

**ANALYSIS OF *HURRIYYAT AL-TA'AQUD* AGAINST
AN EXEMPTION CLAUSE OF A *SHARI'AH* STANDART
CONTRACT IN *SHARI'AH* BRI BANK OF KCP OF GRESIK
(An Analysis of Philosophy of Islamic Law)**

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ABSTRACT

This research focuses on answering the fundamental questions, namely: how is the application of a standard contract at exemption clause in Shari'ah BRI Bank of KCP of Gresik? And how is the analysis of hurriyyat al-ta'aqud against a shari'ah standard contract related to exemption clause. This is a field and qualitative research in which the data are collected through interview and documentation. The collected data are then descriptively analyzed with an inductive mindset to uncover the fact or object of the research on a standard contract of an exemption clause in Shari'ah BRI Bank of KCP of Gresik. The research also explores the application of hurriyyat al-ta'aqud theory accompanied by some principles of Islamic law of muamalah. The study concludes that in Shari'ah BRI Bank of KCP of Gresik has a standard contract applied in every product. In making contract between the bank and the customer, it does not offer any negotiations between the parties. So it gives opportunity for the bank to insert the onerous clause for the customer, such as freeing the bank from its responsibility about the risk that should originally be borne. The second is that a standard contract of Shari'ah BRI Bank of KCP of Gresik does not meet the principle of hurriyyat al-ta'aqud since it does not offer negotiation to the parties. In line with the above conclusions, there are two main recommendations for Shari'ah BRI Bank of KCP of Gresik. First, Shari'ah BRI Bank of KCP of Gresik has to put forward the principles of shari'ah and provide the opportunity for the customers to do negotiation in making contract. Second, for the customers have to be more careful, more thorough, and more selective in conducting contract with other parties in the field of either financial institution or non financial institution.

Keyword: a standard contract, exemption clause, *hurriyyat al-ta'aqud*

INTRODUCTION

A rapid development in the field of economic makes the business actors present and offer various new products to attract the consumers' interest. Either conventional or *shari'ah* banking system, they both try to make their products intended. They compete to launch their latest-visible products which seem to be very favorable for the customers.

As Muslim, they are supposed to carry out the daily economical activities based on the rule of *shari'ah*. In Islam, a rule to regulate the human's activities is commonly called *muamalah*. *Muamalah* is the rule or law of Allah which is intended to regulate the human life in worldly affairs or the matters relating to social life. In the field of economy, it is more specifically focused on the relationship among the people on the area of the economy such as buying and selling, leasing, and cooperating (*murabahah, musharakah, mudarabah*).

In Islamic business, there are several important principles, among others: the principle of freedom of contract, the consensual principle, and the principle of justice. These fundamental principles are then becoming the basis of carrying a contract. Islamic law recognizes the freedom of contract. It is a legal principle which states that everyone can make any kinds of contract without attached to the names that have been specified in *shari'ah*. They can also insert any clauses into the contract made based on their own interest as far as it does not result taking treasure illegally. The principle of freedom of contract is a further concretization where a specification is conducted more firmly against the principle of *ibahah* in *muamalah*.

Contract is a part of an agreement. It is an agreement between one or more binding themselves with one or more people. An agreement should illustrate that the parties are bound to each other to raise a legal relationship between the parties. The parties of the contract have right to meet their personal interest to create a mutual engagement. The consideration is that the individuals should have freedom in each bid and consider the benefit for themselves. In this context, the court must give an ease procedure to individuals to make a contract.

The standard contract in business, in practice, is not only conducted in a conventional transaction but also in a transaction based on the principles of *shari'ah* by both of banking financial institution and non-banking financial institution. This shows that the enforceability of the standard contract has already become a business necessity that can be accepted by the community with all of its advantages and disadvantages.

