100.000	s.d Rp. 10.000.000		
3	Rp.10.000.001	s.d Rp. 100.000.000		
4	Rp.100.000.001	s.d Rp. 1.000.000.000		
5	Rp.1.000.00 <mark>0.00</mark>	01 s.d Rp. Up to		

Nisbah of sharing profit cannot be changed and in accordance with the agreement at the beginning of the contract.

- 4. Customer and Bank agree to bind with regulation and law as long as does not contrast with the sharia principles.
- 5. Customer and Bank agree to bind the general terms of opening account, and provisions contained in savings book of Batara Syariah.
- 6. If Customer passed away, the withdrawal and the closing of account balances are represented by heirs.

The contract of savings Batara Sharia based on the principle of *Al-Mudlârabah Al-Muthlaqah* is drafted by consensus agreement (*musyawarat mufakat*) and it become valid from the date signed.

	•••••

CUSTOMER

BANK

-	·		(
		,	

*) Cross out unnecessary.

The form of standard contract clause above is the new form of standard contract clause recommended to BTN Sharia. Therefore, the form of standard contract clause entitled "Akad Pembukaan Rekening Tabungan Batara Syariah Berdasarkan Prinsip Mudlârabah" (The contract of opening savings account based on Mudlârabah principle) is able to accommodate all field of positive law relevance, to remove logical contradiction in it and finally, it provides clear and simple description.