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RECONSTRUCTION OF CREDIT AGREEMENTS BETWEEN DEBTORS AND CREDITORS THAT ARE EQUAL AND FAIR IN FREEDOM OF CONTRACT

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Abstract

Reconstruction of credit agreements between debtors and creditors that are equal and fair in freedom of contract. The purpose of this study is to analyze: 1) How to assess the credit agreement between debtor and creditor balanced in the contract in freedom of contact? 2) What are the legal consequences for the process of implementing a credit agreement between debtors and creditors who are balanced in contact? 3) How is the reconstruction of credit agreements between debtors and creditors balanced and fair in freedom of contract?. The research method used is normative juridical with a statutory approach, concept approach, and case studies. The results showed that: 1) Freedom of contract means that everyone is free to enter into an agreement that contains the terms of any kind of agreement, as long as the agreement is made legally and in good faith, and does not violate public order and decency. This freedom is the embodiment of free will, the radiance of rights and human rights. Freedom of contract is one of the important principles in treaty law. 2) In practice, the principle of freedom of contract is generally used as a basis for the use of standard contracts that regulate consumer transactions with business actors. For reasons of practicality and able to save costs and time, this standard contract is widely used in almost all business activities including insurance contracts, contracts in banking, lease contracts, house/apartment sale and purchase contracts from companies (real estate), office building lease contracts, credit card manufacturing contracts, goods delivery contracts (land, sea and air, and so on. 3) The contract law regulatory system is an open system, which means that everyone is free to enter into agreements, both as stipulated in law. Article 1338 paragraph (1) expressly affirms that all agreements made validly apply as law to those who make them.

Keywords: Agreement, Credit, Balanced, Freedom of Contract.

INTRODUCTION

Background

The covenant contains the meaning "promise must be kept" or "promise is debt". The agreement is a bridge that will lead the parties to realize what is the purpose of making the agreement, namely achieving protection and justice for the parties. By agreement, it is hoped that each individual will keep the promise and carry it out Reimon[1]. An agreement in the form of an agreement is essentially binding, even in accordance with Article 1338 paragraph (1) of the Civil Code, this agreement has binding force as law for

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the parties who make it Huala[2]. Making an agreement should take into account important matters, including the terms of validity of the agreement, the principles of the agreement, the rights and obligations of the parties, the structure and anatomy of making contracts, resolving disputes and termination of contracts.[3]

The birth of the credit agreement requires the parties who bind themselves to the credit agreement to comply with the agreed terms both in the form of rights and obligations of both parties as stated in the credit agreement. Binding terms in credit agreements. For the parties and the obligations of the parties to the credit agreement are protected by law if the credit agreement is born in a valid condition, namely the valid process of making and placing it and valid the content or conditions contained in the credit agreement.[4]

Freedom of contract, which is the soul of a contract or agreement, implicitly provides guidance that in contracting parties are assumed to have a balanced position. Thus, it is expected that a fair and balanced contract/agreement will emerge for the parties. However, in practice there are still many standard contract models that tend to be considered biased, unbalanced and unfair.[5]

The phenomenon of imbalance in contracts / agreements can be observed from several contract models, especially consumer contracts in standard / standard form, where standard / standard agreements are agreements that have been determined and poured into certain forms or formats, which contain clauses that tend to contain biased content. In the practice of providing credit in the banking environment, for example, there is a clause that requires customers to comply with all bank instructions and regulations, both existing and those that will be regulated in the future. In the sale and purchase contract, for example, there is a clause that goods have been purchased cannot be returned. These clauses are generally extension clauses whose contents seem more burdensome to one of the parties.[6]

Based on the principle of freedom of contract, through a process of negotiation among the equals between them. But today the trend is increasingly showing that many contracts in business transactions do not occur through a balanced negotiation process between the parties.[7] The contract occurs by the way that one party has prepared standard terms on a contract form that has been printed and then presented to the other party to be approved with almost no freedom at all to the other party to negotiate the terms offered. Such contracts are called standard contracts or standard contracts or adhesion contracts.[8]

Business contracts are actually expected to bridge business activities that connect the rights and obligations of each business person as an effort to create a balance of rights and obligations, as well as legal certainty in doing business. Business contracts are also expected to maintain the harmony of rights and obligations for the parties who make contracts, therefore the contracts they make are formal legal sources, as long as the contract is a valid contract.[9]

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The issue that is then interesting to examine is the balance criteria that can be internalized in bank credit agreements so as to realize commutative justice. Through the existence of these balance criteria, it should be used as a basis for the preparation of bank credit agreements. If these criteria are violated or not met, it can be used as a basis or reason according to law that the court can cancel an agreement because it violates the principle of balance which in the development of treaty law has been used as a principle of balance.