The rapid development of business is also attended by a simple use of demand, efficiency, and capability to accommodate the interest of businessmen through a standard contract. With this point, businessmen, especially manufacturer and creditor have prepared standard clauses as outlined in a particular contract. Consumer or debtor does simply read the raw content of the contract between *to take it* or *to leave it*. Therefore, the opportunity to negotiate as an early process to gain an agreement is even neglected. In this case, businessmen can just put in a provision or value of freedom in a contract in order to avoid risk that will occur in the relevant contract. It is usually revealed in an implicit or explicit sentence which is not easily understood by consumer or customer.

Every transaction made by *Shari'ah* Bank is embodied in a written form, namely contract. A contract made by the *Shariah* Bank and the customer is then manifested in a standard contract as extraordinarily done by a conventional bank. The use of a standard contract, as a form of business efficiency by the actors of businesses especially those who have a dominant position in the transaction, is also used to gain the benefit by the way of including exemption clause or exoneration clause that aggravate one of the parties. Exemption clause is a clause of contract which frees or restricts the responsibility of one of the parties in the event of default. It, whereas according to law, is to be assigned to him.

The ordinary exemption clauses contained in a certain standard contract would be a problem especially in a contract that emphasizes the application of *shari'ah* principles. So the existence of clauses which are usually listed in a standard exception would burden one of the parties, either debtor or customer. Considering this matter, then the use of the raw contract which contains an exemption clause would cause one of the parties impaired since there is no a balanced position and a justice of the customer. It might occur when the contract is made without any negotiations and considerations of each party.

In *Shariah* BRI Bank, where the writer does a research, found some contracts of financing contain the exemption clause. Based on the above explanation, in conducting an engagement, it should be appropriate with the existing rule from either *al-Qur'an* and/or law, so there is none that would later become the cause of damage or disorder arising from the contract.

In concerning with this matter, the author wants to investigate further about the analysis of *hurriyyat al-ta'aqud* (freedom of conducting contract) against a standard contract of *shari'ah* in exemption clause of *Shari'ah* BRI Bank of KCP of Gresik. This study aims to determine the application of a standard contract in *Shari'ah* BRI Bank of KCP of Gresik and to know the analysis of *hurriyyat al-ta'aqud* (freedom of conducting contract) against a standard contract of *shari'ah* related to the exemption clause of *Shari'ah* BRI Bank of KCP of Gresik.

RESEARCH METHODS

This is a field research which uses a qualitative approach. Field research is a research that departs from a case found in the field. While a qualitative research is a research which tries to search data from documents, field notes, and interview.

Understanding of Contract

'*Aqd* is a part of *tasarruf*. *Tasarruf* is "everything that comes out from a man's and *shari'ah*'s will to determine some of his rights". The word "perjanjian", in Indonesian term, is called "'aqd" Islamic law. Etymologically, the term of '*aqd* has several meanings, namely 'binding', 'concluding', and 'promising'. Terminologically, the word '*aqd* refers to gathering requirements of contract or something that indicates a contract which is accompanied by a force of law. As Syamsul Anwar said that contract is "the meeting of *ijab* and *qabul* as a mutual statement to create a legal object.

To realize the fundamental law of contract, the parties bear some responsibilities as well as rights of the other parties. This right and responsibility is called right of contract. It is also called a result of additional legal contract. The result of the additional legal contract is divided into two kinds, namely the legal consequence which determined by the *shari'ah* and the parties. While, the additional legal consequences determined by the parties themselves are clauses they make in accordance with their own interest, for example, the delivery of goods in the home of buyer conducted by a seller.

Majority of jurists impose a requirement of contract perpetrators that they should freely determine the choice of doing a sale contract. If there is coercion in the sale contract so it is invalid on the hand of law. Here, the author gives an example of some forms of contract which often carried out by a bank, among others:

1. *Murabahah* contract. It is one of the transactional contracts where a seller provides information to a buyer about the cost that would be issued to acquire the commodity (cost of purchase) and the additional desired profit which is reflected in the selling price. In a *murabahah* contract, there are two forms; first, a request purchase of a commodity with specific criteria proposed by a customer then approved by a bank. In this case, a bank

promises to buy commodity as intended and a customer promises to buy according to the primary price of goods coupled with a level of profit that the bank agrees. Second, it is if the bank wants to delegate to a customer to buy goods from the third party (supplier), then both parties must sign agency agreement (agency contract) where the bank gives authority to the customer to be its agent in order to purchase commodity from the third party on behalf of the bank. In other words, a customer is a representative of a bank to buy commodity (*murabahah bil wakalah*). In addition, the essence of *wakalah* is that the one does a legal act for other people. In this case, the representator is not only get profit but also responsible for the contract.

