

The Principle of Balance in Informal Credit Agreements

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Abstract

This research seeks to examine how the principle of equilibrium is utilized by the parties involved in the informal credit agreement. The research method involves empirical research. Furthermore, the research involves conducting interviews and reviewing relevant literature. The legal content is reviewed qualitatively and then explained in detail with analysis. The findings of this study indicate that the application of the principle of balance at the pre-contractual stage has reflected fairness for the parties involved, as both the bank and the debtor provide opportunities for negotiation to exchange rights and obligations fairly. However, at the contractual stage of informal credit agreements, there is still an omission of a crucial clause, namely, the clause stating "the agreement is made in two copies, each of which is given to the parties involved." This clause is essential as it guarantees that each party receives a copy of the credit agreement, thereby fostering the principle of balance in contracting. In the post-contractual stage, many debtors still do not receive a copy of the informal credit agreement. This practice is inconsistent with the principle of balance, which requires equal standing between the parties.

Keywords: Principle Of Balance, Informal Credit Agreement, Pre-Contractual, Contractual, Post-Contractual

INTRODUCTION

The level of societal needs tends to increase over time, prompting people to undertake various efforts to meet these needs, including securing housing or business premises. To fulfill these requirements, people engage in various agreements, such as buying and selling, borrowing and lending, loans, leasing, and usage agreements. Tapia-Hoffmann (2021) states agreements are made to provide legal certainty to the parties involved, specifically regarding their rights and obligations. This is aimed at preventing potential issues that may arise during the execution of the agreement. Generally, Klass (2008) explains agreements between two parties are made in writing, clearly outlining the rights and obligations of each party. Conversely, when agreements are not documented in writing, referred to as oral agreements, it becomes challenging for the parties to provide proof of the agreement in the event of a breach of contract. The evidentiary strength of both written and oral agreements is essentially the same, provided that the parties involved honestly acknowledge the contents of the agreement. The difference in evidentiary strength only becomes apparent when disputes arise during the execution of the agreement's terms. (Lipson, 2007).

A credit agreement is one type of agreement. The definition of credit is regulated in Article 1 Number 11 of the Republic of Indonesia Law Number 7 of 1992 concerning Banking, as amended by Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking (hereinafter referred to as the Banking Law), which regulates that "Credit is the provision of money or bills that can be equated with it, based on an agreement or loan agreement between a bank and another party which obliges the borrower to repay the debt after a certain period of time with the payment of interest." According to Jiménez, G., & Saurina, J. (2004), the Banking Law does not provide detailed explanations regarding the specific form of banking credit agreements. However, contractual relationships in credit agreements between banks and debtors are always documented in writing, even though credit agreements can be made orally. Currie (1954) proposes credit agreements can take the form of either authentic deeds or private deeds. Both forms of agreements remain valid and binding because agreements made by the parties constitute law for the parties who make them. A written agreement facilitates the parties in understanding their rights and obligations within the contract, thus

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requiring the parties to obtain a copy of the agreement to comprehend the agreed-upon terms. John (2018) defines failure to provide a copy of the credit agreement to the debtor constitutes a violation of the Principle of Good Faith, which implies that the mental state of the parties in making and executing the agreement must be honest, transparent, and trusting. Therefore, in the provision of bank credit, a copy of the agreement must be provided to the debtor so that the debtor is aware and able to fulfill their obligations according to what has been agreed upon in the agreement. Providing a copy of the agreement is one form of good faith by the creditor as they have endeavored to provide accurate, honest, and clear information about the rights and obligations of the parties stated in the agreement.

Furthermore, the parties should adhere to the procedures stipulated in Article 30, paragraph (3) of the Financial Services Authority Regulation Number 6/POJK.07/2022 concerning Consumer and Community Protection in the Financial Services Sector (hereinafter referred to as POJK 6/2022), which states that "Financial Services Institutions are obliged to provide access to Consumers to obtain and/or print copies of standard agreement documents as referred to in paragraph (2)." Therefore, Banks as Financial Services Providers must provide debtors with a copy of the credit agreement. However, in the phenomenon observed in society, there are still debtors who are not provided with a copy of the credit agreement. Consequently, this imbalance in the positions of the parties occurs because it is incumbent upon the Bank to provide debtors with a copy of the credit agreement to understand the rights and obligations stipulated therein. This is done to avoid confusion and uncertainty regarding the information.

LITERATURE REVIEW

Legal certainty is an indispensable characteristic of law, particularly for written legal norms. Law without the value of certainty would lose its significance as it can no longer serve as a guiding principle for everyone's behavior. Kekes & Rescher (1979) state *ubi jus incertum, ibi jus nullum* (where there is no legal certainty, there is no law). Legal certainty is closely related to justice, even though law is not synonymous with justice. The law is general, binding on everyone, and egalitarian, while justice is subjective, individualistic, and not egalitarian. Legal certainty entails implementing the law according to its wording, ensuring that society can ascertain that the law is enforced. In understanding the value of legal certainty, it should be noted that this value has a close relationship with positive legal instruments and the role of the state in actualizing it within positive law (Asnawi, 2023).