Based on the background of the problems mentioned above, the author is very tricked and wants to study more about credit agreements, and this research was raised in a study with the title: **"RECONSTRUCTION OF CREDIT AGREEMENTS BETWEEN DEBTORS AND CREDITORS THAT ARE BALANCED AND FAIR IN** Salim H.S*, Contract Law Theory and Contract Drafting*, (Sinar Grafika, Jakarta, 2010), p. 45. **FREEDOM OF CONTRACT".**

Problem Statement

1. How to assess a credit agreement between debtor and creditor balanced in the contract in freedom of contact?
2. What are the legal consequences for the process of implementing a credit agreement between debtors and creditors who are balanced in contact?
3. How is the reconstruction of credit agreements between debtors and creditors balanced and fair in freedom of contract?

Theoretical Framework

1. Theory of Legal Certainty

Legal certainty is judicial protection against arbitrary actions, which means that a person will be able to obtain something expected under certain circumstances. The community expects legal certainty, because with legal certainty the community will be more orderly. The law is tasked with creating legal certainty because it aims at public order.[10] Adherents of positive legal theory assert "legal certainty" as the goal of law. According to their assumption of order or order, it is impossible to exist without definite lines of life behavior. Order will only exist if there is certainty and for legal certainty to be made in a definite form (written).[11]

According to Utrecht, legal certainty contains two understandings, namely first, the existence of general rules that make individuals know what actions can or cannot be done, and second, in the form of legal security for individuals from government security because with the existence of general rules individuals can know what can be imposed or done by the state on individuals.[12]

2. Equilibrium Theory

The principle of balance is a principle in Indonesian Treaty Law which is a continuation of the principle of equality that requires a balance of rights and obligations between the parties to the agreement. The principle of balance, in addition to having certain

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characteristics, must also be consistently directed at concrete truths. The principle of balance is encouraging and at the same time a working principle of treaty law, both from Indonesian treaty law and from Dutch treaty law which represents modern law. In Dutch treaty law, the application of the principle of balance is seen in the obligation to refer to decency, good faith, propriety, and propriety in exercising the rights and obligations in a treaty.[13]

Agreements in the economic world are important instruments for bringing about economic changes in the distribution of goods and services. The agreement has the aim of creating better conditions for both parties.[14] The agreement has a number of aspects, namely the actions of the parties, the content of the agreement agreed by the parties, and the implementation of the agreement. Three interrelated aspects of the above agreement can be raised as testing factors with regard to the basic working power of balance. The same thing was also stated by Mariam Darus Badrulzaman who said that an agreement has a number of aspects, namely the actions of the parties, the content of the agreement, and the implementation of the agreement that has been agreed upon by the parties. The three interrelated aspects of the agreement can be raised as criteria regarding the conditions of balance, but also as criteria for imbalance if the conditions of balance and the three aspects are not met.[15]

3. Treaty Theory

Treaties are known as *overeenkomst* in Dutch law; they are translated back into Indonesian with various terms. The Civil Code (KUH Percivil) translation Subekti and R. Tjitrosudibio use the term "consent", as well as Achmad Ichsan in his book "Civil Law IB" and R. Setiawan, in his book "Fundamentals of Binding Law". While some other scholars such as Utrecht in their book "Introduction to Indonesian Law" use the term "Agreement" to translate *Overeenkomst*. This difference is more due to differences in perception and emphasis of meaning between the two.

