
Application of Proportionality Principles on Creditor and Debtor Interests in Banking Credit Agreement

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Abstract:

This paper describes the application of the principle of proportionality to the interests of creditors and debtors in the credit agreement of the bank, and the legal protection on the interests of creditors and debtors in the credit agreement banking.

The research method focuses on the study of library research with qualitative data on library materials or secondary data, based on the prevailing laws and regulations in Indonesia on Banking, Consumer Protection and Mortgage Rights.

The results show that the application of the principle of proportionality in the credit agreement of a bank to the interests of the creditor and debtor is the recognition of the existence of the rights of the parties manifested in the provision of equal opportunities in the exchange of interests in forms of rights and obligations.

Thus, the application of the principle of proportionality to the position of the creditor and debtor in order to be equal in the credit agreement of banking it must use the principle of freedom of contract.

Keywords: *Proportionality, Legality, Banking Credit Agreement, Creditor, Debtor Interest*

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1. Introduction

Credit agreements are controlled by general principles of contract law, beside by a consensuality principle referring to what is specifically agreed upon by both parties. The credit agreement serves as a proof of the limitations of rights and obligations between creditors and debtors. The credit agreement serves as a tool for monitoring credit. Banking credit agreements often use standard contracts according to Law No. 8/1999 on Protection of consumer (hereinafter referred to as Consumer Protection Law).

Sometimes, by looking at the weakness of the customer's position in granting credit facilities, legal protection for customers is very important. However, it is difficult to find firm rules on legal protection for bank customers, especially regarding the use of contracts / standard agreements in the bank's business. As a result, the bank exploits the situation by pouring the exoneration class in the form of limitation of creditor's liability which in fact according to the law becomes its responsibility is the limitation of responsibility to bear the risk that may arise from the agreement.

The description of the standard agreement can be seen that the standard contract is unlikely to meet the requirements of the validity of the agreement, contained in Article 1320 of the Criminal Code and the principle of freedom of contract implicit in Article 1338 of the Criminal Code. The law recognizes a person's autonomous right to freely make arrangements with anyone and freely determines the contents of the agreement known as freedom of contract.

In addition to this principle, the principle of binding force states that all legally-made agreements act as laws for those who make them, as set forth in the provisions of Article 1338 of the Criminal Code. The other fundamental principle of contract law is consensualism (Mulyawan, 2018). The three basic principles need to be supplemented by another principle, namely principle of proportionality, in order to be able to be operated throughout the principle of contract law in particular or legal instruments contained in the Criminal Code by basing its own values and legal norms (Wirawan, 2018).

The Consumer Protection Law gives new nuance because this law regulates that business actors do not arbitrarily include standard clauses in offering goods and / or services. The law is not expressly and clearly defined as the business of the business actor, but it can be said generally that every seller of goods / services including the unlimited banking party is also a service provider (Hakim, 2017; Ghofur and Susilo, 2017). The problems in this research, thus, are how the application of the principle of proportionality to the interests of creditors and debtors in the credit agreement of the bank, and how the legal protection against the interests of creditors and debtors in the credit agreement banking.

The research method used in this research is normative law research, which focuses the study of library research with qualitative data on library materials or secondary data (Salim and Nurbani, 2013), based on the prevailing laws and regulations in Indonesia on Banking and Consumer Protection of Mortgage Rights, and Book The Civil Code.

2. Rationale Concerning the Importance of Proportionality Principle In Credit Agreement Banking

The principle of proportionality in credit agreements is often interpreted with proportionality in all things, which in the sense that everything is mathematically balanced, both about the balance earned when profitable, and balanced to bear it if it loses, while the meaning of proportionality is balanced in accordance with proportionally owned by each party fairly (Abubakar, 2009). The term principle of proportionality in the covenant agreement is defined as the principle underlying the exchange of rights and obligations of the parties according to its portion or part thereof. The principle of proportionality does not concern the equality of results, but rather emphasizes the proportion of the distribution of rights and obligations between the parties (Hernoko, 2011).

Herlien Budiono argues that the principle of balance as understood in everyday language, the word "balanced" refers to an understanding whereby the principle of proportionality is given meaning two things, meaning that a state of load sharing on both sides is in a balanced state. The meaning of proportionality here means on the one hand in the limits of will (based on considerations or favorable circumstances) and on the other hand belief (of ability). Within both sides the balance can be realized. The principle of proportionality as a juridical principle means that the principle of proportionality can be understood as a fair or just principle, and is subsequently accepted as the basis of juridical attachment in Indonesian contract law (Arif and Prayogo, 2018; Wicaksono, 2018).

The idea of the principle of proportionality should be put forward beside the principle of balance in the contract, and the principle of proportionality is not seen from the context of mathematical proportionality, but on the process and mechanism of the exchange of rights and duties that take place fairly (Abubakar, 2009; Khotimah, 2018), because justice does not always mean all one should always get something in equal measure, regardless of the differences that are objectively present to each individual or parties to the agreement. In banking to secure credit or financing, most of the loan agreements are written in writing and in standard contracts (Hakim, 2017).

