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The Principle of Freedom To Make An *Aqad* In Islamic Law and Its Implementation to Sharia Banking in Indonesia

Diantara Purnama
Universitas Sriwijaya

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Abstract

Aqad is a basic requirement in every transaction. In Islam, some principles must be fulfilled in each process of making 'aqad, one of which is the principle of freedom to make 'aqad. This principle guarantees the creation of a balance and equal bargaining between the parties conducting the transactions. Along with the development of 'aqad in Sharia Banking, the principle of freedom to make 'aqad is sometimes not fulfilled, which causes an imbalance between the parties involved in the transaction. This study aims to determine the regulation of the principle of freedom to make 'aqad in Islamic law and how the principle is applied in Sharia Banking. The approach method used in this research is normative juridical, which relies on secondary data consisting of primary, secondary, and tertiary legal materials. The results of this research are that 'ulama fiqh have different opinions about the limitations of the principle of freedom to make 'aqad to be included in the terms of the 'aqad, there are those who allow it and those who don't. The implementation of the freedom to make 'aqad in terms of making a clause in the 'aqad of Sharia Banking in Indonesia, the customer is not yet fully able to claim the right of freedom to make 'aqad because Sharia bank offers standard contracts to its customers and the customer only has the option to take it or leave it.

Corresponding Author:
Diantara Purnama,
Universitas Sriwijaya
Email: diantarapurnama@fh.unsri.ac.id

1. INTRODUCTION

Islam, as a religion that *is shamil* and *kamil,* has regulated how the relationship between humans and their God (*hablumminallah*) and between human beings (*hablumminannas*).[1] The relationship between humans and their God regulates how humans interact and their attitude as servants to their God, and how humans perform worship. Meanwhile, the relationship between human beings regulates how humans, as social creatures, should communicate and get along with other humans properly.[1]

One of the consequences of muamalah between human beings is the transactions, and contracts are the basic things that are needed in every transaction. The importance of a contract in a transaction is to ensure certainty related to what will be transacted and what rights and obligations must be carried out by each party involved. In its implementation, this contract must be based on principles, one of which is the principle of freedom in making an agreement or called *al hurriyah.*[2] The freedom referred to here is not absolute freedom but freedom that is limited by existing shari'a rules.

The development of the Islamic economy, especially in the banking sector, was marked by the establishment of Bank Muamalat in 1991.[3] At a relatively young age, Bank Muamalat Indonesia immediately faced an economic storm in the form of a monetary shock that occurred in 1997-1998. However, here Bank Muamalat has succeeded in proving that with principles and principles applied in accordance with shari'a, so that it does not have too much influence on its business. This is far different from other financial institutions that at that time experienced financial difficulties. High interest rates cause difficulties for entrepreneurs, resulting in real sectors with low productivity. As a result of high interest rates, the quality of bank assets is damaged, and the banking system is burdened with high funding.[4]

Sharia Banks in Indonesia is supported by laws that regulate them, as contained in Law Number 7 of 1992 concerning Banking, as amended by Law Number 10 of 1998 and Law Number 23 of 1999 concerning Bank Indonesia. Then, the existence of Sharia Banking was further strengthened with the passage of Law Number 21 of 2008 concerning Sharia Banking. Developments in the field of regulation further strengthen and encourage the formation of Islamic financial institutions, especially Sharia Banking in various regions in Indonesia.

Along with its facts, Sharia Banking is also required to continue to meet the needs of the community in the banking sector, especially those in accordance with Sharia principles. This demand also encourages Sharia Banks to continue to develop contracts that can be chosen by the public in conducting transactions. The development of the principles in the contract that must be fulfilled is sometimes not implemented properly. One of them is the implementation of the principle of freedom of contracts. In fact, Islam regulates how a person can be free to determine the contract that he will agree to according to his needs as long as it does not contradict the provisions of sharia. This freedom is allowed to meet his needs. This is emphasized in the rules of fiqh that "basically, all forms of muamalah are permissible unless there is evidence that prohibits it."[5]