2. *Wadi'ah* contract. It is a transaction of giving mandate from the one who had placed an object to another person to save appropriately. In a modern business, *wadi'ah* is also relating to entrusting an amount of capital to a certain bank in the form of saving, checking, and deposit.
3. *Musharakah* contract. It is a mutual agreement between two or more parties for a certain business in which each party gives a fund contribution with the consequence of sharing benefit and risk in accordance with the agreement.

Hurriyyat al-Ta'aqud (Freedom of Conducting Contract)

Islamic law recognizes a freedom of conducting contract. It is a legal principle which states that every person can make any kinds of contract without attached to the determined names that have been specified in the *shari'ah* legislation. They also have right to insert any clauses in the contract in accordance with their own interest so far not resulting illegal treasure. However, among the schools of Islamic law, there is a different point of view about such a freedom. The text of *al-Qur'an*, the prophetic tradition, as well as the legal maxim show that Islamic law adheres to the principle of freedom of conducting contract. The principle is a further concretization and a firm specification against the principle of *ibahah* in *mu'amalah*.

Freedom of conducting contract and adding whatever requirement is the right of everyone except in one condition, it is the contract which contains *riba* which is totally prohibited by the *shari'ah*. So if a contract is indicated to contain a command forbidden by the text of *al-Qur'an* or the acceptable argumentation of the legal maxim, surely rejecting it is an obligation. There are two difference opinions of the jurists regarding to the freedom of conducting contract, namely:

- a) The more careful opinion declares that the origin of the contract is forbidden until there is a proof that allows it. And this ability must be fulfilled. According to this opinion, so long as the argumentation of the contract is not found in *al-Qur'an*, the prophetic tradition, the consensus of the Muslim scholars, and other main sources of Islamic law, it is not allowed and should be ignored. It is because there is no evidence from the main sources of Islamic law.
- b) The ease opinion states that the good will of the two people to act contract is a proof that cannot be ignored. It is also stated that one of the fundamental principles of contract is a mutual will of the two people to do transaction.

The second above opinion states that human is free to do contract according to what they will. They may also insert some requirements as long as they can give the benefit for both except there is a proof of the text about the ban. At least, the principle of freedom in conducting contract is based on two propositions, among others:

- a. The word of Allah as mentioned in chapter *al-Maidah*, verse 1: “O you who have believed, fulfill [all] contracts. Lawful for you are the animals of grazing livestock except for that which is recited to you [in this *Qur’an*] - hunting not being permitted while you are in the state of *ihram*. Indeed, Allah ordains what He intends”. According to this proposition and based on the legal maxim (methodology to discover the Islamic law), the command in this verse indicates an obligation. It means that fulfilling contract is an obligatory. In this verse, the word ‘*aqd* is mentioned in a plural and definitive form (*al’uqud*). According to *usul fiqh*, a plural and definitive form shows a generality. Thus, the verse can be concluded that people can make any contracts.
- b. The principle of Islamic law states that the original transaction is an agreement between the two people where the legal consequence of which is the responsibility of both through a promise. It is also based on principle of *ushul fiqh*: “each transaction must be based on freedom and willingness, no coercion or disappointment from each. If that happens then the transaction is invalid. This rule explains that freedom to act contract is because the agreement expressed as based on an agreement of the parties and the legal consequence is what they charge through appointment. Freedom of conducting contract in Islamic law is not absolute, but rather restricted. In addition, the restriction is associated with the “prohibition of eating treasures illegally”. What is meant by eating illegally is eating another man’s treasure in unjustified way and unlawful in *shari’ah* law.

