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GOOD FAITH IN BANK CREDIT AGREEMENT

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Abstract
In our life interactions amidst the society, the honest people or people with good faith must be protected. The provisions concerning good faith in the Civil Code are contained in Article 1338 Paragraph 3 stating that all agreements should be carried out in a good faith. This means that any party making an agreement should act in a good faith, including the credit agreement in a bank. In the bank credit agreement, the parties are given an opportunity to enter into an agreement (consensus) on the content in accordance with the wishes of the parties. But, not all agreements made with a consent reflecting the values of honesty and propriety available in the society. Sometimes there are parties who seek their own advantage in implementing an agreement by looking for the weaknesses and shortcomings of the agreement. The good will contained in an agreement provides a legal protection for those implementing the agreement. Good faith has to be present from the pre-contract phase where the parties begin to negotiate to reach an agreement up to the stage of contract implementation. In the event that an agreement is deemed to violate the principles of a good faith, the law gives the judge an authority to change or even remove part or all of the agreement. The principles of good faith also provide a clue that in carrying out the agreement each party should be fair to each other.

INTRODUCTION

In general, it can be said that in social interaction, the honest people or people with a good faith have to be protected. Conversely, the dishonest or bad-intentioned party should feel the consequences of his/her dishonesty. A good faith is the most important factor in a law because the behavior of the people is not only regulated in a legislation, but also in the rules based on the agreement of each party. However, since rules are made by humans, then they are not perfect (Syahrani, 2013).

Honesty or a good faith can be seen in two types. Good faith when entering a legal relationship or at the time of execution of the rights and obligations set forth in the legal relation (Prodjodikoro, 2011).

The lack of good faith in public relations leads to actions that are generally denounced by the society. The censure comes from the inner attitude of the doer who has no good faith. Inner attitude here leads to the 'deliberate misconduct' of the doers who are psychologically aware of their actions and their inherent or likely attributes to them. The good faith works not only after an agreement has been made, but it has also started to work when the parties will enter or want to enter into an agreement (Sjahdeini, 1993).

According to Sudikno (2004), the principles of law are dynamic and develop along with their rules, while the rules of law will change with the development of the society, affected by time and place (*historich bestimmt*).

In the Civil Code, the provisions of good faith, particularly those relating to the execution of agreements are contained in Article 1338, Paragraph 3, which stipulates that all agreements should be carried out in a good faith (Subekti & Tjitrosudibio, 2007). This means that any party making an agreement should act in a good faith, including in the credit agreement of a bank (Khairandy, 2015).

Freedom of contract and principles of *pacta sunt servanda* can in fact result in injustice (principles of legal certainty in an agreement, i.e. the parties have legal certainty and are therefore legally protected. If a dispute arises in the execution of an agreement, the judge through his decision may force the infringing party to exercise his rights and obligations under the agreement) (Subekti, 1982). Freedom of contract is based on the assumption that the parties have an equal bargaining position, but in reality the parties do not always have a balanced bargaining position (Setiawan, 1994).

Overall, the above-mentioned requiremenets also applies to a bank and customers relationship. Good faith can be categorized as a relationship between creditors and debtors, *fiduciary relations* and *confidential relations*. The three relationships between the bank and the customer are coupled with *prudential relations*. The four relationships underpin the relationship between a bank and its customers (Sjahdeini, 1993). The bank can use the money freely, but the relationship between the bank and the customer is not solely the relationship of the debtor-creditor, the relationship is also regarded as a *fiduciary relation* (Bako, 1995).

The phenomenon of imbalance in a contract as mentioned above can be observed from some contract models, especially standard contracts which contain one-sided clauses (Greenwood, 1998). In the practice of providing loans, the bank for example, puts a clause that obliges customers to obey the bank guidelines and regulations. The rules are either existing or to be regulated later, or clauses that waive the bank from the customer losses as a result of the bank actions (Cheeseman, 2000). For example, debtors are required to comply with all bank guidelines and rules, both in the form of existing and future arrangements (Badrulzaman, 2003).

Since a credit agreement is a form of engagement, the parties to the credit agreement are given an opportunity to enter into an agreement (consensus) on the content in accordance with the wishes of the parties (Badrulzaman, 2003). But not all agreements made with a consent reflecting the values of honesty and propriety available in the society. Sometimes there are parties who seek their own advantage in implementing an agreement by looking for the weaknesses and shortcomings of an agreement (Clark, 1987).

MATERIAL AND METHODS

The research (Soehartono, 2002) was the normative legal approach (Soekanto and Mamudji, 2001). The normative legal research method is a legal research that puts law as a norm system (Fajar & Yulianto, 2010). The data was secondary data consisting of (Ali, 2009): a) primary legal materials in the form of legislations; b) secondary legal materials in the form of writings, either books, articles containing comments or analysis related to the subject matter; c) tertiary legal materials such as dictionaries. The data was collected using literature reviews and document analysis. The data was analyzed using qualitative methods based on a deductive thinking logic (Nasution, 2008).