The principle of freedom to make a contract is an important principle because with this principle the parties have a balanced bargaining power without feeling dictated by one of the parties with certain provisions in a contract. On the contrary, the relationship between customers and Sharia Banks often has an imbalance between the two. Customers are in a weak bargaining position and Sharia Banks are in a strong bargaining position. This results in Sharia Banks being free to include clauses or make conditions in the contract that are manifested in the form of standard contracts or contracts with standard clauses. Finally, those who have a strong bargaining position tend to dominate those who have a weak bargaining position. In this situation, Sharia Banks can impose their will and can even dictate to other parties to follow their will in the formulation of the content of the contract.[6]

Based on the description explained above, it can be formulated the problems that need to be studied in this article, namely: *first*, how to regulate the principle of freedom to make contracts in Islamic law. *Second*, how to apply the principle of freedom to make contracts in Sharia Banking in Indonesia.

2. RESEARCH METHODS

The problems that have been formulated above will be explained and researched using the normative juridical approach method. The normative juridical approach method used to solve research problems by examining secondary data through literature studies and applicable laws and regulations. Juridical research is a literature research or document research that is carried out by examining the discussion of literature, which is secondary data. It can also be said that normative juridical research looks at law from the aspect of

norms.[7] Juridical law research is legal research that lays down law as a building of a system of norms. The norm system in question is about principles, norms, rules of laws and regulations, court decisions, agreements and doctrines (teachings).[8]

3. RESULTS AND DISCUSSIONS

3.1 The Principle of Freedom of Contract in Indonesian Law

Indonesia also recognizes the principle of freedom to make contracts, with the term the principle of freedom of contract regulated in Article 1338 of the Civil Code, which states that all agreements made legally are valid as laws for those who make them. Based on the reading of Article 1338, it can be understood that everyone is allowed to make any agreement freely as long as the agreement is valid in accordance with the conditions of the validity of an agreement according to Article 1320 of the Civil Code.[9] Freedom of contract in Article 1338 of the Civil Code is declared valid if it fulfills Article 1320 of the Civil Code and is then limited by Article 1337 of the Civil Code, which states that a cause is prohibited if prohibited by law, or if it is contrary to morality or public order.

Civil law (especially treaty law) is essentially an additional law (*aanvullenrecht*), in the sense that the person in the agreement he makes can make provisions that deviate from the provisions of the agreement. A law that is additive will add to the void in the agreement, if it is not given an influence by the person concerned on certain matters.[10] This principle provides an opportunity for the parties to form agreements according to their respective needs, with new agreements that are not in the named agreements that have been regulated by law.[9]

The above explanation regarding the limitations of freedom of contract in Indonesian law can be concluded that a person is given freedom of contract in the following scope:[11] Freedom to make or not make agreements; Choose the party with whom he wants to make a deal; Determine or choose the causa of the agreement to be made; Freedom to determine the object of the agreement; The right to determine the form of an agreement; and Freedom to accept or deviate from the provisions of the law that are optional (*aanvullend optional*).

The implementation certain conditions requires state intervention. This is important because it is necessary to realize economic justice by regulating and/or prohibiting contracts that have a negative impact and harm society. In addition, state intervention is needed so that there is no oppression of weak business actors by strong business actors, where there are often monopolistic practices, oligopolies, and so on. The oppression can generally occur through acts of agreement.[9]

One party has prepared the standard terms on the existing agreement form and then presented it to the other party for approval by giving almost no freedom at all to the other party to negotiate the terms proposed. Such agreements are referred to as standard agreements or standard agreements or adhesion agreements.[11]

The word standard means a benchmark used as guideline for every consumer that indicates a legal relationship with the entrepreneur, which is standardized in the standard agreement, including models, formulas, and measurements.[12] A standard contract is a contract that is only made by one of the parties with pre-defined terms.[13] A standard contract also known as a contract that has been made in a standard form, or printed in large quantities with blanks for several parts that are the object of the transaction, such as the amount of transaction value, type, and quantity of goods transacted and so on so as not to open the opportunity for other parties to negotiate what will be agreed to be included in the contract.[14]