The definition of covenant in general is an event where one person promises to another or where two people promise each other to do something. From that event, a relationship arose between the two people called an engagement. In its form, a covenant is a series of words containing promises or undertakings that are spoken or written. While the definition of an engagement is a legal relationship between two people or two parties, based on which one party has the right to demand something from the other party, and the other party is obliged to fulfill that demand.[16] Gives an overview that basically all agreements can be made and held by everyone. Only agreements containing achievements or obligations on one of the parties that violate laws, decency and public order are prohibited.

RESEARCH METHODOLOGY

The type of research carried out is applied normative *(applied law research*), which is legal research on the enactment or implementation of normative legal provisions (codification, laws, or contracts) in-action on *each* particular legal event that occurs in

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society. The *in-action* implementation is an empirical fact and is useful for achieving the objectives set by the parties to the contract, which is expected to take place perfectly if the formulation of normative legal provisions is clear, firm and complete.[17] Applied normative law research uses *applied legal case studies*, for example examining the implementation of bank credit agreements.[18]

In accordance with Soerjono Soekanto's opinion[19], normative legal research is research that includes research on legal principles, research on legal systematics, research on legal synchronization, legal history research, and comparative legal research, in order to answer legal problems or issues to be studied. Normative legal research examines legal rules or regulations as a system building related to a legal event. This research was conducted with the intention of providing legal argumentation as a basis for determining whether an event has been true or false according to law.[20]

The problem approach used in this research is an applied normative approach, which is an approach that is carried out by first formulating problems and research objectives. This study used secondary data derived from books. In addition to using data from books, this study collected data and information from the parties. The data collection taken in this study uses library *research*, namely data collection by searching, examining and reviewing secondary data.In this research, a [21]document study will be carried out as a means of collecting data related to the problems raised, namely literature studies / document studies *(documentary study),* sourced from laws and regulations, books, official documents, publications and research results.[22]

RESEARCH RESULTS

A balanced credit agreement between debtors and creditors

Balance is the same as being in harmony. However, the meaning of balance according to each individual is always different. Balance does not mean getting something with an equal comparison, but getting something with a comparison that suits the needs of each individual. Without prejudice to the rights of others, and without prejudice to others in its division. The principle of balance is a principle in Indonesian Treaty Law which is a continuation of the principle of equality that requires a balance of rights and obligations between the parties to the agreement. The principle of balance, in addition to having certain characteristics, must also be consistently directed at concrete truths.[23]

The principle of balance is the principle that requires both parties to fulfill and execute the agreement. The principle of balance is very important in the formation of a contract agreement. The principle of balance is made with the aim that between the two parties concerned no one feels disadvantaged or only one party benefits. The basis in the process of forming an agreement is, between the two parties have had discussions and have gone through several negotiation processes. The process is carried out to obtain mutual benefits where between the two parties there must be no one who wants to be harmed. The principle of balance in a covenant includes the process of formation, the process of making a covenant, and the execution of a covenant. If these three things are

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done well, it means that the principle of balance can be applied in the agreement. But if there is one thing that is not done, such as in the implementation there is one party who violates the agreement. Thus, the principle of balance fails to be applied and violators can be subject to sanctions as written in the agreement.[24]

One of the legal principles adopted in treaty law is the "principle of freedom of contract", which means that everyone is free to enter into an agreement that contains the terms of any kind of agreement, as long as the agreement is made legally and in good faith, and does not violate public order and decency. This freedom is the embodiment of free will, the radiance of rights and human rights. Freedom of contract is one of the important principles in treaty law. In the nineteenth century, freedom of contract was highly glorified and dominated. The existence of the principle of freedom of contract cannot be separated from the influence of the school of liberal economic philosophy. Where in the field of economics developed the *Laissez Faire stream*, pioneered by Adam Smith who emphasized the principle of non-government intervention in economic activities and the working of the market.[25] In the field of treaty law, the influence of the L*aissez* Faire school is manifested in the form of restrictions on government interference with private contracts that regulate relations between legal subjects, both individuals and legal entities. As long as these private contracts do not contradict the law, public order, decency and decency.[26]

