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# Judicial Interpretation of the Inclusion of Standard Clauses in Murabahah Contracts Reviewed from the Principle of Proportionality and Islamic Law

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**Abstract**

*Agreements are an important aspect of law relating to business. An agreement basically must fulfill several conditions for the validity of the agreement, as well as paying attention to the legal principles of the agreement. In practice in banking, including Sharia banking, generally agreements or contracts are made using standard clauses. The aim of this research is to find out Juridical interpretation of the inclusion of standard clauses in murabahah contracts in Islamic banks in terms of proportional principles and Islamic law. This research is normative legal research using statutory approaches, legal principles and Islamic law. The results of this research show that the juridical interpretation of the inclusion of standard clauses in murabahah contracts contains elements of a combination of positive law and Islamic law. The inclusion of standard clauses in a murabahah contract must be interpreted contextually, both in terms of the object being traded or the subject matter of the parties involved in the contract.*

***Keywords:*** *Interpretation, Standard Clauses, Agreement, Murabahah Agreementword*

## Introduction

Treaty law is one of the important aspects of law and is interesting to study more deeply, because all aspects of people's lives today cannot be separated from a legal act such as an agreement.[1] In practice, the agreement has an important position to be the basis of the juridical legitimacy of every right and obligation of the parties who make it. As a juridical legitimacy, a treaty must meet several conditions, as well as pay attention to the legal principles of the covenant itself. Departing from this, understanding what is meant by an agreement is very important.

Article 1313 of the Civil Code (hereinafter referred to as the Criminal Code) defines an agreement as "an act by which one or more persons bind themselves to one or more persons". The definition of the agreement, according to some legal experts, is no longer in accordance with the development of today's society because it only includes unilateral agreements. Subject in his book "Law of Agreements", interprets an agreement as an event in which one person promises to another person or where two people promise each other to carry out something. It is further stated that the relationship is a source of engagement, in addition to other sources. Engagement itself is defined as a legal relationship between two or more people, with which one party has the right to demand something (achievement), and the other party is obliged to fulfill that demand.[2]

[1] Hasnati Indra Afrita Krismat Hutagalung, "Perlindungan Hukum Konsumen Terhadap Perjanjian Baku Yang Merugikan Konsumen," *Mizan* 10, no. 2 (2021): 209.
[2] Subekti, *Hukum Perjanjian* (Jakarta: Intermasa, 2021), 1.

The above explanation teaches that a contract is a juridical basis that gives birth to rights and obligations for the parties who make it. Thus, an agreement can not only be interpreted as an agreement, but rather a value and norm that must be obeyed by the parties. As explained earlier, the role of legal principles and principles of agreements is very important in determining their validity such as the principles of consensualism, good faith, freedom of contract, and Pacta Sunt Servanda. In addition, the principle of proportionality also has a crucial function to ensure a balanced position between the parties.[3] What is meant by the principle of proportionality is the principle that requires that each party who makes an agreement has the same position in determining the content of an agreement made. The purpose of this principle of proportionality is the end result that places the position of the parties who are equal in determining their rights and obligations.[4]

One of the implementations of agreements that commonly uses standard clauses is in banking practices. As with the practice of agreements applied to conventional banks, every transaction carried out by an Islamic bank is also manifested in the form of an agreement, which is referred to as a contract. Islamic banks are financial institutions that function as collectors and distributors of public funds in the form of financing based on sharia principles. The sharia financing contract is manifested in the form of a written agreement, but in an era like today, practice in banking usually applies standard clauses when making an agreement. One of the contracts that uses the standard clause is the murabahah contract. Simply put, murabahah is a sale and purchase contract in which the sale of certain goods is added to the agreed profit, so that before the agreement is made, the seller must inform the purchase price and the profit set on the object being sold.[5]

An interesting point according to the author is related to the inclusion of a standard clause in the murabahah financing contract, where the standard clause is interpreted as every rule or provision and condition that has been prepared and determined in advance unilaterally by the business actor which is outlined in a document and/or agreement that is binding and must be fulfilled by the consumer, so that it raises questions related to whether the practice is allowed according to the law Sharia economics and how it is implemented if reviewed with positive law. In addition, it is necessary to review the profit limits set by Islamic banks in the inclusion of the standard clause. This is because the essence of the murabahah contract is buying and selling where the contract is carried out based on mutual agreement, while the essence of the standard clause is taken it or leave it.