RESULTS AND DISCUSSIONS

Good Faith in an Agreement

In the execution of an agreement, faith is the most important joint in a legal agreement (Subekti, 1979). Good faith is an abstract understanding and difficult to formulate. As such, people formulate it through the court sessions. Good faith in an agreement is related to the issue of propriety and appropriateness (Suryodiningrat, 1985).

In *Black's Law Dictionary* (Garner, 2004), good faith is defined as: A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.

Charles Fried perceived good faith as a way of transacting with others in an agreement honestly and decently (Fried, 1981). In line with that, Wirjono Prodjodikoro equated the term good faith with honesty (*goede trouw*), as noted in many works of legal literature. The decision to define good faith in an agreement is not decisive or based on the drafters' intent.

This principle of a good faith can be distinguished as subjective and objective (Burton & Andersen, 1995). Good faith in a subjective sense can be defined as an honesty of a person in doing a legal act, namely what lies in one's inner attitude when a legal act is done. The good faith in an objective sense is the implementation of an agreement which must be based on the norm of propriety or what is perceived as appropriate in a society (Simamora, 2005). Subjective good faith refers to the inner attitudes or elements present inside the doer, whereas good faith in the objective sense is associated with things outside the doer (Prodjodikoro, 1992).

Etymologically, propriety is defined as feasibility (Ali, 2008). The requirement of propriety is rooted in the nature of general rule of law, that is, the effort to balance the various interests of the society.

In the Civil Code, propriety is one of the pillars that must be upheld. As a principle, the propriety function is first, as a working guide for the legislator; secondly, as a basis for interpreting laws (laws or contracts); thirdly, as a basis for legal analogy.

Principally, any agreement from two parties that voluntarily enter and intend to create legal obligations can be made regardless of the presence of what law practitioners refer to as 'considerations'. This general principle is

further known as freedom of contract. Exceptions are based on coercion, fraud, illegality or error. (De Cruz, 2014).

The fundamental doctrine in the freedom of making a contract is that the contract is born *ex nihilo*, namely contract as the embodiment of the free will of the parties (Khairandy, 2014). Good faith in a legal agreement acts as a doctrine or principle derived from the doctrine *bona fides* in the Roman Law. (Zimmerman & Whitttaker, 2000). That is why the principle of a good faith is more closely related to the Civil Law System than the Common Law System (Budiono, 2006).

Fides means a religious source, meaning a trust given to someone else, or a belief in one's honor and honesty. *Bona fides* requires good faith in agreements made by the Romans. One particular category that should be applied in an agreement. Erskine's statement that "the strongest *bona fides* must give way to truth" is correct but does not go beyond the trite point that established rights lessens interests regardless the fact that the holder of a lesser right has an honest belief in its superiority. A second category seeks to clarify the issue of a possible superior nature and enhances a scope of a right held on a basis of good faith (Miller, 1999).

In the Netherlands, the interpretation of good faith in a contract by the court appeared in the case of *Hengsten v. Onderlinge Paarden en Vee (Artist de Laoboureur Arrest*), HR 9 February 1923, NJ 1923, 676. According to Hoge Raad, good faith is a doctrine that refers to the rationality and propriety that lives in the society. Hoge Raad stated that an agreement must be implemented with rationality and propriety (Wery, 1990). Thus it is said that Hoge Raad has equated good faith with rationality and propriety (Satrio, 1995)

The abstract and vagueness of the good faith meaning are also felt in the United States' Uniform Commercial Code (UCC). Section 1-203 of the UCC stipulates that every contract or duty within this Act imposes an obligation of a good faith in its performance or enforcement. Good faith obligations imposed by UCC and recognized by *The Restatement of Contract* are associated with the execution of the contract. Although there have been provisions that give an authentic explanation of a good faith, but many academics and courts still feel unclear about it (Mason, 2000).

The Principles of European Contract Law, as one of the notes on national systems, attached the article of the Principles which requires each party in a contract must act in accordance with a good faith and fair dealing. This leads to the possible European harmonisation of contract law at a much more general level, one of the underlying but more long-term objectives of the European Contract Commission. It seems that a general principle of a good faith would be part of such harmonisation (Macqueen, 1999).

Good faith in an agreement must exist before a new agreement is agreed upon. This means that a good faith exists at the time of pre-agreement negotiations, as Ridwan Khairandy said: "good faith must have existed since the pre-contract phase where the parties start negotiating to reach an agreement up to the phase of contract implementation" (Khairandy, 2003).

Good Faith in Bank Credit Agreement

As a financial institution, banking institutions have a strategic role in the life of a country's economy. The institution is intended as an intermediary of

parties with an excess of funds and parties with a lack of funds. Thus, banking will be engaged in credits and other services. The bank serves the financing needs as well as launching a payment system mechanism for all sectors of the economy (Djumhana, 2003).

In banking practice, the form and format of a credit agreement is made entirely by the bank. But, there are things that must be followed. Such agreements shall not be vague or unclear. In addition, the agreement should at least pay attention to validity and clear requirements regarding the amount of credits, as well as other requirements commonly practiced in credit agreements.