In the Civil Code and in other laws and regulations, there is not a single article that expressly states the application of the principle of freedom of contract. Regarding the existence of the principle of freedom of contract can be concluded from several articles of the Civil Code, namely Article 1329 of the Civil Code which specifies that "everyone is capable of making agreements, unless he is determined to be incompetent by law." From the provisions of Article 1332 of the Civil Code it can be concluded that "as long as it concerns goods of economic value, everyone is free to pledge them." From Article 1320 paragraph (4) Jo. Article 1337 of the Civil Code it can be concluded that "provided that it is not about causa prohibited by law or contrary to good decency or public order, then everyone is free to pledge it.[27] "18 Article 1338 Paragraph (1) of the Civil Code which states that "All agreements validly made shall apply as law to those who make them." It can be interpreted that anyone can make an agreement with any content, there is freedom of every legal subject to make an agreement with whomever he wants, with the content and form he wants.[28]

Referring to the provisions of Article 1320 of the Civil Code, it can be assumed that there is a deviation from the application of the principle of freedom of contract in the standard contract of business activities, because the business agreement that occurs is not due to a balanced negotiation process between the parties, but the agreement occurs by means of one party has prepared standard conditions (standard clauses) on an agreement form that has been printed and presented to the other party to be approved almost does not give any freedom at all to the other party to negotiate on the terms offered. Weak parties (usually in this case consumers) are only allowed to read the conditions proposed by parties with strong positions, and if he agrees to these terms then consumers are welcome to sign them (take it), but otherwise if consumers do not agree to the terms

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proposed by business actors, then the transaction cannot continue (leave it). That is why this standard agreement has come to be known as "*take it or leave it contract*."[29]

The process of implementing a credit agreement between debtors and creditors

With regard to the content of the credit agreement, it must be known to the creditor that there are things that have been agreed before the approval of the credit application such as the amount of interest, the amount of the loan submitted by the debtor, and administrative costs that change at the time of signing the credit agreement. A release of credit by the Bank to the Debtor will always first begin with an application for credit by the prospective debtor concerned. If the bank considers the application feasible to be granted, then in order to be able to carry out the release of credit, it must first be by holding an agreement or agreement in the form of a credit agreement. The relationship between the bank and the debtor begins with a written agreement between the bank and the debtor, where the clauses in the agreement are standard or standard clauses set by the bank concerned so that they are no longer negotiated but the debtor seems forced to comply with what is already in the credit agreement.[30]

In practice, the principle of freedom of contract is generally used as a basis for the use of standard contracts that regulate consumer transactions with business actors. For reasons of practicality and able to save costs and time, this standard contract is widely used in almost all business activities including insurance contracts, contracts in banking, lease contracts, house/apartment sale and purchase contracts from companies (real estate), office building lease contracts, credit card manufacturing contracts, goods delivery contracts (land, sea and air, and so on.[31]

Article 1320 (1) specifies that an agreement or agreement is invalid if it is made without consensus or agreement from the parties who made it. The provision provides a hint that treaty law is governed by the "principle of consensualism". The provisions of article 1320 paragraph (1) contain the understanding that the freedom of a party to determine the content of the agreement is limited by the agreement of the other party. In other words, the principle of freedom of contract is limited by the principle of consensualism.[32]

When referring to Article 1320 of the Civil Code, there are actually several provisions that limit the application of the principle of freedom of contract in accordance with the legal requirements of the agreement:[33]

1. There is agreement between the parties;
2. The ability of the parties to enter into agreements
3. The existence of certain objects;
4. The existence of a causa that does not contradict the law

Force *majeure* circumstances such as natural disasters and pandemics, sometimes the debtor's business does not run smoothly to get a steady income. So that the debtor has difficulty carrying out the obligation to pay installments. While on the other hand, collateral submitted at the time of signing the credit is very unfortunate if it must be handed over to

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creditors for auction. With these various circumstances and possibilities, restructuring arises from the creditor. The creditor will review the business and income obtained by the debtor to arrange credit restructuring. To restructure credit with the following conditions:

1. Customers or Debtors experience difficulties in paying installments (principal debt and / or interest)
2. Customers or Debtors have good business prospects so that they are considered able to pay off obligations after the credit is restructured.

