



## Reconstruction of Financing Agreement Based on the Principle of Profit and Loss in Sharia Banking\*

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Submitted: Nov 16, 2015; Reviewed: Dec 22, 2015; Accepted: Jan 4, 2016

**Abstract:** *The main purpose of this paper is to provide an analysis that with the reconstruction of the contract that is based on sharing profits and losses it will form a model contract that has Islamic values, maslahat and justice. In the practice of sharia banking in Indonesia, the financing agreement based on the principle of profit and loss sharing in form standard does not fully reflect the characteristic of the contract. Approach used is legislation approach, conceptual approach and contract approach. Legal materials consist of primary legal materials and secondary legal materials. The study is helpful in practice sharia banking, namely the model of financing contract based on the principle of profit and sharing. Standard contracts in sharia banking serve as a form of legal frame that can be reconstructed. The characteristics of the contract is based on the principle of profit and loss sharing which state is that no one is justified to get a profit without having to bear the business risk.*

**Keywords:** *Contract; Financing Agreement; Profit and Loss Sharing Principle; Sharia Banking*

**DOI:** <http://dx.doi.org/10.20956/halrev.v1n1.211>

### INTRODUCTION

Sharia banking as one of banking choices for businesses is experiencing significant growth both in assets and a variety of banking products to follow the increasingly varied needs as the bank that is born of the development of thought in Islamic Law.

As a product of fiqh in developing products to suit customers' diverse needs required to implement sharia principles kaf-fah and focused as mandated by Law No. 21, 2008 concerning the Sharia Banking (hereinafter referred to as the Law of Banking Sharia).

\* Compiled from the research by Title "The Principle of Justice in Transactions Based on Profit and Loss Sharing in Sharia Banks", Cost of BOPTN, based on the decision letter the Rector of Airlangga University No.965/UN3/2014.

Knowingly or not, the dynamic development of the products of sharia banking, is not accompanied by the development of new thinking in the science of fiqh. Since the inception of sharia banking industry, it is not followed by the development of renewal of a significant sharia banking law which is needed to support the sharia banking industry. Thought classical fiqh though is still some dominant mindset fatwa scholars to frame the sharia banking products as a product of contemporary jurisprudence.

Adherence to sharia, fiqh banking in this case, entirely engraved on the businesses themselves. Until this moment the contract form as the foundation of the legal relationship of the parties, formatted as a standard contract. The Contracts have significance in the business continuity of sharia banking as a “wheel base of business of sharia banking”. Contracts through a variety of business activities of sharia banking can be run. This fact indicates that the business wheel of sharia banking cannot be separated from what is called contract, which facilitate sharia banking in running the business, because it is right if this standard contract issue is placed as part of the business of sharia banking.<sup>1</sup>

Contracts in sharia banking mostly frame modern contract with the contract name in the classical fiqh. Islamic law provides a number of principles and norms of the agreement as stated in the Qur'an and the Sunnah of the Prophet Muhammad.

Principles and norms are very limited and they become the basis for situation developed by recognized Shariah reasoning method for current needs. The issues raised in practice is related to the practice of mixing non-Islamic contract and the contract is based on sharia in the standard contract in sharia banking, financing agreement or contract either raising funds, especially in the contract which is based on the principle of profit and loss sharing.

The previous studies obtained a conclusion that the principle of profit and loss sharing has not been fully applied to the financing agreement ie the financing agreement of mudharabah and Musharaka in Sharia Banking X and Y. There are clauses in contract that do not reflect contracts based on the principle of profit and loss sharing, namely:<sup>2</sup>

- In clause about payment, that “if the customer pay back or pay off debt, facilitated by banks earlier than the agreed time it does not mean that payment will eliminate or reduce the portion of revenue / profits that belong to the bank as stipulated in the contract.
- There is a clause on the use of the term “debt” in contract mudharabah at Sharia Banking Y. The contract mudharabah does not use the term “debt”, because the characteristic of contract mudharabah is based on the principle of profit and loss sharing not contract of debts.

<sup>1</sup> Trisadini Prasastinah Usanti, A. Shomad, Ari Kurniawan. (2012). *Absorption of Islamic law in sharia Bank contracts*, Reports Featured Research Universities. DIPA UA, decision letter the Rector of Airlangga University No. 2613/H3/KR/2012. 9 Maret 2012. pg.1 (Trisadini *et.al* I).