So far, it has been clear that state interference in the freedom of contract has been apparent. For example, with Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition. This law expressly prohibits monopolistic practices and unfair business competition. Another example is Law Number 8 of 1999 concerning Consumer Protection. This law emerged with the spirit of protecting the interests of consumers who are often presented with standard clauses whose content is detrimental to them. Therefore, through this Law, one must not make a standard clause that is unfair.[9] The content of the standard clause that must not be included in the content of the agreement is regulated in Article 18 Paragraph (1) which reads:

"Business actors in offering goods and/or services intended for trade are prohibited from making or including standard clauses in every document and/or agreement if:

a. Declare the transfer of responsibility of business actors;
b. Stating that business actors have the right to refuse to return goods purchased by consumers.
c. Declaring that business actors have the right to refuse to return the money paid for goods and/or services purchased by consumers.
d. Declaring the granting of power of attorney from consumers to business actors either directly or indirectly to carry out all unilateral actions related to goods purchased by consumers in installments.
e. Regulating the matter of proving the loss of usefulness of goods or the use of services purchased by consumers.
f. Giving the right to business actors to reduce the benefits of services or reduce the wealth of consumers who are the object of buying and selling services.
g. Declaring the consumer's submission to regulations in the form of new, additional, continuation and/or further changes made unilaterally by business actors during the period the consumer uses the services he purchases.
h. Declares that the consumer authorizes the business actor to impose dependents, pawns, or security rights on goods purchased by consumers in installments."

Furthermore, in Article 18 Paragraph (2) it states that business actors are prohibited from including standard clauses whose location or form is difficult to see or cannot be read clearly whose disclosure is difficult to understand.

Based on the explanation above, it is very clear that in Indonesian law, freedom of contract does not mean absolute freedom but freedom with certain limits. Thus, it can be said that freedom of contract within the scope of the national economy is carried out freely and responsibly by complying with existing regulations.[9]

3.2 The Principle of Freedom of Contract in Islamic Law

The word "agreement" in Islamic law is commonly called "*aqad*".[15] The word *aqad* comes from word *Al-'aqd* and the plural is *al-'uqud*, which linguistically means *al-rabt* or bond, binding.[16] The word *aqad* in the Qur'an is also used for the meaning of "oath" as in Surah an-Nisa' verse 33.

Contracts or agreements are basically made based on the principle of freedom of contract between two parties who have a balanced position, and both parties try to reach an agreement through the negotiation process. In its development, many agreements in business transactions do not occur through balanced negotiations between the parties.[17]

Freedom of contracts in Islamic law dates back to the beginning of Islamic sharia, namely in the 7th century AD. In that century, the Qur'an was revealed to the Prophet Muhammad SAW, as well as a guideline for his people.[18]

The principle of freedom of contract is not explicitly mentioned in the Quran, and only guides how a person should make a contract and make a contract. In general, the Qur'an provides restrictions on muamalat and covenants not to eat property in a bathil manner, including the prohibition of eating usury. This is as explained in Q.S. an-Nisa':29 which means:

> "O you who have believed, do not unlawfully eat your brother's property, unless it is obtained by means of a trade that exists voluntarily between you. And do not kill yourselves, for indeed Allah is Most Merciful to you." (Q.S. An-Nisa': 29).

Based on the above, in the early days of Islam, the focus in muamalat was on permissible transactions (halal) and prohibited transactions (haram). In the end, as times changed, the understanding of the verses of the Qur'an and Hadith that regulate contracts evolved into a theoretical formulation of the contract and its principles by classical fiqh scholars.[9] Such as Imam Abu Hanifah, Imam Malik, Imam Shafi'i, and Imam Ahmad Ibn Hanbal.

