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Implementation Of Balance Principles In Small Business Development Through Bank Credit Agreements

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Abstract

This article aims to examine the application of the principle of balance in the development of small businesses through bank credit agreements. An example of a clause that burdens small businesses in developing their business is related to the existence of material guarantee requirements. Banks still set requirements and procedures that are not easy for small businesses to be creditworthy (bankable). This problem is on the banking side because banks apply the principle of prudence in lending to small businesses. This is also due to the lack of information about the performance and capabilities of these small businesses. The application of the principle of balance is needed in bridging the interests of small businesses and banks in their legal relationship. Through the application of this balance principle, it can provide protection for small businesses that are economically weak in their business development. And also this principle of balance is a principle that must be in an agreement that can reflect justice for the parties who make the agreement. With the bank's position as a stronger party in determining rights and obligations in credit agreements when dealing with small businesses, this balance principle is a solution to bridge credit agreements between small businesses and banks.

Keywords: Balance Principle, Small Business Development, Credit Agreement.

I. Introduction

The principle of balance is a principle that serves to harmonize the main principles of contract law. The principle of balance must be based on efforts to achieve a state of balance which as a result must lead to a legal transfer of wealth. The non-fulfillment of balance affects the juridical strength of an agreement.[1] The principle of balance is one of the principles underlying the credit agreement which contains a legal relationship between a bank and a small business that can accommodate the interests of these parties.

In the formation of an agreement, imbalances can arise due to the behavior of banks and small businesses as well as a consequence of the substance (contents) of the agreement or the implementation of the contract. The bank credit agreement contains the rights and obligations that must be fulfilled by the parties. A balanced situation is expected to prevent losses between the parties to the agreement, including bank credit agreements with small businesses. The purpose of the principle of balance is to put the parties in an equal position in determining their rights and obligations.

In bank credit agreements, the principle of balance cannot be applied perfectly, especially in credit agreements between banks and small businesses. This is because the position of the bank as the creditor in the credit agreement is more dominant in determining the rights and obligations contained in the credit agreement between the bank and small business as the debtor. In dealing with weak economic entrepreneurs, the bank's position is

stronger in determining rights and obligations in credit agreements. This is because these small businesses really need money to develop their business so that they inevitably have to agree with the provisions applied by the bank.[2]

The importance of setting a balanced credit agreement between banks and small businesses is to develop small businesses through banking institutions, especially credit agreements, which are very necessary, especially with regard to the need for business capital and can provide protection for weak parties, namely small businesses. Protection for small businesses is needed because of the existence of small businesses[3] which plays an important role in the country's economic growth[4] and in building the community's economy.

Implementation of the Indonesian economy[5] which is based on Article 33 of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution of the Republic of Indonesia)[6]states that "the economy is structured and developed as a joint effort of all the people in a sustainable manner based on the principles of justice, efficiency, and economic democracy to realize prosperity, welfare, and social justice for all the people of Indonesia" should actually be applied in developing small businesses.[7]

With the impact of the Covid-19 pandemic, small businesses need government assistance to survive. One of the necessary factors that affect Indonesia's economic growth is the problem of inequality in economic management, where owners of large capital always get wider opportunities than small and medium entrepreneurs who are completely undercapitalized. In addition, access to obtaining capital assistance from banks is also more favorable to large entrepreneurs compared to weak entrepreneurs.[8]

Small business development due to credit agreements that should be able to provide balanced rights and obligations for small businesses to obtain bank credit, but on the other hand it must also provide legal certainty for banks in terms of credit repayment by small businesses so that they do not become bad loans.[9]Therefore, the application of the principle of balance in bank credit agreements can provide a legal solution for banks and small businesses as well as provide the best solution for the parties for the realization of a win-win contract, on the one hand, can provide legal certainty for the parties. banks in repaying loans and on the other hand providing convenience for small businesses in obtaining business capital for small business development. This dilemma of conflict will be minimized through the application of the principle of balance, especially those related to the rights and obligations of the parties so that a win-win contract is realized.[10]