<sup>2</sup> Trisadini Prasastinah Usanti, A. Shomad, Ari Kurniawan. “The Principle of Justice in Transactions Based on Profit and Loss Sharing in Sharia Banks”, *Jurnal Mimbar Hukum*, 26(2): 308-320. Available online at: <http://mimbar.hukum.ugm.ac.id/index.php/jmh/article/view/484/325> (Trisadini *et.al* II).

Based on the above background, the need for reconstruction of the financing agreement is based on the principle of profit and loss sharing in sharia banking Indonesia to be a financing agreement which is characterized by the principle of profit and loss sharing, Islamic values, justice and mashalat.

## METHOD

Legal research is conducted by a method according to the distinctive character of legal science. The hallmark of the science of law is its normative nature.<sup>3</sup> This study is to reconstruction of financing contracts based on the principle of profit and loss sharing in Sharia Banking Indonesia. Materials used are laws covering supra, primary and secondary legal materials, and are supported by the results of interviews with the staff of X and Y Sharia Banks. The materials are then analyzed and further described in descriptive narrative form.

## ANALYSIS AND DISUCSSION

### Contracts Based on Principle of Profit and Loss Sharing

In banking, where there is a tendency to use a standard contract, the contract previously by certain parties (companies) have unilaterally determine the contents with the intent to be used repeatedly with different parties or customers of the company. In the standard contract some of its contents have been defined by the Vendor which is not open to the possibility of a renegotiation and partly intentionally left blank to allow negotiations with the consumer, who has only been charged after

an agreement is obtained.<sup>4</sup>

Contracts based on the principle of profit and loss sharing in the practice of sharia banking in Indonesia is manifested in a standard contract. Standard contract in sharia banking as a form of legal frames can be reconstructed. With the reconstruction it will be refined into a contract that expresses Islamic values, justice and more benefits.

The aim is to achieve the benefit of Islamic law, as as described by al-Maliki Syathibi “(destination) the establishment of the Shari’ah al-Shari’ah is to mashlahat servant in the world and hereafter.<sup>5</sup> Sharia has a purpose (maqashid sharia), which maintains the religion (al-din hifzh), maintaining life (hifzh al-nafs), maintain a sense of mind (hifzh al-aql), maintaining the honor (al-nasl hifzh) and maintaining property (hifzh al-maal). The fifth goal of the sharia is something daruriyat or essential in Islam, because neglect one of five maqoshid will bring the destruction of moral and social order in total. it is pointed out by statement Laldin.<sup>6</sup>

*“The essentials (al-daruriyyat) are the matter on which the religion and worldly affairs of the people depend upon, their neglect will lead to total disruption and disorder and it could lead to evil ending. These must be protected and all measures that aim at safe guarding them must be taken, whether by the individual, or by government authorities”.*

<sup>3</sup> Philipus M. Hadjon and Tatiek Sri Djatmiati. (2005). *Legal Argumentation*. Yogyakarta: Gadjah Mada University Press, p. 1.

<sup>4</sup> Mardani. (2013). *Agreement Sharia Law in Indonesia*. Jakarta: Sinar Grafika, p.79.

<sup>5</sup> Abi Ishaq Ibrahim Ibn Musa al-Lakhmi al-Syathibi al-Maliki. (1341). *Hal-Muwafaqat fi Ushul al-Ahkam*, j. II, Dar al-Fikr, p.2.

<sup>6</sup> Mohammad Akram Laldin. (2006). *Introduction to Shariah and Islamic Jurisprudence*. Second Edition. Kuala Lumpur: CERT Publication, p.18.

Contract based on the principle of profit and loss sharing is a contract which emphasizes the presence of justice. The principle of justice is one of the fundamental characteristics of the three characteristics of the economic system and sharia banking, in addition to traits, prohibition to activities and paying attention to aspects of expediency. The principle of justice requires and teaches four terms in the management of Islamic banks, namely:<sup>7</sup> 1) Transparency and honesty; 2) Transactions are fair; 3) Healthy competition; and 4) A mutually beneficial agreements. There are three basic economic values which are based on the philosophy of monotheism, ie:<sup>8</sup> 1) Ownership; 2) Balance (equilibrium); and 3) Justice.