Based on Q.S. An-Nisa': 29 mentioned above, Ibn Kathir interpreted that Allah forbids His believing servants to eat their neighbor's property in an unlawful manner and in ways of seeking profit that is illegitimate and violates the Shari'a such as usury, gambling, and the like from various deceptions that seem to be in accordance with the Shari'ah, but in fact Allah knows what is done is just a trick from the perpetrator to avoid the provisions of the law which the shari'a of Allah has outlined.[19] Thus, the sharia economic system is upheld on the theological concept and morality that comes from the characteristics of halal, good, honest, trustworthy, clean, mutually sufficient, mutual help, mutual love, a sense of brotherhood, and faith that economic activities are part of worship.[20]

In the rules of fiqh, it is stated that "the origin of everything is mubah, until there is evidence that shows its haram."[21] From this fiqh creed, it is very clear that Islam allows any contract made by a believer, provided it is not contrary to Islamic law. The scholars, in essence, agree that in Islamic law there is no freedom to make a contract without restrictions, this is because the limits of freedom have been clearly mentioned in the Quran and Hadith. These restrictions are not a form of restraint but to realize the good for the parties and protect the parties from the form of danger and crime.

According to Iswahyudi A. Karim, the things that are considered in the sharia contract are the things that are agreed and the object of the transaction must be halal according to the sharia, there is no ambiguity (*gharar*) in the formulation of the contract or the agreed achievement, the parties are not oppressive and not wronged, the transaction must be fair, the transaction does not contain elements of gambling (*maisyir*), there is a principle of prudence, not making goods that are not useful in Islam or unclean goods (*najsy*), and does not contain usury.[2] The haram in the contract process includes making clauses that contain elements of usury, gambling, fraud, coercion, chastity, violations of morality, violations of public order, and not upholding the values of justice.[9]

The scholars agree with the limitations of the contract as stated above, but nevertheless, the scholars disagree regarding determining the conditions in the contract. In this case, some scholars allow for determining the conditions in the

contract and there are also scholars who do not allow for determining the conditions in it.[9]

3.2.1 The Opinion of Scholars Who Do Not Allow

According to Al-Asimi, basically, the contract and making the conditions in the contract are haram, until there is evidence (provision) of the shari'a that allows it. This opinion is held by the fukaha Zahiriyyah with its figure Ibn Hazm. In line with that were the usul of Abu Hanifah, the usul of as-Shafi'i, and the usul of a group of companions of Malik and Ahmad.[9]

According to Ibn Hazm, basically, the only one who has the right to make a contract and the conditions in it are the lawmakers, namely Allah and His Messenger. In this regard, Ibn Hazm presented 7 (seven) kinds of conditions contained in the book of Allah, as follows:[9]

a. Requiring pawns in non-cash buying and selling (as collateral for debt payers).
b. Requires the delay of payment until the specified time.
c. Payment terms are only at loose hours.
d. Imposing certain properties on goods.
e. Implying no fraud,
f. Implied that the property belonging to the slave that was sold by his master was to the buyer, either partially or fully.
g. Implies that the fruit of the tree that has been mated and sold by the owner is for a partial or total buyer.

Based on these conditions, Ibn Hazm emphasizes that any condition that is not affirmed by the nash or the condition is not found in the Quran, while the parties mention the conditions at the time of making the contract, then the transaction is null and void.[9]

According to the view of the Hanafi madhhab, this requirement is also void. It is permissible to have conditions if the conditions do not contradict the claim of the contract, strengthen what is the claim of the contract, there is evidence that allows it, and in accordance with custom.[9] The meaning of conditions that do not conflict with the demands of the contract is the condition required by the contract where or the logical consequence of the contract, so that even if it is not regulated in the contract, the condition has entered by itself. Such as implying that the purchased goods belong to him.[9]

The meaning of the condition that strengthens what is the contract demands that the condition strengthen in terms of meaning. For example, the seller requires a pawn or guarantor in the purchase and sale transaction at an installment price.[9] The meaning of the conditions in accordance with the prevailing customs (*'urf*) is the conditions that apply in society. For example, someone buys fish on the condition that it is cleaned of the dirt in their stomach.[9]