Moreover, good faith is an objective measure for assessing the implementation of agreements, where adherence to norms of propriety and morality and whether the execution of the agreement has proceeded in the right direction are considered. As stated in Article 1338 paragraph (3) of the Civil Code, an agreement must be executed in good faith. The terms propriety and morality are not explicitly defined in the law, but from their linguistic meanings, propriety signifies appropriateness, suitability, conformity, compatibility, while morality denotes decency, civility. From these meanings, it can be inferred that propriety and morality serve as "values that are worthy, fitting, appropriate, suitable, compatible, polite, and civilized," as desired by each party entering into the agreement (Marom, 2024). According to Mo, et.al., (2023), good faith not only refers to the good faith of the parties involved but must also be based on the values developed within society because good faith is a part of society. This good faith ultimately reflects the standards of justice or propriety within society. Based on such meaning, making the standard of good faith as a universal social force governing their social relationships, every citizen has an obligation to act in good faith towards all other citizens. This is an objective conception universally applied in all transactions. The principle of good faith demands propriety and fairness, meaning that the requirement for legal certainty, manifested in the execution of contracts, must not violate norms of propriety and principles of justice (Nedeva, 2024).

The obligation of business actors is to provide accurate, clear, and honest information regarding the condition and guarantees of goods and/or services, as well as to provide explanations on usage, repairs, and maintenance. This is because information not only constitutes a consumer's right, but also because the absence of information or inadequate information from business actors constitutes one type of product defect (information defect) that can significantly disadvantage consumers (Karn, et.al., 2023). The importance of conveying accurate information to consumers about a product is to prevent consumers from misconceiving the characteristics of

a particular product. Providing information to consumers can take the form of representations, warnings, or instructions (Wu, et.al., 2022).

RESEARCH METHODS

The research method utilized in the compilation of this thesis is empirical legal research. Empirical research method is a legal research method aimed at observing law in a real sense and examining how law operates within the community environment (Banakar & Travers, 2005). The research location is in the Makassar city. The population in this research consists of banks and debtors located in Makassar. This research utilizes both primary and secondary data sources collected through interview techniques and relevant literature. All legal materials are qualitatively analyzed and presented in a descriptive analytical manner.

RESULTS AND DISCUSSION

THE PRINCIPLE OF BALANCE AT THE PRE-CONTRACTUAL STAGE

Understanding the meaning of the principle of balance in general is the equilibrium of positions between contracting parties. In this regard, Park (2021) states when an imbalance occurs that disrupts the contents of the contract, intervention by a specific authority (the Government) is required. Building upon the aforementioned notion, the understanding of the operational aspect of the principle of balancing the positions of contracting parties feels predominant concerning consumer contracts. This is based on consumers being in a weak position during the contractual formation process. The interpretation of the operational aspect of the principle of balance includes:

It leans more towards balancing the positions of the parties, meaning that in the contractual relationship, the positions of the parties entail balance.

Equal distribution of rights and obligations in the contractual relationship as if without considering the process involved in determining the final outcome of such distribution.

Balance appears as merely the end result of a process.

State intervention serves as a coercive and binding instrument to ensure the balance of positions of the parties.

Essentially, balancing the positions of the parties can only be achieved under the same terms and conditions.

The application of the principle of balance is much broader, not only concerning the contents of the contract, but there are manifestations of contractual justice determined through two approaches. First, the procedural approach, which focuses on issues of free will in a contract. The second approach is the substantive approach, which emphasizes the content or substance, and substantive implementation needs to consider differing interests (Hjørland & Pedersen, 2005). Meanwhile, the scope and operational aspect of the proportionality principle appear to be more dominant in commercial business contracts. Based on the assumption that the characteristics of commercial business contracts place the parties on an equal footing, the objective of profit-oriented contracts will be achieved if there is a fair exchange of rights and obligations (proportionate). The principle of proportionality is not seen in the context of mathematical balance (equilibrium) but in the process and mechanism of exchanging rights and obligations that proceed fairly (Urbina, 2017).

The principle of proportionality, which means "the principle that underlies or grounds the exchange of rights and obligations of the parties according to their proportion or share in the entire contractual process." The principle of proportionality implies that the distribution of rights and obligations is realized throughout the entire contractual relationship, both in the pre-contractual phase, contract formation, and contract implementation (pre-contractual, contractual, post-contractual) (Siliquini-Cinelli & Hutchison 2017). In the formation and execution process of commercial business contracts, there are several stages, one of which is the pre-contractual stage that provides opportunities for negotiation for the parties to exchange rights and obligations fairly. In this regard, if it is not proportional, negotiations with bad faith must be rejected (Kates, et. al., 2021).