In the view of philosophy, the ultimate goal of the law is justice, to do with the Islamic law that justice must be achieved and should refer to the basic guidelines of Islam, Al Quran and Hadith which means that the goal of justice through the legal system must be started from the two terms and two terms leads to fairness too. The purpose of the estuary justice two terms in the form of justice is the ultimate goal to be achieved by a universal legal system that should be oriented towards human justice and justice to God.

Justice among humans may not differ in interpreting legal justice. While the justice that leads to God that all activities performed

by humans within the remit of worship to Him. This opinion is in line with Friedmann opinion that “as long as the principle of fairness standards are not adhered to the guidelines of religion then it will not reach the ideal point of the principle of justice”.<sup>9</sup>

Sheikh Ghazali Sheikh Abod explained that: “The major types of business organisations in an islamic economy will be: (1) Sole proprietorship; (2) Partnership; (3) Mudarabah.<sup>10</sup> Partnership is a relationship between two or more persons to distribute the profits (or losses) of business run by all of them or by one of them on behalf of others. The profits will be distributed among the partners at the agreed ratio. The loss will be distributed in proportion to the amount of capital invested.

The reason lies in the definition of the concepts of profit and loss. Mudarabah is a relationship between two or more persons such that one or more persons supply capital and other run the business on his or their behalf at an agreed rate of profit”. According to Salahudin Ahmed, the definition :<sup>11</sup>

*“Mudaraba is a profit-sharing agreement between the banks and the depositors where the banks is responsible for investing depositors funds to generate profits. The Islamic banks employ the mudaraba concept when they accept deposits from their customers who open deposit accounts for the purpose of earning returns or profits on their deposits”.*

<sup>7</sup> Trisadini Prasastinah Usanti and A. Shomad. (2014). *“The Principle of Justice in Transactions Based on Profit and Loss Sharing in Sharia Banks”*, Cost of BOPTN In year of second, Final report, p.7 (Trisadini et.all III)

<sup>8</sup> Mulhadi. (2007). *“Prinsip-Prinsip Perlindungan Nasabah Debitur Berdasarkan Sistem Perbankan Syariah”*, USU Repository, as quoted from Muhammad. (2000). *Lembaga-Lembaga Keuangan Umat Kontemporer*. Yogyakarta: UII Press, p.22

<sup>9</sup> Abdul Ghofur Ashori. (2006). *Philosophy of Law*. Yogyakarta: Gadjah Mada University Press, p.64.

<sup>10</sup> Sheikh Ghazali Sheikh Abod, et. al. (2008). *An Introduction to Islamic Economics & Finance*. Kuala Lumpur: CERT, p.269.

<sup>11</sup> Salahudin Ahmed. (2009). *Islamic Banking Finance and Insurance*. Kuala Lumpur: A.S. Noordeen, p.26.

Confirmed by Muhammad Yusuf Saleem that mudharib may be authorised to do anything which is normally done in the ordinary course of business. However, he is not allowed to perform the following activities unless he obtains a clear approval or permission from the capital owner. If a mudharib performs any of the following activities without obtaining the permission of the capital owner, then he will be liable for any losses that may inflict the capital.<sup>12</sup>

- a. A mudharib should not use the capital of the mudharabah to act as a sahib al-mal in another mudharabah contract.
- b. A mudharib also should not use the capital of the mudharabah to enter into a partnership (sharikah/musharakah) contract with other. He also should not mix the capital of the mudharabah with his own or with another person's capital and invest them.
- c. A mudharib should non purchase goods on a deferred basis. A mudharib also should not buy goods the total cost of which exceeds the mudharabah capital, as this will increase the liability of the sahib al-mal without his permission.
- d. A mudharib is not allowed to incur debts in the name of mudharabah for the purpose of mudharabah business. He also should not lend the capital of mudharabah or part of it to others.
- e. The mudharib is not allowed to commit the mudharabah business for any sum greater than the capital contributed by the sahib al-mal. The liability of the sahib al-mal in a mudharabah contrac

is limited to the extent of his capital contribution.