According to the Shafi'i madhhab, in essence, the conditions in the contract are invalid and can damage the validity of the contract, unless the conditions do not contradict what the contract requires, and conditions that, although not in accordance with what the contract wants, provide benefits for the contract itself. Conditions that do not conflict with what is controlled by the contract can be exemplified by the conditions for the delivery of goods purchased in cash, the conditions for returning the purchased goods if defective ones are found, and the conditions for being able to use the purchased goods.[9]

The opinion of the Maliki madhhab is that all conditions are essentially prohibited unless they are in accordance with the conditions of the validity of the contract and do not contain *gharar* and uncertainty. Thus, conditions that do not contradict the demands of the contract or are not compatible with the contract but contain virtue are valid. For example, a person who sells a house requires that he or she can stay temporarily for a month or a year in the house he is selling. Conditions like this do not prevent the buyer from exercising his rights as a homeowner. In an example like this, the contract and conditions are valid.[9] But if it is stipulated that the buyer cannot sell the goods he has bought, this condition is invalid and can damage the contract. This is because it prevents the buyer from exercising his rights to the goods purchased.[9]

Based on the that fact, it can be concluded that the opinion of the Maliki school is broader in scope than the Hanafi and Shafi'i schools. In matters related to the validity of conditions that do not contradict the demands of the contract and conditions that are not compatible with the contract, Madhhab Maliki and Shafi'i are of the view that if the conditions contain benefits, then it is permissible. But the basis of the benefits of these two schools is different.

According to the Shafi'i madhhab, the benefit that can ratify such a contract must be based on nash shar'i. Such as khiyar conditions, determination of time limits, pawns, and others. Meanwhile, the Maliki school ratifies all conditions that contain logical benefits for one of the parties, even though it is not required by the contract.[9] Scholarly opinions that allow

3.2.2.The Opinion of Scholars Who Allow

In principle, making contracts and conditions is permissible and valid. Neither of them is haram or void except what is forbidden or canceled by the Sharia, either based on nash or qiyas. This opinion was followed by Ahmad Ibn Hanbal. The reason is that there are many hadiths and opinions of the Companions that confirm many contracts and conditions that are not found by Imams other than Imam Ahmad. Therefore, Imam Ahmad based on it and qiyas, other things that have the same meaning as him.[9]

This opinion was later supported by Ibn Taymiyyah. According to him, all contracts and conditions are valid. The reason is that when the Sharia (Allah and His Messenger) has commanded to fulfill what has been decreed and what is required by an agreement. This means the original principle that all forms of contracts are valid and permissible.[9] Ibn Taymiyyah emphasized that the conditions in an agreement are, in essence, permissible as long as it does not legalize something that has been forbidden and/or prohibit something that has been legalized. Therefore, no one has the authority to legalize what is forbidden by Allah and forbid what He has made lawful.

In terms of freedom of contract and making conditions in the contract, Ahmad ibn Hanbal and Ibn Taymiyyah, in addition to basing on the shari'a, also based on rational considerations (al-i*'tibar*), which consist of, *first,* contracts and conditions in the form of customary customs as long as no evidence prohibits it. *Second,* all the conditions included are human needs and interests, as long as there is no evidence that prohibits it. *Third,* the validity and existence of conditions in it depend on the agreement of the two, which is based on willingness and does not relate to prohibited things.[9] That is, Ahmad Ibn Hanbal tends to release on the condition that it must not be contrary to Islamic law.

Based on the differences of opinion of the scholars, the point is that there is no absolute freedom to remain in the corridor of Sharia law. Then, when referring to Sharia principles, some conditions are allowed to be included as clauses in the contract, among which are[22] *first,* conditions that strengthen the consequences of the contract. *Second*, conditions that are in harmony with or support the meaning of the contract. *Third*, the conditions that have occurred in customary customs. *Fourth*, conditions that contain benefits for one party or a third party, as long as they are not prohibited by law, do not conflict with public order, and morality.