The consumer protection law, in article 18 paragraph (1) of Law Number 8 of 1999 concerning Consumer Protection, prohibits business actors from including standard clauses in every agreement in offering their goods and/or services. However, in practice, the inclusion of standard clauses in credit agreements is still carried out to this day.

## Method

The research method used in this study is normative legal research using a legal approach. As normative legal research, in this study the author will examine laws and regulations, legal principles and/or principles related to the legal issues raised. The data used is secondary data consisting of

[3] Ahmad Iffan, "Keberadaan Asas Pacta Sunt Servanda Dan Good Faith Menurut Hukum Internasional Dan Hukum Islam," *Journal Equitable* 3, no. 1 (2018): 29-48.
[4] Syahruddin nawi dan Salle, *Hukum Perjanjian* (Makassar: Kretakupa Print, 2019).
[5] Adiwarman Karim, *Bank Islam: Analisis Fiqih Dan Keuangan* (Jakarta: Raja Grafindo Persada, 2007), 113.

primary legal materials such as laws and regulations, secondary legal materials such as books, journals, and scientific articles related to the legal issues discussed. All data obtained will be analyzed qualitatively and the results will be presented descriptively to answer research problems.

## Result and Discussion

### Juridical Interpretation of the Inclusion of Standard Clauses in the Murabahah Contract Reviewed from the Principle of Proportionality and Islamic Law

In Islamic Law, the contract Murabahah is one of the permissible contracts because it is a form of sale and purchase contract. Basically the term Murabahah are not specifically regulated in the verses of the Qur'an or Hadith, but Wahbah Az-Zuhaily argues that there are several verses of the Qur'an about the ability to buy and sell as a legal basis.[6] The verse is "and Allah legalizes buying and selling and prohibits usury"[7] Or "O you who believe, do not eat the wealth among you except by means of trade based on mutual concession among you".[8] Based on this, the validity or existence of the murabahah contract is based on the law of buying and selling, which is permissible. In the context of Islamic banking practices, the mechanism of the contract Murabahah It is when Islamic bank buys goods needed by customers (buyers) and then sells them to the customer at a certain price and profit. In addition, Islamic banks must also inform the original price of the goods sold. Usually, the mechanism is carried out through an installment system, then the system does not affect the agreed price.[9]

Contract Murabahah is an agreement whose application must be subject to the concept of buying and selling. A sale and purchase agreement is a legal action that results in the transfer of rights to an item from the seller to the buyer. Therefore, in this legal action, it must be fulfilled by the legal terms and conditions for buying and selling. The pillars that must exist in buying and selling are the presence of sellers and buyers, objects (halal), money and objects, and pronunciation (consent).[10] Quoting the statement of Ibn Rushd, Murabahah is the sale and purchase of goods with additional agreed profits. In this contract, the seller must provide overall information to the buyer along with the profits he will get.[11] Therefore, it can be concluded that the tendency of the implementation of the contract Murabahah The seller sells goods to the seller by listing or confirming the purchase price of the goods. Then the seller provides information on the profits obtained. In this case, Islamic banks usually apply contracts Murabahah with the payment method in installments. Contract Murabahah It can also be applied to the purchase of consumptive or productive goods.