Contracts in islamic business are conducted based on the principle of sharia in accordance with the concepts offered in Al-Qur'an and al-Hadith, avoiding fraud and legal flaws that can lead to one party feeling aggrieved. In a proportion of profit sharing several requirements must be met, including:<sup>13</sup>

- a. The proportion of profits distributed to its business partners must be agreed upon at the beginning of the contract/agreement. If the proportion is not yet determined then the contract is no valid according to sharia
- b. Ratio/benefit ratio of each business partner must be determined in accordance with the real profits earned from the business and is not based on capital included. Not allowed to set to certain partners or certain profit level associated with capital investment

While in loss sharing, Islamic jurists agree that each partner has to bear the proportion in loss to their investment. Therefore, if a partner includes 40% of the capital, he has to bear 40% of the losses. So, according to Imam Syafii the portion of the gain or loss of each partner must comply with the portion of its capital investments. Meanwhile, according to Imam Abu Hanifa and Imam Ahmad, the portion of profit may differ from the portion of capital that is included but the portion of the loss must be borne in accordance with the equity portion of each partner. The advantage is based

<sup>12</sup> Muhammad Yusuf Saleem. (2013). *Islamic Commercial Law*. Singapore: John Wiley & Sons, p.117.

<sup>13</sup> Ustad Adil. (2011). *Getting to know Notary Sharia*. Bandung: Citra Aditya Bakti, p.80.

on the agreement of the parties, while the losses always depend on the proportion of investment.<sup>14</sup>

In a deed relating to Islamic business especially in the notary deed at sharia banking, then notary must understand the Islamic business contract. This is to avoid or reduce errors in the Islamic business contract that contains elements of *riba*, *gharar* and *maysir*.

### Reputation Risk in Sharia Banking

Financing agreement in sharia banking which do not reflect the characteristics of the contract, as well as the financing agreements which are based on the principle of profit and loss sharing do not reflect justice then will have an impact on the reputation of the sharia banking. Therefore, Islamic principles which are run by sharia banking has become an important foundation for the existence of sharia banking.

The important thing that distinguishes sharia banking from conventional banking is the Sharia Supervisory Board (hereinafter referred to as DPS) which is independent and parallel position with the board of commissioners. The main task of sharia supervisory board is to supervise Islamic banks which refers to the edicts of the National Sharia Board (hereinafter referred to as DSN) as well as the norms regarding the operationalization of sharia banking, sharia banking products and moral of management.<sup>15</sup>

Sharia banking have an obligation to ensure the validity of the products and services

offered in accordance with the principles of Sharia, as well as the operational. Actually it is the duty and responsibility of the DPS. DPS has a duty to ensure that the transactions are applied to the various forms of sharia banking must be ensured compliance with Islamic principles. Adherence to Islamic principles at sharia banking as defined in Article 2 of Law Banking Sharia, sharia banking in conducting its business activities based on principle of sharia, democracy economic and prudential.

In Article 32 of the Law of Banking Sharia regulated that DPS should be formed in the Islamic Bank and Commercial Bank which has UUS. DPS is appointed by the General Meeting of Shareholders on the recommendation of the DSN. DPS duty is to give advice and suggestions to the board of directors and oversees the activities of the bank to comply with principles of Shariah. In Article 1 Number (11) Bank Indonesia Regulation No. 11/3/PBI/2009 concerning sharia Banking, it is state that DPS is a council tasked with providing advice and recommendations to the Board of Directors and oversees the activities of the Bank to comply with Islamic principles. The duties and responsibilities of the DPS include, among others:<sup>16</sup>

- a. Assess and ensure compliance principle of sharia at operational guidelines issued by bank;
- b. Oversee the process of new product development bank;
- c. Asked for a fatwa to the national islamic council for new products of bank which there is not a fatwa;

<sup>14</sup> *Ibid.*, p.81

<sup>15</sup> Wirdyaningsih *et al.* (2005). *Bank and Insurance Islam in Indonesia*. Jakarta: Kencana, p.100.

<sup>16</sup> Trisadini *et al* III, *Op.cit.*, p.32.

- d. Conducting reviews for compliance with islamic principles on the mechanisms of fund raising and distribution of funds and bank services; and
- e. Requested data and information related to sharia aspects of unit banks in the implementation of their duties.