Conditions other than those mentioned above are not valid to be agreed upon, and because of that, that condition is called fasid. Conditions that fall into this category are considered non-existent (useless), and the contract remains valid as long as it is not proven that the condition is the motive that motivated the making of the contract. On the other hand, if it can be proven, the contract becomes void.[22]

3.3. Implementation of the Principle of Freedom of Contracts in Sharia Banking in Indonesia

In general, all Sharia banking contract products are made with reference to the provisions made by Bank Indonesia. Therefore, in general, the content of the contract also has similarities between one Sharia Bank and another. The difference is that the internal policies of the bank are made as a development of the provisions in general in the context of business development. Such as determining the profit sharing ratio, the amount of ujrah, the return period, the imposition of fees, provisions for promise injuries, restrictions on customer actions, sanctions provisions, and others.[9]

In Sharia Banking in Indonesia, the clauses of the contract and the conditions in the contract have been made in such a way by the Sharia Bank in the form of a standard contract. A standard contract, as mentioned earlier, is a contract where one of the parties has prepared the standard terms on the existing agreement form and then presented to the other party for approval by hardly giving any freedom at all to the other party to negotiate the terms offered.[11]

The standard contract used by Sharia Banking in Indonesia makes the use of the principle of freedom to make a contract for customers not fully usable. Sharia Banks in this are often in a strong position because they have capital. Meanwhile, customers are parties who have a weak bargaining position. With this position, the customer cannot use the freedom to make his contract in entering terms and/or clauses into the contract. For the customer, the freedom that exists is generally only the freedom to accept or reject the standard terms or clauses offered to them.

In the content of the standard contract, not all of the clauses are standard and cannot be negotiated. In practice, in Sharia Banks, in some cases, customers can still exercise the right of freedom to enter into terms or make clauses of the agreements they make.[9] The several points of clauses or conditions of the contract in which the customer can exercise the right to freedom of making a contract can be explained as follows:[9]

a. Determination of profit sharing or profit or price of goods in musyarakah, mudharabah, murabahah, salam, and istisna contracts.

   In the case of determining profit sharing, if the financing value is more than one hundred million, the customer can use the right of freedom to include a clause regarding the amount of profit sharing, but if it is below one hundred million,

the customer cannot use the right of freedom. Then, in terms of the amount of profit taken by the bank if the transaction is more than one billion, the customer can negotiate it, but if it is less than that, the customer cannot negotiate the amount; this depends on the provisions of the respective Sharia Bank. For determining the price of goods in salam and istisna, customers can negotiate the price. The agreed price will later be included in the contract.

b. The type of guarantee given to the Sharia Bank.
   In terms of providing collateral, the customer can use his freedom to hand over collateral in various types, as long as the bank is considered worthy of being used as collateral, such as land certificates, decrees of appointment as permanent employees, and others.
c. Determination of the needs of goods to be purchased or ordered by customers, as long as they are not prohibited by Sharia.
d. Installment payment repayment period.
   In the financing contract, customers can exercise the right to freedom to determine the installment payment term. Nazabah can choose a period of 12 (twelve) months, 24 (twenty-four) months, and so on. This is completely left to the customer according to their abilities.

The right to freedom in making customer contracts in transactions at Sharia Banks cannot be used in the following cases:[9]

a. Provisions for the imposition of administrative fees.
   The provisions of administrative fees in all Sharia Banks are set to be charged to customers to pay them. So that the customer cannot use his right to freedom in this case. This is based on the Murabahah Product Standard Book published by the Financial Services Authority in Chapter 10, Sub Chapter 10.10. The costs clause is as follows:
   (1) administrative fees that have been determined based on the bank's reference standards, which are irrespective of the amount of financing and must be paid at the time the contract is signed; and
   (2) Other costs incurred in connection with the execution of the contract include, but are not limited to, notary/PPAT fees, insurance premiums, and collateral binding fees as long as they are notified by the Bank to the Customer before the signing of this Agreement, and the Customer expresses its consent.
   (3) Tax costs incurred in connection with this contract are a liability and must be paid by the Customer, except for the Bank's income tax.
   Based on these provisions, legitimately, the imposition of administrative fees in financing contracts in Sharia Banking in Indonesia has met the requirements and is legally valid.[23]
b. Restriction of Customer Actions
   In every financing transaction, in general, Sharia Banks include clauses in their contracts regarding customer actions. This clause is a standard clause that has been prepared by Sharia Banks so that customers cannot exercise their right to freedom.
   The clauses that have been set by the Sharia Bank clearly provide restrictions on the debtor to carry out business actions. These clauses are deliberately included by the bank as a creditor, which, in the bank's view, is a protective measure for the bank if the debtor commits an act of default that can harm the bank. [24]
c. Appointment of insurance for financing and life.