In more detail, freedom of conducting contract or *hurriyyat al-ta’auq* is allowed but limited by the following things, among others:

1. *Riba*. It is an illegal addition of unauthorized income in the form of a similar goods exchange transaction which is not the same quality, quantity, delivery time (*al-fadl*) or in borrowing and lending transaction that requires customer, as a recipient of the fund, to return the received fund exceeds its principal debt due to the passage of time (*nasi’ah*). In this case, freedom of conducting contract is restricted by *riba*. This is based on the principle that the benefit of the contract made by the parties aims to realize benefit for them and should not cause any harms.

2. *Gharar* or obscurity. It is a transaction which is hung to an uncertain circumstance and chancy in nature. As for the relationship with the freedom of conducting contract, these two matters must be transparency concerning with the content of the agreement. The principle of engagement argues that each party must be acting in a good faith in doing transaction with the other parties. They are not justified to exploit the ignorance of their partners.

3. *Dzulm*. It is a transaction that raises injustice to another party. In a principle of freedom of conducting contract, the element that must be eliminated is *dzulm*. In this case, either one party or both parties may not include the element which contains injustice. It is based on the principle of fairness in engagement in Islam.

The Application of a Standard Contract without Negotiation in Signing Contract on *Shari’ah* BRI Bank of Gresik

A standard Contract on *Shari’ah* BRI Bank of Gresik has been used in every application of its product includes *faedah* savings *Shari’ah* BRI, saving dream, *haji* saving, deposit, current

account, pledge of gold, vehicle ownership, mortgage loan, holding of metal noble, bailout of *haji* and *umrah* financing, and other micro-finances.

Based on the above explanations, it is known that the existence of a standard contract is really helpful in the traffic banking activities. Not only in the world banking, a standard contract has also been used in a variety of activities such as contract of insurance, lease contract, contract of sale and purchase home Real Estate company, contract leasing office building, contract credit card manufacture, and delivery of goods (land, water, air).

Customer, who will invest (funding) and finance (lending), was originally performed by employees of *Shari'ah* BRI Bank of KCP of Gresik who do offer products from the *Shari'ah* BRI to a candidate of the customer. If the customer, to whom is offered the product of the Bank, interests in investing or financing, then the customer will complete the requirements that must be met for a contract to be a customer's agreement with *Shari'ah* BRI Bank of KCP of Gresik.

But sometimes, it must be done in accordance with the order of a bank, for example in notary's office when it is a big amount of loan. Every contract made by *Shari'ah* BRI Bank of KCP of Gresik to customer is done without any negotiation processes. Determination of margin, installment time, and the amount of the ceiling or financing are directly determined by the bank. The term used is not negotiation but initiation. Initiation is the process of introducing and offering product of the bank to the customer.

Burden Clauses in a Standard Contract on *Shari'ah* BRI Bank of KCP of Gresik

Based on research conducted by the author about some product applications in *Shari'ah* BRI Bank of KCP of Gresik, the author finds some burden clauses in a standard contract which contains aggravating the customer. In the theory of clause, it is called an exemption clause. For example in a contract of Gold Ownership, in article 2 about the requirement of realization in figure 4 explained that "there are not things that cause the Bank becomes unable to carry out its obligation and/or its right under the contract either because of the change of the provisions in force or other reasons".¹

In this case, the bank frees the customer's responsibility, for example, relating to the bank's liabilities at any increases in margin time performed by the central office, but it is not done by the branch office maid.² Then in chapter 10 of the representation and warranty to customer point 6 states that "in the matters relating to the provision of contract and *syartum*, the customer promises to bind himself to free the bank from any claims or lawsuits coming from any parties and/or for any reasons".³