Functions and duties as stipulated in Decision DPS - Indonesian Ulema Council No. 2, 2000 on Guidelines for Household National Sharia Board of the Indonesian Ulema Council, that DPS at any financial institution has the following main tasks:<sup>17</sup>

- a. Provide advice and recommendations to the board of directors, business unit leaders and branch office management Islamic financial institutions on matters relating to aspects of sharia.
- b. Conduct surveillance, either actively or passively, especially in the implementation of the fatwa DSN and provide guidance/supervision of products/ services and business activities to fit the Islamic principles.
- c. As a mediator between the Islamic financial institutions with DSN in communicating proposals and product development advice and services of the financial institutions that require sharia review and fatwa of DSN.

DPS serves as a representative of the DSN that is placed on Islamic financial institutions are required to: <sup>18</sup> a) Running the fatwa DSN; b) Formulate problems that require validation DSN; c) Report the business activities and the development of Islamic financial institutions and supervised by the DSN at least once a year.

<sup>17</sup> *Ibid.*, p.35

<sup>18</sup> *Ibid.*, p.36

Implementation of all products sharia banking are set forth in a contracts, previously must be examined by the DPS, so as not to deviate from Islamic principles, if there is agreement that has not a fatwa, then DPS should ask previously to the DSN. Before there is approval from DSN then the product can not be offered to the customer. <sup>19</sup>

The role of DPS is very important because DPS is not optimal role in overseeing the sharia banking activities, thus resulting in a violation of sharia compliance, then these violations affect the reputation risk. Reputation risk is the image and credibility of sharia banks in the community will be further negative impact on liquidity risk and other risks. The negative publicity will decrease the level of public confidence in the sharia banking community, which in turn can attract funds do not even want to deal with sharia banking. <sup>20</sup>

One of the important buffer in the development of Islamic financial institutions is sharia compliance. The sharia compliance is the key differentiator between Islamic financial institutions by conventional financial institutions. To ensure the application of the principles of sharia banking and Islamic financial institutions supervised by DPS. Implementation of Shariah compliance in the sharia banking becomes very important. Shariah compliance violation clearly will damage the image and credibility of sharia banking or Islamic financial institutions in the public eye, so it can reduce public confidence in the sharia banking and Islamic financial institutions. Therefore, the role of the DPS should be optimized and qualifica-

<sup>19</sup> Wirdyaningsih, *Op.cit.*, p107

<sup>20</sup> Trisadini *et al* III, *Op.cit.*, p.37

tions to be a DPS should be tightened.<sup>21</sup>

Bank Indonesia Regulation No. 3/2 / PBI / 2011 on the Implementation of the Compliance Function Commercial Bank, stated that the compliance culture is values, behaviors, and actions that support the creation of compliance with Bank Indonesia regulations and legislation in force, including Sharia Principles for sharia banking and sharia business unit. Compliance function is a series of actions or steps that are ex-ante (preventive) to ensure that the policies, regulations, systems, and procedures, as well as business activities conducted by the bank in accordance with Bank Indonesia regulations and legislation in force, including Sharia Principles for sharia banking and sharia business unit, as well as ensure the bank's compliance with the commitments made by bank to Bank Indonesia and / or other competent supervisory authority. Compliance risk is the risk arising from the bank does not comply with and/or implement legislation and regulations, including Sharia Principles for sharia banking and sharia business unit. Bank compliance function include measures to:<sup>22</sup>

- a. Culture embodies the implementation of compliance at all levels of the organization and activities of the bank;
- b. Manage the risks faced by the bank's compliance;
- c. Ensure that policies, regulations, systems, and procedures as well as business activities conducted by the bank in accordance with Bank Indonesia regulations and legislation in force,

- d. Ensure the bank's compliance with the commitments made by bank to Bank Indonesia and / or other competent supervisory authority.