The legal relationships established as a result of legal acts, while being regulated in legislation, are partly regulated or constituted by an agreement or consent among interested parties. The human legislation cannot achieve a complete perfection as there are still imbalances and deficiencies. In an agreement, it is also impossible to include rules that can cover any possibilities that will arise in the future. There are always things beyond the human mind in an agreement. The role of honesty or good faith is urgently needed so that a true agreement can be made with the willingness and legal feeling of the parties (Satrio, 1999).

Since a credit agreement is a form of engagement, the parties in the credit agreement are given an opportunity to enter into a consensus on the content of the agreement in accordance with the wishes of the parties (Budiono, 2008). But, not all agreements made with the consent reflecting the values of honesty and propriety (Hernoko, 2014). Sometimes there are parties who seek their own advantage in implementing an agreement by looking for the weaknesses and shortcomings of the agreement. Where there is economic imbalance between the parties, particularly in customer contracts, legislative regimes exist to protect customers from unfair terms, but even here the substantive fairness of the actual exchange is not subject to scrutiny (Thomson, 1999).

The Principles of European Contract Law, the House of Lords pronounced on the case of Smith v. Bank of Scotland. Smith extended to Scotland the previous decision of the House in the English case of Barclays Bank plc v. O'Brien, and in the leading speech, Lord Clyde remarked at one point upon "the broad principle in the field of contract law of fair dealing in a good faith". The decision in Smith is focused on the requirement of a good faith between the creditor and the debtor in a cautionary obligation, underpinning a duty of disclosure to the cautioner and also a duty to warn the cautioner of the consequences and to urge upon him or her a need to take independent advice on the transaction. Lord Clyde saw this requirement of a good faith as a better basis for the introduction of O'Brien in Scots law than the English Equity concept of constructive notice. Nearly all of Lord Clyde's remarks about good faith were therefore focused on the contract of cautionary, but it is apparent that he did not see the requirement as limited to that particular context (MacQueen, 1999).

In a case which was decided by Kabanjahe District Court No.72/Pdt.G/1987/PN/KBJ and reinforced by the Medan High Court, between Kuetteh Sembiring and Bank Negara Indonesia 1946 - Kabanjahe Branch Office, the judges argued that the credit agreement clause authorized

the Bank to unilaterally terminate the credit agreement prematurely. This has placed the bank in a stronger position than the debtor, contrary to the good faith referred to in Article 1338 of the Civil Code, and has violated a sense of justice.

Upon the decision of the District Court, the plaintiff filed an appeal to the Medan High Court registered in a file No.286/PDT/988/PT-MDN. In its decision, the Medan High Court has annulled the decision of Kabanjahe District Court and decided to grant the plaintiff's lawsuit and punish BNI Bank to pay a compensation to the plaintiff as much as 25 million rupiah. The considerations underlying the decision of the Medan High Court are as follows:

Firstly, the authority of BNI Bank to unilaterally shorten the loan period as stipulated in the credit agreement has placed BNI Bank not equal to the plaintiff. Moreover, since BNI Bank has failed to prove any argumentation of denial relating to the above authority, then such matter is a manipulation on the provisions of Article 1338 in the Civil Code which requires a good faith of the parties in executing a legal agreement.

Secondly, in accordance with Subekti's opinion, the judge has the power to prevent an execution of an agreement that is too offensive to the sense of justice. Thirdly, that the auction application for Deed Grosse by BNI Bank has violated the provisions of Article 244 Herziene Inlandsch Reglement (H.I.R) since the credit agreement is not a Debt Recognition Act.

In the case of Mrs. Lie Lian Joun v. Arthur Tutuarima, No. 91/1970/Perd./P.T.B, the judge tried to give an interpretation to the meaning of good faith (Khairandy, 2004). The Bandung High Court stated that the agreement should have been executed in a good faith. Carrying out agreements in a good faith means that agreements should be performed in accordance with propriety and justice. An agreement should not only be determined by a series of words composed by the parties, but also determined by propriety and justice.

In the event that an agreement violates the principle of a good faith, the law authorizes the judge to alter or even remove part or all of the agreement. The principle of a good faith also provides a clue that in carrying out the agreement, each party should be fair to the other. Good faith is an understanding of relationships (*relatie begrif*). The principle will then prevail in a contractual relationship, whereas community precision is a common notion (*begrif*) so it does not based on a contractual relationship (Sudikno, 2006).

Good faith acts as a means of or a bridge between civil rights as a juridical dogmatic system on the one hand, and civil rights as a means of justice for the settlement of disputes in a society on the other hand. In its development, a good faith must also control the circumstances before the legal relationship or agreement is made (Hondius, 1991).

CONCLUSIONS

An agreement containing the people’s rights and obligations must be obeyed by the parties. In a legal agreement, there is a good faith principle that must be obeyed not only at the time of an agreement, but also in the execution of the agreement, especially in the credit agreement of a bank.

The good faith contained in an agreement provides a legal protection for those implementing the agreement. A judge, under the notion of good faith, can reduce or increase the obligations set out in an agreement. Therefore, under the guidance that an agreement should be carried out in a good faith, the judge has the power to prevent an act that is too offensive to the sense of justice.

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