In addition to the article 12 of the risks explained that "customer is responsible to check and examine the condition of the goods purchased from supplier, including on the validity of the document or the letter proof of the ownership of goods. Bank is not obliged to check the condition of goods and is not responsible for the hidden defect on goods and is not responsible for the invalidity of the document ownership of the goods".⁴

Based on an interview conducted by the author with the account officer of PT of *Shari'ah* BRI Bank of KCP of Gresik, he stated that in each existing contract in *Shari'ah* BRI Bank of KCP of Gresik has, in fact, been made by the central office based in Surabaya, but for the sake of

Shari'ah BRI Bank of KCP of Gresik itself, we add some clauses to protect the bank, to keep the bank's margin, to maintain the liquidity of the bank, and of course to keep the credibility of the bank. The purpose is that *Shari'ah* BRI Bank of KCP of Gresik can rapidly grow especially in Gresik.⁵

From the search of the writer, the contract, which contains exemption clauses exists in the application of "Ownership Precious Metal", can surely burden some customers. The consequence of the case is that the customer must bear the risk for any procurements which includes the condition of goods as well as the document or letter proof of the ownership of the goods, which should be the responsibility of the bank, but it must be borne by the customer.⁶

Basically the actual contract has been explained that "Ownership Precious Metal" of *Shari'ah* BRI Bank of KCP of Gresik uses the *murabahah* contract *bil wakalah*.⁷ But in practice, "Ownership Precious Metal" of *Shari'ah* BRI Bank of KCP of Gresik only uses the *murabahah* contract. And in fact, the risk of procurement contract should be borne by the customer.⁸

Analysis of the Application of a Standard Contract on *Shari'ah* BRI Bank of KCP of Gresik

A standard contract is essentially an agreement where its content has been standardized by the strong economical party, while the other parties are merely asked to accept or reject it.⁹ In the process of making a standard contract, there are many possibilities among the businessmen to include a provision that could incriminate the debtor, in this case is the customer, in order for the bank to obtain profit.

Exemption clause is a clause of the contract to free or to limit the liability of the party in the event of default. Whereas according to law, that the responsibility should be charged to the bank. Based on the search of the writer: first, on article 2 it is mentioned that the requirement of a gold *murabahah* contract determined a clause "there is nothing to cause the bank cannot implement the obligation and/or its right under the contract either because of the change to the provision in force or due to the other causes".

In the article shows that the bank disclaims if there is a change regulation that comes later. Based on an interview conducted by the author, the regulation that comes later like the rising margin determined by the central office. In this case, the bank would not negotiate further with the customer, and not inform about the increase directly, but it will directly debit the amount of debt installment and margin from the customer's account without informing to the customer.¹⁰

In addition of article 2 the bank protect itself on what included in article 12 which explains that the bank is not obliged and is not responsible for the risk of procurement. The article 2 is to protect the bank if there is a protest of the customer to the article 12. The two articles, 2 and 12, are intentionally included in order the bank to gain profit. So the customer cannot protest on all the risks that they must bear in the procurement of goods. Whereas, based on the contract, the procurement of the goods is the responsibility of the bank itself.

Second, in article 10 about the representation and warranty for the customer point 6, it is stated that "in the matters relating to the agreed provision of contract and *syartum*, and with this, the

customer promises to bind himself to free the bank from any claims or lawsuits coming from any parties and/or for any reasons”.¹¹ From this article, it is clear that the bank has freed itself from all that will happen about either from defaulting customer or error made by the banks.¹²

Third, the article 12 about the risks mentioned that “the customer is responsible to check and examine the condition of the goods purchased from supplier, including against the legitimate documents or letters evidence of the ownership of the goods. Bank is not obliged to check the condition of goods and is not responsible for the hidden defect on goods and is not responsible for the invalidity of the document of the ownership of the goods”.