### **Reconstruction Contracts Based on the Principle Profit and Loss Sharing**

Lack of caution in approving the contract can cause serious problems for the community (either as an individual or as a corporate entity) that may not be unexpected in the future. Good contract is part of risk management, to minimize potential losses to be faced, among others, to build a sense of caution in checking the reputation and legal capacity and financial capability of the contract partners.<sup>23</sup>

Contracts must satisfy the elements that can be classified into three groups, namely essentialia elements, Naturalia elements and accidentalia element:<sup>24</sup>

1. Essentialia element of a contract is a very important element and an absolute must fulfill in order to be said to have been born a contract. It is intended to provide clarity of what is an absolute must have in a contract. For example, the elements of a lease contract must be there are "price rents". In mudharabah the elements that absolutely must be there as one of the pillars of the mudaraba contract, which is about the sharing of profit and loss. Profit ratio is one of the pillars in mudharabah. This ratio reflects the reward

<sup>21</sup> Agustianto, "Revitalisasi syariah compliance", accessed on 22 March 2015.

<sup>22</sup> Trisadini *et al* III, *Op.cit.*, p.38

<sup>23</sup> Ricardo Simanjuntak. (2006). *Business Contracts Design Techniques*. Jakarta: Gramedia, p.10

<sup>24</sup> Trisadini *et al* III, *Op.cit.*, p.9

for both parties in mudharabah. Mudharib get compensated for their work, while Shahibul maal get rewarded for their capital investments. Profit ratio specified in the contract to avoid disputes between the parties regarding the division of profits. Profit ratio must be expressed in percentage between the two sides, not expressed in nominal values.

The determination of the ratio is determined by agreement of each contracting party. In the practice of sharia banking, which is in the collection of funds in savings or time deposits with contract of mudharabah, bargain ratio between the owners of capital (ie shahibul maal or depositors) with sharia banks just happen to depositors/shahibul maal with a large amount, because they have bargaining power is relatively high. As for the small depositors customers bargaining does not occur. sharia banks will offer the ratio, depositors could agree or not be agreed. If agree then he will continue to save, if not agreed then seek sharia banks that offer more attractive ratio.<sup>25</sup>

2. Naturalia element is the element of the contract is governed by law. However, enforcement of contracts can be revoked by the parties. For example, collateral agreement, the lender usually not apply the provisions of Article 1831, 1833, 1837, 1847, 1849 Burgelijk Wetboek (BW), which regulates the obligation of creditors to first seek the

fulfillment of the debt from the debtor prior to billing guarantor in the guarantee agreement. In the regulation of Religious Court stated that the absolute competence of Islamic economic dispute resolution is conducted by a religious court, but the parties can agree that if there is a dispute then the solution through a national sharia arbitration board (BASYARNAS).

3. Accidental element is a contract that describes for the parties' freedom in the contract. The parties in this case could portend things that have been agreed upon and put it in the contract, although the agreed things are not set by law. In mudharabah agreed that for the collateral granted by mudharib must be insured.

In terms of format, the contract have no maximum idea about how many chapters or how thick the contract that must be designed for a particular agreement objects. However, it can be measured that at least a good contract should contain the minimum that must be met. At least a good contract contains the following provisions:<sup>26</sup>

1. Title of contract.
2. Date, day and place of signing the contract .
3. Information on the contracting parties, ie name, address and legal domicile, legal status, as well as the legal authority of the parties to the contract signed.
4. Background that needs to be made in respect of the contract described.

<sup>25</sup> Tiara Gustiviana, "The system for the profit sharing of Bank Muamalat", article accessed on December 18, 2015

<sup>26</sup> Ricardo Simanjuntak, *Op.Cit.*, p.278

5. Definition as the first part of both parties to equate understanding of technical terminology that interpretative.
6. The assertion about the approval of the object of the contract.
7. An explanation of the main points of the agreement between the parties.
8. Rights and obligations of the parties in order to fulfill the agreement points.
9. Representations and warranties.
10. Covenant.
11. The things that could be used as a default.
12. consequences with a default.
13. Force majeure.
14. choice of law, choice of jurisdiction, choice of forum, choice of domicile in resolving conflicts.
15. Procedure communicate changes or additions to the contract.
16. statement about the overall contract.
17. statement about the separation clause of the contract unlawful.
18. Condition Precedent.
19. Signatures of the parties.
20. Witnesses.

