

FREEDOM OF CONTRACT IN MORTGAGE LOAN AGREEMENT AT PT. BANK CIMB NIAGA, TBK. IN MEDAN

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ABSTRACT

In a credit agreement, the position of the bank as a creditor and the customer as a debtor is never balanced. The position of the bank is stronger than that of potential customers. Whereas freedom of contract can only achieve justice if the parties have a balanced bargaining power. Unbalanced bargaining power occurs when a strong party can impose his will on a weak party, until the weak party only follows the terms of the contract proposed to him. Given that in the credit agreement there has been a contractual relationship and the clauses tend to favor the bank as the creditor, in a credit agreement, mostly for debtors its only a take it or leave it option, so that the opportunity to negotiate as an initial process of obtaining an agreement is small and even neglected. The research is used a empiric juridical legal research method. Data sources from the research were derived from secondary data consisting of legal materials and legal documents that became the basic foundation for answering problems in this study. The results of this study revealed that the completion of defaults in the mortgage loan agreement can be made before it is executable. Settlement of the default can be done by rescheduling, re-requirements and rearrangement.

Keywords: Agreement, Debts, Mortgage.

INTRODUCTION

Banking institutions as one of the financial institutions have a strategic value in the economic life of a country. The institution is intended as an intermediary for parties who have excess funds (surplus of found) with parties who lack and need funds (lack of founds). Thus, banks will be engaged in credit activities, and the various services provided, banks will serve financing needs and facilitate payment system mechanisms for all sectors of the economy.

Indonesian banks in carrying out their business are based on economic democracy using the precautionary principle, their main function is to collect and regulate public funds, as regulated in Article 3 of Law no. 7 of 1992 in conjunction with Law no. 10 of 1998 concerning Banking, hereinafter referred to as the Banking Law to carry out its functions, the efforts undertaken by banks include: a. Collecting funds from the public in the form of deposits in the form of demand deposits, time deposits, savings and other forms. b. Give credit. c. Issuing a debt acknowledgment letter. d. Conducting activities in foreign exchange. e. Transferring money either for their own benefit or for the benefit of customers. f. Performing factoring activities, credit card business, and other.

In a credit agreement, the position of the bank as a creditor and the customer as a debtor is never balanced. The position of the bank is stronger than that of potential customers.

Whereas freedom of contract can only achieve justice if the parties have a balanced bargaining power. Unbalanced bargaining power occurs when a strong party can impose his will on a weak party, until the weak party only follows the terms of the contract proposed to him.

The credit agreement made between PT. Bank CIMB Niaga, Tbk. with debtor customers is a standard agreement or standard. In the agreement, the clauses have been formulated in advance by the bank unilaterally. The clauses contained in the credit agreement tend to be a protection measure for creditors to overcome credit risk in credit customer relationships. Therefore, the customer as a prospective debtor has no other choice but to accept or reject the clauses contained in the credit agreement.

Given that in the credit agreement there has been a contractual relationship and the clauses tend to favor the bank as the creditor, a statement arises: is the credit agreement at PT. Bank CIMB Niaga, Tbk. have fulfilled the principle of freedom of contract? Given its role, in order to achieve national development goals, it is not excessive if the government conducts strict guidance and supervision. All of this is based on the premise that banking institutions in Indonesia are able to function efficiently, healthily, fairly, and are able to properly protect the funds entrusted to them by the public, and be able to channel these public funds into productive field to achieve developments goals.

Based on the description above, the authors are interested in conducting a study with the title: "Freedom of Contract in Mortgage Loan Agreements in PT. Bank CIMB Niaga, Tbk. in Medan" There are several problem statements in this report which are stated as follows: 1. How is the regulation regarding the principle of freedom of contract in the mortgage loan at PT. Bank CIMB Niaga, Tbk.? 2. How to implement the principle of freedom of contract in the mortgage loan agreement at PT. Bank CIMB Niaga, Tbk. in Medan? 3. How to resolve the dispute if there is a breach of contract on the standard credit contract at PT. Bank CIMB Niaga, Tbk in Medan?

METHODOLOGY

The method that is used in this research is empirical juridical method. This research is intended to conduct research with a problem approach in terms of applicable laws and regulations and several supporting theories. This research is descriptive analytical which has the understanding that this understanding explains and analyzes the problem of default in the mortgage loan agreement at the bank. In this study, laws and regulations related to banking are used with the aim of achieving explanations and answers to the formulation of the problem in writing this thesis. The data used in this research is using secondary data that can support the primary data.