Based on the article 12, the writer found the two irregularities: first, from the article 12 that the contract should be *murabahah bil wakalah*. However, what is stated in the contract is merely a *murabahah*. Theoretically, it has been clear that the bank had made a mistake. If the bank had used the contract of *murabahah*, it should have been responsible for any risks from the procurement of the goods because the bank itself is the doer of the procurement. Yet, from the article 12, the bank has given a delegation of responsibility to the customer. In addition, the customer acts a legal conduct on the name of the bank. This shows that there is no a consistency of *Shari’ah* BRI Bank of KCP of Gresik with the contract which is required by the head office of *Shari’ah* BRI Bank located in Surabaya. It is because the contract determined by the head office of *Shari’ah* BRI Bank Surabaya on “Ownership Precious Metal” is *murabahah bil wakalah*.

The second one is the article 12 which is an exemption clause damning one party because there is a devolution of responsibility to one party, namely the debtor on the risk in execution of the contract as it has been explained in the discussion of chapters II on exemption clause. It is because the contract performed by the customer with the third party is actually happening for the benefit of the bank. The core of *wakalah* is that someone acts a legal conduct for the other. Although the contract was made by a proxy or representative, then the agreement is an agreement between the principal and not between the representative and the third party as a partner. The principle is the one who gets the benefit of the contract and is responsible for the contract.¹³

Supposedly, as a bank that puts the principles of *shari’ah* (transparency) and promotes the conditions or restrictions in freedom of contract (*hurriyyat al-ta’aqud*), it does not do the things that are prohibited by the *shari’ah*. As in the article 12 of financing contract of “Ownership Precious Metal”, these requirements can oppress the customer. Whereas in concerning with contract, Islam says that a contract is regarded to be valid if there is nothing forbidden by the *shari’ah*. And *dzulm* is a requirement to be avoided by the *shari’ah*.

Analysis of *Hurriyyat al-Ta’aqud* against a Standard Contract on Exemption Clause of *Shari’ah* BRI Bank of KCP of Gresik

The word *‘aqd* in Indonesian terminology is known as a treaty or a contract. In performing contract of any products, *Shari’ah* BRI Bank of KCP of Gresik usually does it without negotiation. All of the provisions related to the terms, margin, duration, financing ceiling, and others have been determined by the bank.¹⁴ The making contract unilaterally provides an opportunity for the bank to insert the term of self-liberation against any risks that should

originally be borne by the bank. It is so because the bank's position at the time of making contract is stronger than that of the customer. The absence of an opportunity to make negotiation makes the customer cannot include any terms in the contract. The absence of negotiation process is also makes the customer only in a weak position. So the customer is inevitably has two options, namely *to take it* or *to leave it*. In the condition where the customer, who needs fund, is then forced to approve what has been required by the bank.

Prior to an approval, the parties should hold negotiation where one party notifies the other parties about the object of the agreement and its requirements. The other parties also state their will in order to reach a solid agreement.¹⁵ Mutual agreement is free in nature. It means that there is no compulsion, pressure from any parties, and really on the voluntary willingness of the parties, as well as no fraud.¹⁶

Munir Fuady said that one of the factors that cause a raw contract to be biased is the lack or even the absence of chance for one of the parties to bargain, so the parties, who proffered their contract, do not have more opportunities to know the content of the contract. Because of the absence or limited opportunity for one of the parties to negotiate the clause in a standard contract, then although the parties finally sign their contract, they are still doubtful whether the content of the contract is indeed true as they want or not. So it is also doubted whether there is an agreement or not. In concerning with this, the word "agreement" is the legitimate requirement of the contract.¹⁷

An agreement which had been made without any negotiations as done by *Shari'ah* BRI Bank of KCP of Gresik reflects the setting aside of the principle of *tawazun* (equilibrium principle) and likely to contain the element that incriminates the customer and also to avoid the principle of *hurriyyat al-ta'aqud* (freedom of conducting contract). Whereas, it, as a financial institution to promotes Islamic *shari'ah*, should uphold justice, transparency, equilibrium, and balance so that the activity undertaken might raise *maslahah*.¹⁸

On the theory of *hurriyyat al-ta'aqud* (freedom of conducting contract), it can only achieve justice if the parties have equal bargaining power. If the bargaining power is absent, then a contract can lead or be unconscionable. Unequal bargaining power occurs when the strong parties can impose their will on the weaker party, until he or she follows the terms of the proposed contract. The theory of *hurriyyat al-ta'aqud* or freedom of conducting contract, as a basis principle of the engagement in Islam, states that any contracts or engagements that have been made by human are certainly consisting of freedom.