Bank credit agreements can be made under the hand or notarial (notary deed / authentic deed). A credit agreement is a standard contract, in which the contents or clauses of the credit agreement have been standardized and set forth in form or form, but not bound in a particular form (*vorn vrij*). Prospective debtor customers sign

only if they are willing to accept the contents of the agreement, do not give opportunity to the debtor to discuss further about the contents or clauses filed by the bank, this is causing often no proportionality in the Credit Agreement, the debtor's rights are disregarded, even impressed always placed as a weak party, so that the debtor only accept all the conditions proposed by the bank, because if not so prospective borrowers will not get the credit in question (Prayogo, 2018).

Actually, judging from the situation where the credit agreement was arranged unilaterally by the banking is not logical because the interest of the debtor is not protected by the agreement. Even the obvious is the extent to which the interests of the borrower is protected, because the debtor has no right to change or modify the standard agreement. The phenomenon of business actors and consumers become unbalanced and consumers are in a weak position is one of the factors of the birth of the Consumer Protection Act.

One of the backgrounds of the birth of Law No. 8 of 1999 is to have a balanced agreement between consumers and producers based on the principle of contractual equality, in which the rights can be equalized with proportionality, meaning the same good portion relating to the rights and obligations. Thus, the right of the debtor in obtaining legal protection in the credit agreement made should not be ignored. This illustrates that in a standard contract there must be a proportionality or a balanced position between the parties both the rights and obligations from the beginning of the pre-contractual to the stage of production and execution of the contract.

3. Purpose of Proportionality Principle In Credit Agreement Banking

The application of the principle of proportionality in the credit agreement is necessary, in order to maintain the continuity of the relationship of the parties. Because the main purpose of the existence of the principle of proportionality is nothing but to give a high sense of trust to the parties to trust each other in conducting business activities, which can benefit him, and of course the cooperation they do will get better results. Some of the functions or significance of contracts in business traffic, among others contracts as legal containers for the parties to pour their rights and obligations (exchanging concessions and interests), contracts as a frame of rules of the game, contracts as evidence of a legal relationship, provide legal certainty, and the contract supports a win-win business climate.

Thus, the function of the principle of proportionality, both in the process of formation and implementation of commercial contracts. In the pre-contract stage, the principle of proportionality opens the possibility of negotiation for the parties to fair exchange of rights and obligations.

Therefore, disproportionate and should be rejected negotiation process with bad intentions. In the formation of contracts, the principle of proportional guarantee of

equal rights and freedom in determining / regulating the proportion of rights and obligations of the parties takes place fairly. In the execution of the contract, the proportional principle guarantees the realization of the distribution of the exchange of rights and obligations according to the proportion agreed / charged to the parties. In the event of a failure in the execution of the contract it must be assessed proportionately whether the failure is fundamental so that disrupt the implementation of most contracts or mere minor things.

Therefore, testing through the principle of proportionality strongly determines the proposed failure of contract implementation, in order not to abuse by one party in utilizing the clause of the failure of contract implementation, solely for the benefit of one party by harming the other party. Even in the case of a contract dispute, the principle of proportionality emphasizes that the burden of proof to the parties must be divided according to fair considerations.

4. Fulfillment of Proportionality Principle in Credit Agreement

The credit agreement in practice grows as a written contract in the form of a form. Repeated and regular acts of the same kind can involve many people or parties, thus giving rise to the need to prepare the contents of the contract first, then standardized to make it easier any time if the community needs it (Bako, 1995). According to Setiawan (2008), the increasing number of credit agreements is one of the factors affecting restrictions on freedom of contract. According to Duncan Kennedy (1981), the industry is public where contract clauses designed by business actors and offered are based on take-or-leave basis, business actors are larger entities than consumers, business actors have monopoly power in relevant markets, commodities in demand become needs, and there is scarcity that gives space for business actors to exploit consumers.

The concept of bargaining power is very useful to understand the market that consists of only a small number of business actors or consumers. It is logical to say that a monopolistic business actor has a greater bargaining power than a seller who resides among many sellers and there is an inequality of power when a sole seller confronts many customers. In this case, the test of equality is about the degree of equality of competition on each side of a transaction. The knowledge required to draft contracts and practices of forcing the take-it-or-leave clauses provides the power for business actors to dictate to consumers.

In terms of time efficiency, cost and energy are indeed reliable even in fast-paced economic and communications systems that make the parties must move as quickly and efficiently as possible. However, on the other hand, the form of contract like this of course puts the party who does not participate in making clauses in the contract as a party either directly or indirectly as an aggrieved party on the one hand. He as one party in the contract has the right to earn a balanced position in carrying out the

contract, but on the other hand he must comply with the contents of the contract presented to him (Sriwati, 2000).