THE PRINCIPLE OF BALANCE AT THE CONTRACTUAL STAGE

The contractual stage involves the alignment of the parties' declarations of intent. According to & Al-Ghamdi (2023), typically, this stage includes the drafting of the initial text, revisions to the text, drafting of the final text, and signing. Subsequently, at the contractual stage, the Bank provides the draft credit agreement to the prospective debtor. The elements of the credit agreement include:

Creditor: the party providing credit (loan) to an individual or business entity;

Debtor: the party receiving a loan from another party;

Trust: the creditor's confidence that the debtor will fulfill their obligation to repay the loan according to the agreed-upon timeframe;

Agreement;

Risk: the potential loss that may occur from the disbursement of the bank's credit;

Term: the duration required by the debtor to repay the loan to the creditor;

Consideration: the compensation for the funds disbursed by the creditor, in the form of interest or a specified amount of money as agreed upon.

Based on the elements of the credit agreement, even though the Bank has prepared a standard credit agreement form (standard form), there are provisions that the prospective debtor can negotiate, such as the amount of credit, the credit term, and the interest rate. This allows the bank and the debtor to have equal rights and the freedom to fairly determine/arrange the proportion of rights and obligations of the parties. However, according to the author, the private credit agreement still lacks an important clause, namely the clause stating "the agreement is made in two (2) copies, each of which is given to the parties." This clause is crucial because it ensures that a copy of the credit agreement is provided to each party, thereby establishing the principle of balance in contracting.

THE PRINCIPLE OF BALANCE AT THE POST-CONTRACTUAL STAGE

The post-contractual stage is the execution of the contract, ensuring the realization of the distribution of the exchange of rights and obligations according to the proportion agreed upon and imposed on the parties (Xiansheng, 2023). The inception of a credit agreement obligates the parties involved to adhere to the terms agreed upon, encompassing the rights and obligations of both parties as outlined in the agreement. The binding nature of the terms in the credit agreement and the parties' obligation to comply with it are protected by law, provided that the agreement is established under legitimate circumstances, meaning the process of its creation and establishment is lawful, and the contents or terms contained within the agreement are valid (Garcia-Teruel, 2020).

A credit agreement, as part of the chain of relationships between the parties, must be built on an understanding of justice grounded in the recognition of the parties' rights. Aloisi & de Stefano (2023) claim the acknowledgment of the existence of these rights is manifested in the provision of equal opportunities and chances for the proportional exchange of interests, rights, and obligations. However, the recognition of rights, freedom, and equality in the exchange of interests must still adhere to the principle of balance in the formation of the agreement. Furthermore, during the execution stage of the contract, special circumstances (*bijzondere omstandigheden*) may arise, either partially or wholly unforeseen, which deviate from normal conditions. These special circumstances can create an imbalance in the execution of the agreement and simultaneously serve as a condition for testing the validity of the agreement. Generally, this situation can be referred to as "circumstances related to the execution of the agreement (*uitvoeringsomstandigheden*)."

The formation of an agreement preceded by methods or procedures that do not reflect equality or inequality of performance will result in imbalance. By conducting such an examination, the detriment of one party can be prevented, and this prevention is one of the conditions for achieving balance. In the event of imbalance, it depends on the aggrieved party to demand the invalidity of the agreement (Aloisi, & de Stefano 2023). Substantively, the application of balance entails equality of position among the parties. The opening of negotiation opportunities and fair rules of engagement demonstrate the functioning of mechanisms for

proportional exchange of rights and obligations both procedurally and substantively at the pre-contractual, contractual formation, and contractual execution stages.

Therefore, after the agreement process among the parties culminates in a contract, it has undergone the desired exchange of rights and obligations by the parties. However, procedurally, one party still does not receive a copy of the contract. This is contrary to the principle of balance, as each party has the right to receive the outcomes of the agreement as stipulated in the contract. The purpose of the parties obtaining a copy of the credit agreement is one of the applications of the principle of balance, with the intention that each party receives the same information. In the event of disputes regarding the meaning of performance, parties can refer to the copies of the credit agreement held by each party to ensure the implementation of the contract and the realization of the distribution of exchanged rights and obligations according to the agreed-upon proportions.

CONCLUSION

The application of the principle of balance at the pre-contractual stage has reflected fairness for both parties because the bank and the debtor open negotiation opportunities to exchange rights and obligations fairly. However, at the contractual stage in the underhand credit agreement, there is still a clause missing, namely the clause stating "the agreement is made in 2 (two) copies, each given to the parties." This clause is crucial as it ensures that a copy of the credit agreement is given to each party, thus creating a balance principle in contracting. In the post-contractual stage, many debtors are still not provided with a copy of the underhand credit agreement by the bank. This is not in line with the principle of balance, which is the equality of positions. This imbalance makes the positions of the parties unequal as the bank should rightfully provide the debtor with a copy of the credit agreement to understand the rights and obligations stipulated in the agreement. This is done to prevent confusion and uncertainty. Therefore, a copy of the credit agreement must be owned by each party.

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