DISCUSSION

A. Regulation Regarding Freedom of Contract in Mortgage Loan at PT. Bank CIMB Niaga, Tbk.

The principle used in writing this thesis refers to the principle of freedom of contract, which is a principle which states that basically everyone is allowed to make a contract (agreement) that contains and does not conflict with the law, decency and public order.

Freedom of contract does not mean that the parties can make contracts (agreements) freely, but still heed the terms of the validity of the agreement, both the general conditions as determined by article 1320 of the Civil Code, as well as the special conditions for certain agreements.

The application of the principle of freedom of contract in Indonesian contract law, among others, can be concluded in the formulations of Articles 1329, 1332 and 1338 paragraph (1) of the Civil Code which states that: Article 1329: "Everyone is capable of entering into agreements, if he is not declared incompetent by law." Article 1332: "Only goods that can be traded can be the subject of an agreement." Article 1338 (paragraph 1): "All agreements made legally valid as law for those who make them." Article 1329 of the Civil Code stipulates that every person is capable of entering into an agreement, unless he is determined to be incompetent by law. Article 1332 can be concluded that as long as it concerns goods of economic value, everyone is free to make an agreement. The provisions of Article 1320 paragraph (4) in conjunction with Article 1337 of the Civil Code can be concluded as long as it is not about a cause that is prohibited by law or is contrary to good decency or public order, then everyone has the freedom to make an agreement.

In the Civil Code, in addition to the provisions above, there are no provisions that require or prohibit someone from binding themselves or not binding themselves in an agreement. This is in accordance with the scope of the principle of freedom of contract. The application of the principle of consensuality in Indonesian contract law further strengthens the freedom of contract. Without an agreement from one of the parties in making an agreement, the agreement made is invalid.

In addition to various restrictions in the Civil Code, the application of the principle of freedom of contract in relation to bank credit is limited by several principles, namely fiduciary relations, confidentiality, and prudential relations. 1. The Principle of Trust 2. The principle of secrecy 3. precautionary principle.

The formulation contained in Article 1138 paragraph (1) of the Civil Code states that all agreements made legally apply as law for those who make them. The term "all" in it contains the principle of partij autonomie; freedom of contract; vrijheid contract. The content and form of the agreement that they will make, including its inclusion in the standard agreement, is completely left to the parties. Regarding the content of the credit agreement, the principle of freedom of contract is closely related to the freedom to determine "what" and with "who" the credit agreement is made.

B. Implementation of Freedom of Contract Principle in Mortgage Loan Agreements at PT.Bank CIMB Niaga, Tbk. in Medan

The exoneration/exemption clause is a clause in an agreement, which in this case is a credit agreement, aiming to relieve or limit the liability of one party (in casu) the bank against the claim of the other party, even though the person concerned should have done things which should not be done and is not in a state of force majeure. The exoneration requirements are contained in Article 6 point XIII of the Deed of Credit Agreement concerning the Publication Clause.

In the Civil Code there are no provisions that explicitly prohibit the exclusion clause as long as the credit granting agreement has fulfilled the four legal requirements of the Article 1320 of the Civil Code, and in the credit granting agreement there is no element of coercion or deception, and does not violate habit or good faith (Dian, 2017).

There are 8 (eight) articles in the deed of credit agreement, where each article regulates: the amount of credit, provisions and administration, credit interest, term, guarantee, credit terms, insurance, and legal domicile. Credit terms which include: Terms of signing the agreement, terms of disbursement of credit facilities, general terms of credit, things that must be carried out, things that cannot be done by the debtor, accelerated / advanced repayment, guarantee statements, collateral conditions, insurance clauses, violation of credit provisions, account debit authorization clauses, debt settlement clauses, publication clauses, bankruptcy clauses, parate execution clauses, power of attorney clauses, other conditions, but in practice the mortgage agreement by PT. Bank CIMB Niaga Medan Branch letter of credit agreement that has been printed and standardized by Bank CIMB Niaga in the form and clauses in it, such as the head of the agreement, the contents of the agreement and the closing.

Bank CIMB Niaga Medan Branch itself does not have specific guidelines or rules in making a mortgage loan agreement, it is only made based on the provisions of the general principles of the agreement as stipulated in the Civil Code. The contents or provisions in the agreement are adjusted to the interests of the parties as long as they do not conflict with existing regulations, this is done to facilitate debtors who do not understand the agreement and or most importantly there is a goal to be achieved in making the agreement.

The principle of freedom of contract is a principle that provides an understanding that anyone can enter into a contract with anyone and for anything. However, in practice the making of the agreement has been provided in advance in the form of a deed (standard contract) by the bank or other financial institution. The application of standard contracts is commonly used where widely applied in the world of business and commerce is intended to simplify business operations and reduce business costs.