In practice, credit agreements between banks and small businesses still do not show a perfectly realized balance. This can be seen in standard agreements made by banks which emphasize more obligations for small businesses. Small businesses that have an economically weak position must accept this unbalanced situation because they are pressured by the need for capital needed for business development. The principle of balance in bank credit agreements is needed in influencing the content of rights and obligations that will be charged to the parties who make the agreement. This needs to be pursued in aligning the binding rights and obligations of the parties in the bank credit agreement, which when faced with small businesses, the position of the parties becomes unbalanced which in turn affects the scope of the content of a credit agreement. Therefore, a balanced achievement and counter-achievement in a credit agreement between a bank and a small business is very necessary so that it can produce a materially balanced credit agreement.

II. Results and Discussion

2.1. The Principle of Balance in Small Business Development Through Credit Agreements by Banks

The word balanced indicates a state of load sharing on both sides which is in a state of

balance. It can also be said to be a state of silence or harmony because of the various working forces none dominates the other.[11] The Dutch Indonesian Law Dictionary uses the term evenwicht which means balance, balance, harmony.[12] Therefore, balance can be interpreted as a condition that does not burden one party by placing the same rights and obligations.

Black's Law Dictionary defines equal as follows:[13]

> Alike; uniform; on the same or level with respect to efficiency, worth, value, amount or rights. World equal as used in law implies not identify but duality and used of one thing as the measure of another.

Sri Soedewi Maschoen Sofwan in viewing the principle of freedom of contract said that the limitation of the principle of freedom of contract as a result of the development of society in the socio-economic field, the intervention of the state to protect the public interest or the weak party, and the people who wanted social welfare.[14] This limitation on the principle of freedom of contract aims to provide protection for parties who are weak in contracting.

In quoting the opinion of Sibylle Hofer who said:[15]

> Sibylle Hofer is prompted to examine the private law theory discussions of the 19th Century by the currently widely held view that in the 19th Century a theory of private law premised on unlimited individual freedom dominated. After studying a broad range of sources she comes to the conclusion that despite a large absence of discourse on contractual freedom this perception of "unlimited freedom" cannot be confirmed, instead this is more of a myth. In the 19th Century, the concept of private law under a paradigm of unlimited contractual freedom was hardly ever supported. Rather, the myth of unlimited contractual freedom was constructed to be better able to attack the liberal conception in the course of the German Civil Code codification.

In Bruggink's view, legal principles such as the principle of balance have a dual function, namely as the foundation of the positive legal system and as a critical test tool for the positive legal system. The benchmark of the legal principle is maintained as an ideal that must be reflected every time. Therefore, according to Bruggink, even though the legal principle has been realized, it can still function as a critical test tool for positive law if it is found that there are rights that are not or lack of protection.[16]

In contract law, according to Mariam Darus Badrulzaman, the principle of balance requires both parties to fulfill and implement the agreement. The principle of balance is a continuation of the principle of equality. Creditors have the power to demand performance and if necessary can demand repayment of achievements through the debtor's wealth, but the creditor also bears the burden of carrying out the agreement in good faith. It can be seen here that the strong position of creditors is balanced with their obligation to pay attention to good faith, so that the position of creditors and debtors is balanced.[17]

The banking world's attention to small business activities does not seem very interested. Even though its presence is promising, the bank still looks at one eye. During the New Order era, small businesses were neglected. Bank lending is preferred to large-scale industries. Because the banking sector does not want to bear the risk of bad credit.[18]According to M.Drajad H. Wibisono, a banking observer, who said that banks no longer consider small businesses as a sector that can provide adequate profits. Banks are relatively more interested in disbursing consumer and property loans for investment and working capital compared to small businesses.[19]

Small businesses are still having difficulties in terms of capital because they lack the trust of banks. Banks are less interested in providing credit or financing to small business actors because these small businesses are not bankable, because they

generally do not have good bookkeeping. Good bookkeeping is one of the many conditions for obtaining a capital loan from a bank as well as a guarantee or collateral.[20]