Similarly, in the sharia banking in Indonesia, the format of the contract shall contain as a minimum the formation of a contract must be fulfilled. Pursuant to Article 38 of Law Number 30, 2004 concerning the Notary as amended by Act No. 2 of 2014 on the Amendment Act No. 30 of 2004 (UUJN), the contract between the sharia banking with this client made with anatomical arrangement or pattern contract right, that every deed comprised of:<sup>27</sup>

Deed or Deed initial head;

- a. Deed body; and
- b. End or cover Deed.

Early Head Deed or Deed contains:

- a. Title deed;
- b. Deed number;
- c. Hours, day, date, month, and year; and
- d. Full name and domicile of the Notary.

Agency Deed contains:

- a. Full name, place and date of birth, nationality, occupation, office, position, place of residence of the parties and / or the people they represent;
- b. Information about the position of the parties;
- c. Contents of the deed which is the will and desire of the parties concerned; and
- d. Full name, place and date of birth, and occupation, position, status, and residence of each witness identification.

End or closing load Deed:

- a. Reading the description of the Deed referred to in Article 16 paragraph (1) letter m or Article 16 paragraph (7), which is recited Deed in advance by the parties in the presence of at least two (2) witnesses, or four (4) special witnesses for the making of wills Deed under his hand, and signed on the spot by the parties, witnesses, and notary. Reading of the Act is not mandatory, if the party wants Deed does not read because the parties themselves have read, know, and understand its contents, provided that it is stated in the Deed cover and on every page minuta Deed initialed by the parties, witnesses, and Notary.

<sup>27</sup> Trisadini *et al* II, *Op.cit.*,p.316

- b. Description of the signing and the signing of the deed or translation if any;
  - c. Name full name, place and date of birth, occupation, position, status, and residence of each witness Deed; and
  - d. No description of the changes occurring in the manufacture of paper or a description of any changes that may include the addition, deletion, or replacement and the number of changes.
- Based on the results of previous studies, it can be summarized that there are minimum requirements on mudharabah and Musharaka as described below (**Table 1**).

**Table 1.** Minimum Requirements Existing in Mudaraba and Musharaka Contract

Anatomy Contract	Mudharabah	Musyarakah
Agreement opening or head	<ul style="list-style-type: none"> <li>- Uses the word <i>mudharabah</i>.</li> <li>- Mentions the day and date of agreement.</li> </ul>	<ul style="list-style-type: none"> <li>- Uses the word <i>musharakah</i>.</li> <li>- Mentions the day and date of agreement.</li> </ul>
Agreement body	<ul style="list-style-type: none"> <li>- Contains the definition to equate both parties to the interpretative technical terminology.</li> <li>- States the parties to the transaction and/or their representatives.</li> <li>- Establishes the bank as the owner of the funds or <i>shahibul maal</i> and customers as a fund manager or <i>mudharib</i>.</li> <li>- Includes an agreed profit and loss sharing ratio for each party.</li> <li>- Specifies the type of business that will be done by the customer.</li> <li>- Mentions that the losses are incurred by the bank if they are not caused by agreement violation and acts beyond capacity.</li> <li>- Establishes penalties for negligence if the customer fails to pay profit and loss sharing in time</li> <li>- Establishes an agreement in the event of force majeure.</li> <li>- Establishes a guarantee from a third party if necessary.</li> <li>- Establishes sanctions if necessary</li> <li>- Establishes Sharia Arbitration or religious court or state court as a settlement in the event of dispute</li> </ul>	<ul style="list-style-type: none"> <li>- Contains the definition to equate both parties to the interpretative technical terminology.</li> <li>- States the parties to the transaction and/or their representatives.</li> <li>- Establishes the bank and customer as partners or <i>syarik</i>.</li> <li>- Establishes the contribution of fund given by each party for the business.</li> <li>- Includes an agreed profit sharing ratio for each party.</li> <li>- Includes the portion of the loss charged in proportion to the contribution of each party's fund.</li> <li>- Specifies the type of business that will be done by the customer.</li> <li>- Establishes penalties for negligence if the customer fails to pay profit and loss sharing in time.</li> <li>- Establishes an agreement in the event of force majeure.</li> <li>- Establishes a guarantee from a third party if necessary.</li> <li>- Establishes sanctions if necessary.</li> <li>- Establishes Sharia Arbitration or religious court or state court as a settlement in the event of dispute.</li> </ul>
Agreement end or closing	Signatures of parties Agreement witnesses	Signatures of parties Agreement witnesses.