The credit agreement of Bank CIMB Niaga Medan Branch which is implemented is only part of the principle of freedom of contract which is applied in the making of the credit agreement, because the contents of the credit agreement have been made unilaterally by the creditor, causing the loss of part of the principle of freedom of contract. The inclusion of an exoneration clause is nothing but to guarantee the security of the creditor's investment against the possibility of default (broken promises) or even losses that are intentionally made by the debtor.

The existence of a contract in human life is very important, because it can facilitate the fulfillment of human needs and interests that cannot be fulfilled alone without the help of others. In fulfilling human needs as social beings who involve other people in all their needs, especially in business matters, a clear and concrete legal rule is needed, namely a contract. This was done to avoid all of this, so contracts have an urgent and central role to oversee all human activities.

With a contract, it will provide a guarantee between the parties because each contract clause is protected by law. Along with the increasing development of the business world,

it was also followed by demands for the use of a simple, efficient contract model, and able to accommodate the interests of business people through standard contracts. With this standard contract, business actors, especially producers and creditors, have prepared standard clauses set forth in a certain contract.

The debtor only needs to read the contents of the standard contract with the option of take it or leave it, so that the opportunity to negotiate as an initial process to obtain an agreement is very small and even neglected. The use of the standard agreement has more or less shown developments that are very dangerous to the interests of the prospective debtor, especially considering that the generality of the prospective debtor to the legal aspects in general, and in particular to the legal aspects of the agreement.

Seeing that the difference in the positions of the parties when the standard agreement is made does not provide an opportunity for the debtor to make "real bargaining" with the creditor. The debtor does not have the power to express his will and freedom in determining the contents of this standard agreement, so it does not fulfill the elements required by Article 1320 in conjunction with 1338 of the Civil Code. Freedom of contract granted by Bank CIMB Niaga in negotiating this mortgage loan agreement granted by Bank CIMB Niaga contained in the loan agreement letter, namely the freedom granted by Bank CIMB Niaga to the debtor, namely the amount of fees required by the debtor and the repayment period.

Debtors may submit the amount of funds and the desired period of time for their business. The creditor will see and consider the suitability of the amount of funds provided with the type of business to be run by the debtor. Seeing that the difference in the positions of the parties when the standard agreement is made does not provide an opportunity for the debtor to make "real bargaining" with the creditor. The debtor does not have the power to express his will and freedom in determining the contents of this standard agreement, so it does not fulfill the elements required by Article 1320 in conjunction with 1338 of the Civil Code. In addition to that section, namely related to the general clauses contained in Articles 2 and 3, which concern the rights and obligations of both parties as well as dispute resolution, in the event of a default, it is non-negotiable. Because, in addition to the transaction clause, the purpose is to legally bind the debtor to avoid default or fraud committed by the debtor. To create a balance and maintain the rights of the parties, before the agreement is made a binding agreement for the parties.

The application of the principle of freedom of contract requires a balance of positions of the parties in formulating an agreement to regulate the legal relationship between creditors and debtors. If this balance is not realized, then it is used by business actors to limit and avoid responsibility by including an exoneration clause, therefore, government intervention is needed to limit the application of the principle of freedom of contract through standard contracts by issuing regulations. which prohibits the inclusion of exoneration clauses, supervises the use of standard clauses by business actors and provides an opportunity for consumers to complain about adverse standard clauses to the Consumer Dispute Settlement Agency or to the courts.

PT. Bank CIMB Niaga Medan Branch includes an exoneration clause, none other than to ensure the security, investment of Bank CIMB Niaga against the possibility of default or even losses that are intentionally made by prospective debtors. There is no prohibition against the inclusion of standard clauses and standard agreements as long as they do not

conflict with Article 18 of the UUPK, but if there are clauses that are contrary to Article 18 paragraphs (1) and (2) of the Consumer Protection Law, then only that clause declared null and void. The inclusion of exoneration requirements by business actors in Article 18 paragraph (1) letters a to h which is detrimental to consumers according to Article 18 paragraph (2) of the UUPK is declared null and void, meaning that these conditions have never existed.

On the application of these principles in the mortgage loan agreement, it is explained as follows: Whereas the principle of freedom of contract is a principle that gives freedom to the parties to:

- a. Make or not make an agreement;
- b. Choose with whom to enter into an agreement;
- c. Determine the content, terms and implementation of the agreement;
- d. Determine the form of the agreement;
- e. Determine legal options;

Of the five freedoms, in the mortgage loan agreement made between the debtor and the creditor, only three freedoms are fulfilled, namely a, b and e. Mortgage credit agreements are made in standard form, the contents of which are made to secure and/or benefit the creditor, while the debtor just accepts and approves it.