The result of credit restructuring is bank installment relief so that it does not burden customers when paying obligations. In credit restructuring in the form of relief such as lowering interest rates, extending the term, reducing principal arrears, reducing arrears, adding facilities, and converting loans. This credit restructuring is actually not only beneficial from the debtor but also from the creditor also benefits because it can avoid the risk of bad loans that affect the company's receivables and profits.[34]

Reconstruction of Credit Agreement Between Debtor and Creditor in freedom of contract

A contract establishes a private entity between the parties in which each party has the juridical right to demand the performance and compliance with the restrictions agreed upon by the other party voluntarily. A contract according to Black*'s Law Dictionary* is defined as an agreement between two or more persons that creates an obligation to do or not do something special. Contract restructuring can be carried out if the parties wish. In the banking world, it can be called credit restructuring, which is one of the efforts made by banks to improve credit activities for their debtors who have difficulty fulfilling their obligations. When making a credit contract, the debtor is required to sign an agreement agreement. Credit payments to include the term, installments, the amount of interest rates, with collateral that will be handed over to the creditor. [35]

Freedom of contract is one of the important principles in treaty law. In the nineteenth century, freedom of contract was highly glorified and dominated. The existence of the principle of freedom of contract cannot be separated from the influence of the school of liberal economic philosophy. Where in the field of economics developed the *Laissez Faire stream*, pioneered by Adam Smith who emphasized the principle of non-government intervention in economic activities and the working of the market. [36]In the field of treaty law, the influence of *the Laissez Faire* school is manifested in the form of limiting government interference with private contracts that regulate relations between legal subjects, both individuals and legal entities. As long as these private contracts do not contradict the law, public order, decency and decency.[37]

With the principle of freedom of contract, people can create new types of contracts that were previously unknown in the named agreement (nominate*) and the contents deviate from the named contract (nominate) regulated by law, namely Book III of the Civil Code. These contracts are known as unnamed contracts (Innominate*). [38]The opportunity for the emergence of new contracts is also inseparable in relation to the open system adopted

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in Book III of the Civil Code as a complementary law that may be set aside by the contracting parties.

Further elaboration of the principle of freedom of contract according to Indonesian treaty law includes the following scope:[39]

1. Freedom to make or not to make agreements;
2. Freedom to choose the parties with whom to enter into agreements;
3. Freedom to determine or choose the cause of the agreement he makes;
4. Freedom to determine the object of the agreement; 5. Freedom for the terms of an agreement, including the freedom to accept or deviate from the provisions of legislation that are optional (aanvullend, optional).

Before making contract changes, usually the parties get deliberation and consensus in order to reach an agreement. The deliberations were held to consider whether it was really necessary to make changes to the contract or agreement. The goal is not to cause problems in the future or there are parties who feel aggrieved in the future. All legally made agreements are valid as law for those who make them. An Agreement is irrevocable other than by agreement of both parties, or for reasons which the law states are sufficient for which an agreement must be executed in good faith.[40]

The contract law regulatory system is an open system, which means that everyone is free to enter into agreements, both stipulated in law. Article 1338 paragraph (1) expressly affirms that all agreements made validly apply as law to those who make them. If analyzed further, the provisions of the article give freedom to the parties to;

1. Make or not make agreements;
2. Entering into agreements with anyone;
3. Determine the content of the agreement, its execution and terms;
4. Determine the form of the agreement whether written or oral.
5. Article 1319 of the Civil Code states that "all agreements, whether they have a special name or no particular name, are subject to the general provisions contained in this and previous chapters".[41]

CONCLUSION

The results showed that;

a. Freedom of contract means that everyone is free to enter into an agreement that contains the terms of any kind of agreement, as long as the agreement is made legally and in good faith, and does not violate public order and decency. This freedom is the embodiment of free will, the radiance of rights and human rights. Freedom of contract is one of the important principles in treaty law.

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b. In practice, the principle of freedom of contract is generally used as a basis for the use of standard contracts that regulate consumer transactions with business actors. For reasons of practicality and able to save costs and time, this standard contract is widely used in almost all business activities including insurance contracts, contracts in banking, lease contracts, house/apartment sale and purchase contracts from companies (real estate), office building lease contracts, credit card manufacturing contracts, goods delivery contracts (land, sea and air, and so on.

c. The contract law regulatory system is an open system, which means that everyone is free to enter into agreements, both stipulated in law. Article 1338paragraph (1) expressly affirms that all agreements made validly apply as law to those who make them

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