Another obstacle for small business actors to obtain credit from banks is due to the reason that bank administration for small businesses is very complicated and requires high costs. The level of creditworthiness is one of the obstacles in granting credit because banks do not have complete information about the financial data of prospective debtors so that banks cannot distinguish the quality of debtors. In determining the quality of debtors, banks need to know which debtors have a good financial position with low risk, and which debtors are bad debtors who have a bad financial position with high risk.[21]

2.2. Application of the Principle of Balance in Small Business Development through Bank Credit Agreements

In a reciprocal agreement such as a bank credit agreement, if the actual position of one party against the other is stronger and the imbalanced position can affect the scope of content and the intent and purpose of the agreement, the agreement must be immediately rejected. The result of inequalities of achievement in reciprocal agreements is imbalance. If the stronger position affects the relationship between one's achievements, and in the case of disrupting the balance in the agreement, this for the aggrieved party will be a reason to file the invalidity of the agreement.[22]

The emphasis on the principle of balance is to place the parties in an equal position in determining their rights and obligations. This imbalance in position prevents the realization of the will to realize justice in the economic exchange contained in the agreement. And if there is a balance disorder in the agreement, intervention from the court is required through a judge's decision.

Factors that can disrupt the balance of the agreement are the way in which an agreement is formed involving parties with unequal status and/or inequalities of promised reciprocal achievements. In principle, based on the basic principles of contract law and on the principle of balance, the determining factor is not the equality of the promised achievements, but the equality of the parties, that is, if the fairness of the exchange agreement is to be upheld.[23]

Moving on from the balance criteria, for the parties concerned an agreement becomes binding, not just achievements and more or less commensurate achievements, but especially if the agreement is materially balanced. The agreement is therefore also valid and binding if one party turns out to be more profitable than the other party. It is the parties who determine and accept the contractual agreements and the purpose of closing the contract for the parties is to benefit from them. Therefore the agreement is considered fair if both parties as a result of the contract are in a more favorable position than before the contract was made.[24]

To reach a decision whether or not there is a balance can only be done on a case-by-case basis. After determining the presence or absence of an unbalanced situation, a study can then be used from the point of view of the teachings of good faith, propriety and propriety, as well as feelings of law and community propriety. In the context of these teachings, for example, it can be studied whether someone by abusing circumstances has obtained certain benefits or initially with regard to provisions that are burdensome to one party which one of the parties considering the existing situation and conditions must be accepted by the opposing party and whether this this can be justified by the interests involved in the agreement.[25]

Every credit in banking that has been approved and agreed upon between the creditor and the debtor must be stated in a credit agreement (credit agreement), in writing.[26]In banking practice, credit agreements are made with standard agreements. In this case the credit agreement is made in the form of a standard contract, where the content or clauses of the credit agreement have been standardized and set forth in the form or blank, but are not bound in a certain form (vorn vrij). Prospective debtors only put their signatures if they are willing to accept the contents of the agreement,

do not give the prospective debtor the opportunity to discuss further the contents or clauses proposed by the bank. In this agreement the position of the prospective debtor is very weak, so just accept all the conditions proposed by the bank, because otherwise the prospective debtor will not get the credit in question.[27]

Sutan Remy Sjahdeini gave several examples of exoneration clauses in credit agreements, namely as follows:[28]

1. The authority of the bank to unilaterally terminate the credit withdrawal permit at any time without any reason and without prior notice;
2. The authority of the bank to unilaterally determine the selling price of the collateral goods in the event that the sale of the collateral goods is carried out because the debtor's credit is bad;
3. Bank's authority to change credit interest rates at any time;
4. The obligation of debtor customers to comply with all existing bank instructions and regulations and which will still be determined later by the bank;
5. The obligation of the debtor customer to comply with the general terms and conditions of the current account relationship of the bank concerned, but without previously being given the opportunity to know and understand the general terms and conditions of the current account relationship;
6. The irrevocable power of attorney for the debtor is returned to the bank to be able to take all actions deemed necessary by the bank;
7. The power of attorney of the debtor to the bank to represent and exercise the debtor's rights in each General Meeting of Shareholders;
8. Proving the negligence of the debtor customer unilaterally by the bank alone;
9. The inclusion of exclusion clauses that free the bank from claims for compensation by the debtor customer for the loss suffered by him as a result of the bank's actions.