C. Settlement of Disputes in Breach of Contract on the Standard Mortgage Loan Contract at PT. Bank CIMB Niaga, Tbk. in Medan

1. Credit Restructuring

Determination of credit quality is carried out by conducting an analysis of the assessment factors of the debtor's business prospects, debtor's performance and debtor's ability to pay, taking into account the components of each of these assessment factors. Credit quality determination is carried out by considering the significance and materiality of each assessment factor and components as well as the relevance of the assessment factors and components to the debtor concerned.

The term non-performing loan has been used by the Indonesian Banking as a translation of problem loan which is a term that is commonly used in the international world. Another term in English that is commonly used for non-performing loans is non-performing loan (Hariyani, 2010).

Non-structural non-performing loans can generally be overcome by restructuring measures in the form of lowering loan interest rates, extending the term, reducing loan interest arrears, reducing loan principal arrears, adding credit facilities, and/or converting loans into temporary investments. As for structural non-performing loans, in general they cannot be resolved by restructuring as for non-structural non-structural loans, but must be given a haircut as regulated by Bank Indonesia Regulation Number 7/2/PBI/2005 so that the business can run again. and the income is able to meet its obligations (Hermansyah, 2001).

According to the provisions of Article 1 paragraph 9 of Bank Indonesia Regulation Number 8/19/PBI/2006 concerning Earning Assets Quality and the Establishment of Allowance for Bank Earning Assets, it provides an understanding that credit restructuring

is an improvement effort carried out by Banks in credit activities for debtors who have difficulty meeting their debt obligations. obligations, which are carried out through (Gubernur Bank Indonesia, 2006):

- a. Rescheduling, namely changes in the debtor's payment schedule or time period;
- b. Reconditioning, namely changes in part or all of Credit requirements which are not limited to changes in payment schedules, time periods, and/or other requirements as long as they do not involve changes to the maximum Credit ceiling; and/or
- c. Restructuring, namely changes in Credit requirements involving the addition of Credit facilities and conversion of all or part of arrears of interest installments into new Credit principals which may be accompanied by rescheduling and/or re-conditions.

Furthermore, Bank Indonesia Regulation Number 8/19/PBI/2006 concerning Earning Assets Quality and Establishment of Allowance for Bank Earning Assets Losses regulates the procedures, prohibitions, and obligations in conducting credit restructuring in Articles 16-22 as follows:

- a. Banks may conduct Credit Restructuring on Debtors who meet the following criteria:
 - i. Debtors have difficulty paying loan principal and/or interest
 - ii. The debtor has good business prospects and is expected to be able to meet its obligations after the loan is restructured.
- b. Banks are prohibited from conducting Credit Restructuring if the aim is only to avoid:
 - i. Credit quality decline
 - ii. Increasing the formation of Allowance for Earning Assets; and/or
 - iii. Derecognition of interest income on an accrual basis.
- c. The quality of the restructured loans are:
 - i. High - high Substandard for loans which before being restructured had Doubtful or Bad credit quality; and
 - ii. Credit quality does not change for loans which before being restructured had the quality of Current or Substandard.

The classification of credit quality above can be changed to:

- i. Current, if there is no arrears in principal and/or interest installments for 3 (three) consecutive payment periods; and
 - ii. Same as Credit quality prior to Credit Restructuring, if the Debtor is unable to meet the conditions as referred to in letter a.
- d. Banks are required to have written policies and procedures regarding Credit Restructuring, in which the Credit Restructuring policies must be approved by the Commissioners, and the Commissioners are required to actively supervise the implementation of Credit Restructuring policies.
 - e. The quality of restructured loans with a grace period is determined as follows:
 - i. During the grace period, quality follows credit quality before restructuring, and
 - ii. After the grace period ends, credit quality follows the applicable quality determination.
 - iii. Bank Indonesia is authorized to make corrections to the determination of the quality of Credit Restructuring, the establishment of Allowance for Earning Assets and interest income that has been actually recognized, if: Credit restructuring according to Bank Indonesia's assessment is found to be included in the prohibited objectives in conducting credit restructuring;
 - iv. The debtor does not carry out the Credit Restructuring agreement or contract; and/or
 - v. Credit restructuring is carried out repeatedly with the aim of improving credit quality without taking into account the debtor's business prospects.