Basically, contracts or agreements are based on the principle of freedom of contract, consensualism, and the parties have the same or equal status. In the development of the banking business, the essence of the equal position between the parties who make the contract has shifted because business people today prefer to use standard clauses in carrying out an agreement. The word standard here is intended as a guideline for consumers or customers who will agree or disagree with

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6 Wahbah Az Zuhaili, *Al Fiqh Al Islami Wa Adillatuhu* (Damaskus: Dar Al Fikr, 1997), 3766.
7 Q.S. Al Baqarah verse 275.
8 Q.S. An Nisa verse 29.
9 Akhmad Faozan, "Murabahah Dalam Hukum Islam Dan Praktik Perbankan Syari'ah Serta Permasalahannya," *Jurnal Asy-Syir'ah* 43, no. 1 (2009), 26.
10 A. Shomad, *Hukum Islam Penormaan Prinsip Syariah Dalam Hukum Indonesia* (Jakarta: Prenadamedia Group, 2010), 162.
11 M. Syafi'i Antonio, *Bank Syariah Dari Teori Ke Praktik* (Jakarta: Gema Insani, 2001), 101.

the clauses in the contract. The standard clause in the contract is characterized by the absence of freedom at all for the consumer to formulate the clause in the agreement made.[12]

The murabahah contract at Islamic banks is regulated in the provisions of the Fatwa of the National Sharia Council No. 04/DSN-MUI/IV/2000 which states that the murabahah financing contract must be carried out riba-free, the goods that are the object of sale and purchase are not prohibited by Islamic law, the purchase price of goods that have been agreed upon is financed by the bank in whole or in part, the bank buys the necessary goods on behalf of the bank itself, The bank must provide all information related to the purchase of goods (for example, the purchase of goods is made in debt or cash), the sale of goods by the bank to the customer is carried out at a selling price equal to the purchase price along with the profits obtained (in this case, the bank must inform honestly and openly), the customer must pay the price of the goods and the agreed period, The Bank may enter into a specific agreement with the Customer if necessary to prevent the abuse of the contract, and if the Bank authorizes the Customer to purchase the goods from a third party, the Murabahah Contract must be made after the goods and legally belong to the Bank.

From the description above, it can be concluded that the emphasis on the realization of the Islamic bank murabahah financing contract is as long as it is not prohibited by Islamic law. The validity of the sharia financing contract is that it does not contain elements of gharar, maysir, riba, tyranny, and haram objects. Gharar is a situation where a transaction contains elements of deception from one party so that it harms the other party. Maysir is a transaction that contains elements of gambling, speculation, and so high luck. Riba is a transaction that contains added value or interest either in buying and selling or debt so that it is contrary to Islamic teachings. Tyranny is an act that causes loss or suffering to another party. Haram goods are goods that are prohibited by Islamic Law from being used or utilized.[13]

To review the proportionality of the application of standard clauses in murabahah contracts in Islamic banks, this can be compared with credit agreements in conventional banks and it is necessary to discuss how to review the Positive Law related to the standard clauses. A credit agreement is a money lending agreement between a bank as a creditor and a customer as a debtor. In this agreement, the bank as a creditor believes in its customers within the agreed period that it will be returned or paid in full.[14] According to Munir Fuady, credit agreements have their own elements, namely: (i) The agreement of the parties (the Bank as a creditor, and other individuals/corporations as debtors); (ii) Funds or capital as the object of the credit agreement; (iii) the obligation of the creditor to provide funds in accordance with the amount and at the agreed time; (iv) The debtor's obligation to pay in full all debts and their interest at a predetermined time.[15] Considering that financing agreements in Islamic banks and conventional banks are based on the principle of creditor trust (fiduciary) to the debtor to pay off their debts, to minimize all risks for the benefit of creditors, the inclusion of standard clauses is considered important.[16]

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[12] Sutan Remy Sjahdeini, *Kebebasan Berkontrak Dan Perlindungan Yang Seimbang Bagi Para Pihak Dalam Perjanjian Kredit Bank Di Indonesia* (Jakarta: Institut Bankir Indonesia, 1993), 65.