The emergence of aggravating clauses or exclusion clauses is due to the application of the principle of unlimited freedom of contract and not implementing the principle of balance in the credit agreement, resulting in an unequal standard credit agreement and very burdensome for debtor customers, especially small businesses. Although there is a principle of freedom of contract where the parties are free to determine the contents of the contract, this principle must be interpreted in accordance with the national values contained in Pancasila where the principle of freedom of contract in Indonesia does not have an unlimited meaning as found in the West which is more concerned with individual interests. . In accordance with the philosophy of the Indonesian nation which is not only concerned with individual interests but also must be harmonious, in harmony,[29]. This principle should support a balanced position between the parties, so that an agreement will be stable and provide benefits for both parties.

In the application of the principle of balance in the credit agreement, there are several things that must be considered by the bank as a lender. According to Thiebarch, there are several outlines that must be considered by lenders (banks) before banks terminate withdrawal permits and collect credit from loan recipients (debtor customers) as follows:[30]

1) The borrower should remain informed of the lender's true intentions as to whether the lender will discontinue or continue to extend credit.
2) Give adequate written notice to the borrower before the loan is declared until the deadline or before the loan will no longer be continued so that the loan recipient has a reasonable opportunity to obtain other financing alternatives.
3) Avoid making threats about a default so that the borrower is willing to obey the lender's instructions.
4) Avoid personal conflicts with loan recipients and act professionally.
5) Consider whether previously a series of transactions (a corse of dealing) has taken place whose terms conflict with the written terms stated in the loan agreement (credit loan).
6) Give proper written notice before taking action against the borrower.
7) Put in writing all the promises that have been given to the loan recipient.

8) Maintain records of all loan files from recipients.
9) Never give instructions to a borrower that could be construed as an act of control over his business.

In order to overcome the existence of a standard, one-sided agreement, the "doctrine of injustice" (unconscionability) was developed there, which prohibits agreements whose contents are very unequal, causing injustice to one party. By the Courts of the United States of America, such an agreement may be partially or completely annulled. In the United States, in addition to the cancellation of the standard contract (which is one-sided) or the clauses in it based on the "injustice" doctrine, even such a standard agreement or clauses can be canceled based on the specific provisions of the standard agreement.

In its development in various jurisdictions, the state intervened to protect the weak either through court decisions or by issuing regulations made by the legislature. In this regard, there are basic rules that must be observed for an unsigned written agreement containing standard requirements, the principle of duty to read which was in force in the United States before the 1960s for signed documents. , and the principle of public policy and the principle of unconscionability.[31]

Corley and Shedd as quoted by Remy Sjahdeini provide an indirect picture through the questions asked when facing an agreement and provide examples of clauses from agreements that are considered unconscionable clauses. According to Corley and Shedd, there are fundamental questions that can be asked regarding the relative position of the parties to bargaining power, relative economic power, alternatives to procurement sources in other words, what options do they have?[32]

An equal bargaining position results in the parties being in a more or less balanced situation. If the situation is balanced, no one will feel disadvantaged. However, of course it can happen if one of the stronger parties takes advantage of a situation that is more favorable to him. However, this situation will be acceptable as long as it does not cause a situation with an unreasonable clause that only benefits one party, which the opposing party, due to its low bargaining position, has to accept.[33]

III. Conclusion

The application of the principle of balance has not been fully implemented in bank credit agreements because of the one-sided standard agreement. This causes the rights and obligations of the parties, especially between banks and small businesses to experience inequality which places more burdens on the weaker parties, in this case small businesses. The inclusion of clauses in bank credit agreements must reflect the principle of balance, because both the bank as the creditor and the debtor customer both need each other in an effort to develop their respective businesses. The principle of balance must be seen in the rights and obligations that must be borne by the parties and not only benefit one party.

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