2. Credit Collateral Execution Before Auction

Settlement of non-performing loans, apart from the credit restructuring mentioned above, can also be executed on collateral items, either through underhand sales or through auctions. In carrying out the execution of credit guarantees, an underhand sale must first be attempted if the debtor is still willing to cooperate (cooperative), but if an underhand sale cannot be achieved, then the execution of the collateral is carried out through an auction. If the collateral for credit is land and buildings, then Law Number 4 of 1996 concerning Mortgage on Land and Objects Related to Land, hereinafter also referred to as the Law on Mortgage according to Article 30, will apply, allowing banks (creditors to) to settle non-performing loans through the sale of collateral under the hand based on the provisions of Article 20 paragraph (2), which reads: "On the agreement of the giver and the holder of the Mortgage, the sale of the object of the Mortgage can be carried out under the hands if in this way the highest price can be obtained. that benefits all parties." Furthermore, the provisions of Article 20 paragraph (3) of the Mortgage Law states as follows: The implementation of the sale as referred to in paragraph (2) can only be carried out after 1 (one) month has passed since being notified in writing by the giver and/or holder of the Mortgage to interested parties and announced in at least 2 (two) newspapers circulating in the area concerned and/or local mass media, and no party has expressed objections.

If you read the terms of the sale under the hand and the explanation in the law, it can be concluded that the sale under the hand may occur if there is an indication that the sale through a public auction will not reach the highest price. The advantage of this underhand sale is that in addition to speeding up the sale of the mortgage object, it can also reduce costs that may arise in executing the collateral.

In the CIMB Niaga mortgage loan agreement, the provisions that must be implemented are the binding of collateral. The credit guarantees that are determined include the basic guarantees in the form of material rights to the houses and land purchased by the debtor as well as additional guarantees in the form of a certain amount of money or goods which will be determined later by PT. Bank CIMB Niaga, Tbk. Medan Branch.

If the principal guarantee is no longer sufficient to be used as credit collateral in addition to the CIMB Niaga mortgage loan agreement, the juridical implementation that must be carried out which is no less important is the binding of the collateral. The obstacles that often occur in housing loans are the occurrence of default on the part of the debtor. To overcome this problem the PT. Bank CIMB Niaga, Tbk. The Medan branch as the creditor then attempts to confirm and contact the debtor who is in arrears, either using the address and telephone number when applying for credit.

Thanks to the efforts made by the creditors, debtors who are in arrears can be contacted and receive a summons to come to the Bank CIMB Niaga Branch Office, aiming to resolve the arrears problem amicably. As for the legal consequences for a debtor who defaults, it must first be determined whether a debtor (debtor) is in default or negligent. In this case, to determine if someone is in default, the criteria or assessment used by PT. Bank CIMB Niaga, Tbk. Medan Branch is if a debtor does not pay for just one month, it is considered a default. Meanwhile, to overcome the obstacles mentioned above, namely

the problem of default, the PT. Bank CIMB Niaga, Tbk. Medan Branch can do the following ways:

- a. By means of deliberation to reach consensus. At this stage, the Bank writes to the defaulting debtor to be resolved amicably and with full kinship. By means of this deliberation, it is possible if all of the interested parties are present, namely the debtor who is in default and the Bank as the creditor.
- b. Through court For any party who feels aggrieved by another party, they can claim compensation addressed to the court, here if such a case occurs then the Bank can file a court and must attach a mortgage deed and confiscation of collateral in the case file, of course the settlement process will take a long time. long and requires a lot of money.

CONCLUSIONS

The conclusions that can be drawn from the discussion above:

1. First, the application of the principle of freedom of contract in Indonesian contract law, among others, can be concluded in the formulations of Articles 1329, 1332 and 1338 paragraph (1) of the Civil Code In the Civil Code, apart from the above provisions, there are no provisions that require or prohibit someone to bind themselves or not to bind themselves in an agreement. This is in accordance with the scope of the principle of freedom of contract. However, the application of the principle of freedom of contract in relation to bank loans is limited by several principles, namely fiduciary relations, confidentiality, and prudential relations.
2. Second, the principle of freedom of contract is a principle that provides an understanding that anyone can enter into a contract with anyone and for any matter. However, in practice the making of the agreement has been provided in advance in the form of a deed (standard contract) by the bank or other financial institution. The application of standard contracts is commonly used where widely applied in the world of business and commerce is intended to simplify business operations and reduce business costs. The credit agreement of Bank CIMB Niaga Medan Branch which is implemented is only part of the principle of freedom of contract which is applied in the making of the credit agreement, because the contents of the credit agreement have been made unilaterally by the creditor causing the loss of some of the principle of freedom of contract.
3. Third, many things can happen until the debtor fails in carrying out his achievements. If the debtor is late in paying the ongoing mortgage bill and the bank (creditor) sees the existence of good ethics from the debtor, the creditor can reschedule, re-requirement and realignment to ease the installment burden borne by the debtor.

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