[13] Article 2 paragraph 3 of Bank Indonesia Regulation No. 7/46/PBI/2005 Concerning the Contract for the Collection and Distribution of Funds for Banks Carrying Out Business Activities Based on Sharia Principles.

[14] Rani Apriani, *Hukum Perbankan Dan Surat Berharga* (Yogyakarta: Deepublish, 2019).

[15] Munir Fuady, *Pengantar Hukum Bisnis: Menata Bisnis Di Era Modern* (Bandung: Citra Aditya Bakti, 2016), 78.

[16] Tangguh Prima Ndaru, "Penerapanprinsipkehati-Hatian Dalamperjanjian Kredit Bank (Studi Kasusputusan Mahkamah Agungnomor 2694k/Pdt/2012)," *Jurnal Bina Mulia Hukum* 6, no. 2 (2017): 161-174.

In banking practice, each bank has provided a blank or financing agreement form whose contents have been prepared in advance (standaardform). This blank credit agreement is submitted to the debtor for approval and without giving any freedom to negotiate the terms it offers. Such an agreement is known as a standard agreement or a standard agreement or an adhesion agreement. According to Sutan Remy Sjahdeini, a standard agreement is an agreement in which almost all of its clauses have been standardized by the user and the other party basically does not have the opportunity to negotiate or request changes.[17]

Mariam Darus Badrulzaman, formulating the characteristics of the standard agreement, includes:

1) The content is unilaterally determined by creditors whose position is relatively stronger than that of the debtor;
2) The debtor does not participate in determining the content of the agreement at all;
3) Driven by his needs, the debtor is forced to accept the agreement;
4) The form is written;
5) Prepared in advance in bulk or individually.

Viewed from the perspective of the principle of proportionality, a credit agreement that contains a standard clause containing all the rules and conditions that have been unilaterally determined by the creditor (Bank) whose position is relatively stronger, is contrary to the principle of proportionality because it does not involve the consumer (debtor) in the formulation of the agreement (Take it or leave it).[18] Some Dutch legal scholars such as Sluijter say that a standard agreement is not an agreement because of the position of the creditor as a private lawmaker (legio particulliere wetgever). Meanwhile, according to Pitlo, the standard agreement is a forced agreement (dwang contract) and therefore can be canceled.[19]

In contrast to this, according to Stein, the standard agreement can be accepted as an agreement based on the fiction of the will to arouse confidence that the parties are bound to the agreement. In line with that, Sutan Remy stated that in contrast to standard agreements in general, in banking financing agreements, it must be remembered that banks not only represent themselves as bank companies but also carry out the interests of the community, namely the depository community and on the basis of this consideration, it cannot be considered contrary to public order, and justice if in the credit agreement contains a clause that is intended to maintain or to protect the existence of banks or aim to implement government policies in the monetary field.[20]

If it is associated with the standard clause in the murabahah contract, it must be based on the principles of the sharia agreement, namely[21]: 1) Divine (Tauhid); 2) Mabda al-Ibadah (ability); 3) Al-Is (justice); 4) Equality; 5) Ash-Shidiq (honesty); 6) Al-Kitabah (written); 7) Good faith; 8) Usefulness

[17] Sutan Remy, *Kebebasan Berkontrak Dan Perlindungan Yang Seimbang Bagi Para Pihak Dalam Perjanjian Kredit Di Indonesia* (Jakarta: Pustaka Grafiti, 2009), 50.
[18] Ryan Oczio Antameng, "Tanggung Jawab Perusahaan Perbankan Terhadap Debitor Dalam Perjanjian Baku Yang Memuat Klausula Eksonerasi," in *National Conference on Social Science and Religion*, 2022, 776-783.
[19] Mariam Darus Badrulzaman, *Draft Rancangan Kitab Undang-Undang Hukum Perdata* (Bandung: Alumni 1993, 1993).
[20] Antameng, "Tanggung Jawab Perusahaan Perbankan Terhadap Debitor Dalam Perjanjian Baku Yang Memuat Klausula Eksonerasi."
[21] Rahmani Timorita Yulianti, "Asas-Asas Perjanjian Dalam Hukum Kontrak Syariah," *La Riba: Jurnal Ekonomi Islam* 2, no. 1 (2008): 96-102.