Based on theoretical exposure of *hurriyyat al-ta'aqud* in chapter II and the argumentation of *al-Qur'an*, chapter *al-Maidah*, verse 1 that people can make any contracts whether named or not named. What should be more emphasized regarding to the discussion of *hurriyyat al-ta'aqud* is fulfilling the contract. In this case, the bank precisely freed responsibility by inserting an exemption clause that does not meet the contract to be agreed. On the other hands, *hurriyyat al-ta'aqud* theory says that every person do contract, he or she is free to include any terms which are considered to provide benefit for himself during that requirement does not violate the *shari'ah*.

This means that each party is free to include and to make any reservations so there is bargaining among the parties in determining *maslahah* for them. To reach the *maslahah*, there are some

determinations, such as: there should not be *maysir* or gambling, it does not reflect any injustices or tyrannies. However, in this case, the theory of *hurriyyat al-ta'aqud* is not found in "Ownership Precious Metal" in *Shari'ah* BRI Bank of KCP of Gresik, and even the contract produced is assessed to oppress the customer.

Similarly, if we look at the contract made by *Shari'ah* BRI Bank of KCP of Gresik in the financing agreement of "Ownership Precious Metal" where the process of making contract was not done with negotiation and the condition that frees the bank from the responsibility. Consequently, it could then make the absence of a balance between the customer and the bank. In addition to doing the contract, according to *hurriyyat al-ta'aqud* theory, achieving mutual agreement in the field of *muamalah* is negotiation.

Negotiation in making contract indicates the respect to human rights. Sutan Remy, in his book, mentioned that President Suharto's speech concluded that the Government of the Republic of Indonesian had authorities and at the same time obliged always to keep harmony and balance between right and obligation. Both are the key of keeping the relationship among the people. Therefore, the parties have an opportunity to make a good contract in line with the principles of *Pancasila*.¹⁹

CONCLUSIONS

1. Application of a standard contract on *Shari'ah* BRI Bank of KCP of Gresik is used on its products both of funding (investment) and lending (financing). In practice, there is no negotiation between the bank and its customer, but it is merely initiation in the form of introducing and offering the products to the public. The contract which has already been presented by the bank is to be stocked and equipped by the customer without further negotiation between both. It is so since the bank considers that the customer will certainly agree with everything determined by the bank. With the absence of negotiation before the contract, one of the parties includes a clause that incriminates him as the author found. There is a clause which frees the bank's responsibility as mentioned in article 12.
2. Islamic law allows the freedom of conducting contract or *hurriyyat al ta'aqud* in any economic activities, but it is still restricted with the elements that are prohibited by *shari'ah*. What happened on *Shari'ah* BRI Bank of KCP of Gresik in making every contract does not, however, reflect the principle of *hurriyyat al-ta'aqud*. A standard contract made even contains *dzulm* because the inclusion of an exemption clause. This could make the contract be invalid. On the other hands, the key of achieving the economic justice is negotiation.

RECOMMENDATIONS

1. *Shari'ah* BRI Bank of KCP of Gresik has to put forward the principles of *shari'ah* and provide the opportunity for the customers to do negotiation in making contract.
2. The customers have to be more careful, more thorough, and more selective in conducting contract with other parties in the field of either financial institution or non financial institution.

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- Hamzah, Office of *Syari'ah* BRI Bank of KCP of Gresik.
- Tina Handriani, Office of *Syari'ah* BRI Bank of KCP of Gresik.
- Didin Adi Nurdini, Office of *Syari'ah* BRI Bank of KCP of Gresik.
- Lucky Kuncoro, a supervisor a banking practicum.

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