When transacting at Sharia Banks, customers are asked to provide collateral to avoid unwanted things happening in the future. One form of guarantee requested by Sharia Banking to murabahah financing customers is several insurance premium funds whose amount depends on how much of the financing ceiling is given.[25] The appointment of insurance is the right of Sharia Banks and at the same time will receive insurance claim payments in the future. The appointment of insurance will be problematic when the insurance appointed by the Sharia Bank burdens the customer in paying the premium because it is not in accordance with their ability. So it is clear that customers cannot use their right of freedom in the appointment of this insurance.

d. Risk burdening
e. The determination of the criteria for an act is said to be an injury of promise/negligence/violation and its consequences.
   In determining the criteria for injury of promises/negligence/violations and their consequences, the customer cannot exercise their right of freedom to propose their opinion on the criteria that they consider burdensome. The customer in this case only needs to agree to the concept offered by the Sharia Bank.
f. Must maintain a balance of at least 1 (one) installment.
   The customer cannot use their right of freedom in the criteria of having to maintain a balance of at least 1 (one installment. This is certainly detrimental to the customer, because funds that should be able to be used to develop a business of 1 one installment cannot be used and must be saved.
g. Determination of late fees or fines and anti-losses.
   Payment of late fees or fines, and anti-loss customers are asked to agree to what is offered by Sharia Banks. So that in this case, the customer cannot use the right of freedom in including clauses and/or conditions in their contract regarding the amount of the fine fee.

Based on the previous description in this article, transactions carried out by Sharia Banks have included various conditions in their contracts. The existence of clauses and/or conditions that cannot be negotiated and changed by the customer shows that the principle of freedom in making contracts in accordance with Islamic law has not been fully applied to existing contracts in Sharia Banking in Indonesia. This makes the impact that the contract does not provide benefits for both parties, especially the customer. In addition, it is also because there is no concrete understanding of the value of benefits that must be considered and maintained by the parties, and there is no serious will towards the implementation of freedom of contract purely based on Sharia principles. Meanwhile, in PBI Number 10/16/PBI/2008 concerning Amendments to PBI Number 9/19/PBI/2007 concerning the implementation of Sharia Principles in Fund Collection and Fund Distribution activities as well as Sharia Bank Services, Article 2 Paragraph (2) mandates that every Sharia Bank is obliged to carry out Sharia principles in carrying out banking services through fund collection activities, fund distribution and bank services. This also means that the mandate of PBI has not been fully implemented by Sharia Banks in Indonesia.

4. CONCLUSION

Based on the description in this article, it is concluded that the jurists agree that in principle freedom to make a contract does not mean absolute freedom but must be limited by the provisions of Islamic sharia such as the prohibition of eating illicit property in other words it is mandatory to uphold the values of justice, avoid committing crimes, usury,

gambling/containing elements of *gharar*, fraud, coercion, violation of public order, and violation of decency. However, fiqh scholars differ in their opinions about including conditions in the contract; some allow and some do not allow on their own basis. However, if it is associated with the current conditions that continue to develop in terms of existing contracts, as long as the conditions included contain benefits for the parties and do not contradict the rules of Sharia, then it is permissible and the contract is valid. Then, the application of the freedom to make contracts in Islamic banking in Indonesia, in terms of making clauses and/or including conditions into the contract, has not been fully implemented. The customer has not fully had the opportunity to exercise his right to freedom, so some of the clauses and conditions in the contract tend to be burdensome and can even cause losses for the customer. This is because the boundaries of freedom of contract are not fully heeded by Islamic banks

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