Considering contractual relationships that will be undertaken by consumer-based companies, the consumers have the same object of agreement and also with consideration of efficiency and ease of service for the interests of the company and its customers and the belief that the draft in general that has been able to represents the interests of business actors and their customers or customers equally well in the light of the fact that the draft contracts are generally still open designs for negotiation, then generally such contract drafts are provided in printed drafts. This is in accordance with Max Weber's (2007) opinion that the modern capitalism enterprises rely heavily on predictions (see also Freeman, 2008).

Max Weber (2007) argues that capitalism requires not only production techniques, but also requires a predictable legal system. On the one hand the use of credit agreements provides benefits, such as the preparatory costs of an agreement are lower based on the fact that there is no negotiation between the parties; this credit agreement reduces costs by limiting the need for legal assistance; the parties in the credit agreement achieve economic goals because the credit agreement saves both time and expense for both consumers and companies; credit agreements provide an opportunity for corporate management to limit their risk; and the credit agreement provides an opportunity for the company's senior management to control the contractual designs performed by subordinate staff without any effort (Kok, 2011).

On the other hand, the underlying weakness of the credit agreement is the lack of opportunity for the other side to negotiate or change the clauses in the contract, so that the credit agreement has the potential to become a one-sided clause (Usman, 2001). The factors that make the parties in the credit agreement are not balanced, namely the lack or absence of an opportunity for either party to bargain, so the party to whom the contract is offered is not much opportunity to know the contents of the contract, let alone there is a contract written in very small letters; due to the unilateral contracting, the provider of the document has enough time to think about the clauses in the document, perhaps even in consultation with the experts or the document has been made by experts.

The party to whom the documents are presented is not much opportunity and often unfamiliar with the clauses; the party to whom the credit agreement presented to him occupies a very depressed position, so it can only be "take it or leave it". In practice, the heavy-handed clauses in the credit agreement usually have the following forms: it is printed with lowercase letters; the language that is less clear and hard to read; unclear and hard to read text; using complex sentences; there is even an intangible credit agreement such as an undercover contract; and if the sentence is placed in places that are unlikely to be read by one party.

The reality according to Sjahdeini (1993), consumers are not always in the weak side because in the case of banks dealing with entrepreneurs' conglomerate class as debtor customers, the bank is in a weak position because the number of entrepreneur's conglomerate group is not much so that the object of competition between banks. In order for the bank not to lose the large conglomerate customers' contribution to the bank's profitability, banks are often reluctant to cave in to the demands or conditions demanded by them.

According to Kennedy (1981), goods are necessities such as food, but it does not mean business actors have greater power than other business actors to dictate prices or clauses such as luxury vessels. If there are many business actors of a need, none of them can charge more than the price and the requirements without losing all the buyers. If there are some luxury sellers, they have substantial power to set prices and requirements, although no one materially becomes worse if the industry stops doing business transactions altogether.

Kennedy (1981) also added that goods are necessities not necessarily buyers because their needs will let higher prices do not dampen demand from what they will leave in the case of luxury goods. One can continue to enjoy the utmost needs, especially food and housing, long after a person has passed the stage where he or she needs to. Looking at the weakness of the credit agreement, according to Zhang (2006), countries have realized that credit agreements are often abused by stronger bargaining parties in the market, so many countries have adopted laws or rules to maintain the fair use of credit agreements. Inosentius Samsul as quoted by Yusuf Shofie (2011) states government intervention on the relationship between producers and consumers is shown in the form of regulation in the field of consumer protection. In the development of consumer protection in Indonesia, the Consumer Protection Law passed and enacted on April 20, 1999.

The Consumer Protection Act is a special provision (*lex specialis*) to the provisions of existing legislation before the Consumer Protection Act (Shidarta, 2006). According to Harianto (2010), in accordance with the legal principle of *lex specialis derogat legi generali*, the provisions outside the Consumer Protection Act remain valid as long as they are not specifically regulated in the Consumer Protection Law or are not contradictory to the Consumer Protection Law.

5. Conclusions

The application of the principle of proportionality in the credit agreement of a bank to the interests of the creditor and debtor is the recognition of the existence of the rights of the parties manifested in the provision of equal opportunities in the exchange of interests (rights and obligations). Thus, the application of the principle of proportionality to the position of the creditor and debtor in order to be equal in the credit agreement of banking using the principle of freedom of contract. In the absence of space for negotiation it places an unbalanced position for the parties.

Legal protection of creditor and debtor's interest in banking credit agreement is based on the existence of good faith is a form of distribution of rights and duties that are proportionally exchanged among the parties, in making credit agreement clauses more cautious in all aspects of the understanding of clauses, rights and obligations and through legislation prohibiting the use of standard clauses.

Thus, in order not to happen something that could harm the parties, the principle of proportionality should be emphasized again its existence, so as not to harm the weak party in the credit agreement due to contract clauses designed by business actors and offered based on the basis of take it or leave it. The parties in the banking credit agreement should pay more attention to what their rights and obligations are, in accordance with their respective proportions, in order to minimize the occurrence of a dispute for the sake of continuity of contractual relationship.

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