**Source:** Based on the processing of clauses in exemplary *mudharabah* and *musharakah* agreements from X and Y Sharia Banks. *Ibid.*, p.316-317

Based on the large Indonesian dictionary is a reconstruction is restore it, reconfiguring.<sup>28</sup> While in Black' Law Dictionary that Reconstruction: the act or process of rebuilding, re-creating, reorganizing or something.<sup>29</sup> Reconstruction of the contract based on the results of an attempt to reconstitute the contract clauses are based on profit and loss sharing principle of justice that reflects the character of the contract.

In mudaraba contract, the principle of justice will actually be realized in the real world, because the two sides together to feel the benefits and bear the loss in case. Investors bear the loss of material (capital), while businesses bear the loss of non-material (energy and mind). So, at mudharabah no one will be justified to make profits without having to bear the business risks.<sup>30</sup>

In addition to the principles underlying the contract, then the contract sharia that need to be considered in making a contract are as follows:<sup>31</sup>

- a. It is agreed and the transaction object must be lawful according to Shari'a.
- b. There is no ambiguity (gharar) in the contract formulation and achievement of agreed.
- c. The parties are not oppressing and oppressed.
- d. The transaction must be fair.

- e. The transaction does not contain elements of gambling (maysir).
- f. There precautionary principle.
- g. Do not make the goods that are not helpful in Islam and unclean goods.
- h. Does not contain usury.

Based on the results of research that all of contract at sharia banks X and Y made under the hand, in addition to the standard form contract made by a notary public in the form of authentic. The contract has been prepared in advance by the sharia banking with the standard format and customers are not longer free to determine the terms for term and condition.

The agreement of financing that reflects the characteristics of the contract is based on the principle of profit and loss sharing and the principle of justice if the contract contain the:<sup>32</sup>

*First*, in the contract there is no word "debt", because this is a cooperation contract to share profits and losses not debt contract. Whenever there are the word "debt" in the contract is no longer shared profits and losses but only the obligation of the customer to pay the debt plus the advantages of its business and in the event of a loss, the loss is only on the responsibility of the customer.

*Second*, in the contract there is not a clause that the bank remains entitled to the benefits that will be received later even though the customer has to pay its obligations earlier than the agreed time period. When this clause is included in the contract then it is not fair when sharia banking enjoys the benefits that will be received while the customer has not used the funds in the attempt.

<sup>28</sup> Definition of Reconstruction. Great Dictionary of the Indonesian Language of the Language Center (KBBI) Offline. Source: <http://pusatbahasa.diknas.go.id/kbbi/> accessed on May 24, 2014.

<sup>29</sup> Bryan A. Garner. (2004). *Black's Law Dictionary*. Eight Editions. USA: Thomson Business, p.1300.

<sup>30</sup> Muhammad Arifin Badri, as cited at: <http://www.pengusahamuslim.com>. Accessed on Jul 18, 2014.

<sup>31</sup> Habib Adjie. (2013). *Private and Administrative Sanctions against a Notary Public Officials*. Bandung: Refika Aditama, p.49.

<sup>32</sup> Trisadini *et al* III, *Op.cit.*, p.74.

*Third*, the necessity of the existence of a force majeure clause in the contract because the contract of financing on Sharia Banking X and Y is not contained force majeure clauses. This is to avoid future disputes relating to the meaning of force majeure in financing based on the principle of profit and loss sharing.

## CONCLUSION

Reconstruction of the contract based on the profit and loss is very necessary, given the purity of Islamic banking is supposed embodiment of the values of sharia has been contaminated with by certain things that are not in line with the sharia. Reconstruction of contract in Islamic banking agreement should be based on sharia real purpose as reflected in maqoshid sharia.

The principle of justice will actually be realized in the financing agreement is based on the principle of profit and loss if both parties are linked together to feel the benefits and bear the losses when they occur together. So, in the financing agreement is based on the principle of profit and loss sharing, sharia banking is not justified accept benefit that will be received at a later date when the customer has to pays back or repay obligations facilitated by the sharia bank earlier than the due time.

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