and Benefit; 9) Consensualism; 10) Freedom of Contract; 11) Binding agreement; 12) Legal Certainty. If it is associated with the application of standard clauses in Islamic banks, it has indirectly violated the principle of freedom of contract because it has limited customers in determining clauses in the agreements made. However, when viewed from its implementation, the principle of freedom of contract is essentially to place the parties as partners, so that the standard clause made by the Islamic bank does not contradict sharia principles. This is because the murabahah financing contract is carried out in accordance with the fatwa of DSN MUI and the principles of sharia agreements. In addition, the author argues that murabahah contracts must also be adjusted to the provisions of Law Number 8 of 1999 concerning Consumer Protection.

Article 1 point 10 of Law Number 8 of 1999 concerning Consumer Protection (hereinafter referred to as the Consumer Protection Law) explains that standard clauses are conditions that have been prepared in advance by business actors unilaterally to then be outlined in the agreement document so that these conditions must be fulfilled when consumers agree to these conditions. Then furthermore, Article 19 paragraph 1 of the Consumer Protection Law prohibits the inclusion of standard clauses if there are things that are detrimental to consumers with the following provisions:

1) Shifting the responsibilities of business actors;
2) Business actors have the right to refuse the return of goods that have been purchased by consumers;
3) Business actors have the right to refuse the delivery of refunds that have been paid by consumers;
4) Declaring the granting of power of attorney from consumers to business actors directly or indirectly to take any action unilaterally related to objects that have been purchased by consumers in installments;
5) Regulating the proof of the loss of usefulness of goods or benefits of services purchased by consumers;
6) Business actors have the right to reduce the benefits of services or reduce consumer wealth related to service objects;
7) The business actor declares that the consumer is subject to new, additional, advanced, and. or changes to the object of service to be purchased;
8) Business actors state that consumers give power of attorney to business actors related to the imposition of liens, liens, or guarantee rights related to goods purchased by consumers in installments.

Then Article 18 paragraph 2 of the Consumer Protection Law also prohibits standard clauses whose form is difficult to see, cannot be seen clearly, and is difficult to understand.

Thus, there are three opinions related to the juridical implications of the inclusion of standard clauses in murabahah contracts, namely: First, the murabahah contract does not have binding legal force because it is contrary to the principle of proportionality, sharia principles, and/or can be canceled because it is compulsory (dwang contract); Second, the murabahah contract is considered valid and has binding legal force with the consideration that Islamic banks in carrying out their business are considered to represent the public interest, namely the interests of the community who deposit funds and carry out government policies in the monetary sector. Third, the murabahah

contract is considered valid and has legal force as long as the contract is carried out and takes into account the combination of the provisions of Law Number 21 of 2008 concerning Sharia Banking, DSN-MUI Fatwa No. 04/DSN-MUI/IV/2000 concerning Murabahah, and Bank Indonesia Regulation No. 7/46/PBI/2005 concerning the Contract for the Collection and Distribution of Funds for Banks Carrying Out Business Activities Based on the Principle Sharia, so that in this case the murabahah contract that contains a standard clause remains valid and has binding legal force, with the following provisions:

1. The murabahah contract must meet the terms of the agreement stipulated in the Criminal Code. This is based on article 1338 of the Criminal Code which states that all legally made agreements are valid as law for those who make them (Pacta Sunt Servanda). Referring to the provisions of article 1320 of the Criminal Code which regulates the legal conditions of the agreement, including:
   a) The agreement of the parties that made it
   b) Talk to make a deal
   c) Regarding a definite matter
   d) A cause that is halal
2. The balance of the parties in a credit agreement can be seen from the principle of proportionality, where this principle is the embodiment of "contractual fairness". The realization of contractual justice can be determined from several approaches: first, the procedural approach, this approach emphasizes the issue of freedom of will in a contract; The second is a substantive approach, which emphasizes the content or substance and the implementation of the contract. The principle of proportionality means that it is the principle that underlies or underlies the exchange of rights and obligations of the parties according to their proportions or shares. The principle of proportionality assumes that the division of rights and obligations is realized in a process of contractual relationships, both in the pre-conclusive phase, the formation of contracts and the implementation of contracts.[22] This principle is very oriented to the context of the relationship and the interests of the parties (maintaining the continuity of the relationship). According to Peter Mahmud Marzuki, the principle of proportionality is referred to as "equitability contract" with elements of justice and fairness. The meaning of "equitability" indicates a relationship that is equal (equality), unbiased and fair (fair), meaning that the contractual relationship basically takes place proportionally and reasonably. By referring to the principle of aequitas praestasionis, which is the principle that requires the guarantee of balance and the teaching of justum pretium, namely propriety according to law. It is undeniable that the similarities of the parties have never existed. On the other hand, the parties when entering into the contract are in different circumstances. However, this inequality should not be taken advantage of by the dominant party.[23]
3. It does not contain elements of maysir, gharar, tyranny, usury, and the haram of objects.

   Based on the description of the discussion above, the author's opinion regarding the inclusion of a guarantee clause in the murabahah contract is not contrary to Positive Law and Islamic Law, because in terms of giving approval the customer is in a state of being free to accept or reject the

[22] Jamilah, "Pelaksanaan Pasal 1131 KUHPerdata Atas Jaminan Benda Milik Debitur," *Jurnal MERCATORIA* 10 (2017): 136-159.
[23] Peter Mahmud Marzuki, *Pengantar Ilmu Hukum* (Jakarta: Kencana Prenada Media Group, 2008), 78.

contract (take it or leave it), So if the customer accepts, it should be interpreted that he agrees with all the clauses in the contract.

Based on the description above, the standard clause applied in the Contract Murabahah must not contradict Law Number 8 of 1999 concerning Consumer Protection, Fatwa of the National Sharia Council No. 04/DSN-MUI/IV/2000 concerning Murabahahand Bank Indonesia Regulation No. 7/46/PBI/2005 concerning the Contract for the Collection and Distribution of Funds for Banks Carrying Out Business Activities Based on Sharia Principles. Validity related to the application of standard clauses in contracts Murabahah must consider sharia principles and the provisions of consumer protection law.

## Conclusion

Based on the above analysis, it can be concluded that the juridical interpretation of the inclusion of standard clauses in the murabahah contract contains elements of a combination of Positive Law and Islamic Law. The inclusion of standard clauses in murabahah contracts must be interpreted contextually, whether it is in terms of the object being traded or the subject of the parties involved in the contract. This means that every clause in the agreement must be interpreted taking into account the interests of the parties. Viewed from the perspective of the principle of proportionality, the inclusion of a guarantee clause is valid if the parties in giving their consent are in a state of freedom without any intervention from any party. When referring to Positive Law, the inclusion of standard clauses in murabahah contracts must be based on the provisions of the Civil Code and Law Number 8 of 1999 concerning Consumer Protection. If it refers to Islamic Law, it must refer to the principles of sharia agreements (murabahah contracts) as enshrined in Law No. 21 of 2008 concerning Sharia Banking, Fatwa of the National Sharia Council No. 04/DSN-MUI/IV/2000 concerning Murabahah and Bank Indonesia Regulation No. 7/46/PBI/2005 concerning Contracts for the Collection and Distribution of Funds for Banks Carrying Out Business Activities Based on Sharia Principles.

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