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Clause - Clause Not Balanced in the "Agreement Standards of Credit Bank"

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Abstract
Raw agreements including the "Raw Bank Credit Agreement" which contains clauses that are not balanced or exoneration clauses that are not balanced, this time in Indonesia has been growing rapidly. Born and growing raw agreement is based is "The principle of freedom of contract" in the agreement, namely that basically everyone is free to make any agreement, both form and content. However, the principle of freedom of contract is restricted by the provisions should not be contrary to good faith, Law, customs, public order, decency and legal kepatutan.Perlindungan for customers / debtors in general have been regulated in Law No. 8 of 1999 on Consumer Protection and Law No. 10 of 1998 on Banking, but the enforcement of the Act still need to get better attention from the government, employers, and consumers themselves. It is hoped we can have a Baku Treaty Act in the future.
Key Words: Bank Credit Agreement, Clause unbalanced, the Law for the Protection of the Debitor / consumers.

Preliminary

In the last decade in Indonesia and other countries including the standard agreement Baku Agreement Credit Bank has been growing rapidly.
E. H. Hondius (1979), has told that there requirements for default in almost all areas of life which made the contract (agreement). For example, I mentioned some activities that are important from the branches of the company, which many agreements made over the terms of the raw: employment contracts (agreements collective work), banking (general terms of banking), construction (requirements uniform administratife to carry out the work), the retail trade sector, the purchase of services, entrepot trade, lease, buy rental, general corporate leasing, press affairs, freight forwarders (the terms of public transport, the general requirements expedition), penertbitan, insurance affairs.
Mariam Darus Badrulzaman (1981), said that the agreement raw (including bank credit agreement) has been widely used in the practice of economic life in Indonesia, which in itself there are some legal issues, among others, the existence of "provisions of binding" and injustice given to the debtor. More Mariam Darus Badrulzaman explained that raw agreement is an agreement whose contents are standardized and set forth in a form. If you are at a time of opening an account in the bank, or send a letter by express courier, or mencetakkan photos on a photographer, you unwittingly committed themselves to the basic agreement. From a bank employee you receive overdraft agreements form, from the deposit of lightning or a photographer, or the cleaners, you as the debtor will receive a receipt that contains raw deal.
The form many different forms, there is a long consisting of several folio sheets, there were only comprises one folio sheet and some are even smaller than that. Small printed letters are sometimes needed glasses to read it.
In other parts of the world the standard agreement has been used widely.
Slawson, an American writer reported that "Contracts Standardform Probably ninety persent of the contracts have now made the Most Persons difficult, remembering the lost time they contracted other then by standard form"
W. Friedmann, is pleased with this standard agreement suggests that "Most Contracts wich Govern out daily lives are of Standard Contracts"
Likewise Anson, seeing that "one of the most important development in the sphere of contracts during the last hundred years has been the appearance of the standard form contract"
Mariam Darus Badrulzaman, explaining the symptoms of raw agreement contained in the community, this agreement can be distinguished four types:
First, the raw Agreement unilaterally (adhesion) is an agreement whose content is determined by the parties strong positions in the agreement. Stronger side here is the creditors who typically have a position (the economy) is stronger than the debtor.
Second, raw reciprocal agreement is an agreement raw content is defined by both parties, for example the raw treaty party-it is composed of employers and other party workers (debtor). Both sides usually bound in the organization, for example on a collective labor agreement.
Third, the standard agreement set by the government is a standard agreement whose contents determined by the government against certain legal acts, such agreements have the object of rights over land. In the agrarian field, see for example, forms the agreement as stipulated in the Decree of Minister of the Interior dated August 6, 1977

No. 104 / Dja / 1977, inter alia in the form of a deed of sale models 1156727, 1045055 models mortgage deeds and so forth.
Fourth, raw Agreement specified in the notary or advocate are agreements that concept from the beginning has been provided to meet the demand from members of the public who requested the assistance of notaries or lawyers concerned. In the library of the Netherlands, this fourth type mentioned contract models.
As described above, bank credit agreement is one form of the standard agreement (the "Agreement Credit Standard Bank"), in addition to other standard agreements. The problem is studied and analyzed here are: Bagaimakanakah the legal position of "bank credit default agreement" and clauses that are not balanced and the protection of the Law for the Client / Debtor ?.

Understanding Legal Protection

The concept of legal protection could be called as a relatively new concept. Its presence is in line with the Human Rights, which emerged as a form of protection against individual rights. Legal protection is a protection granted to subjects of law in the form of both preventive and repressive, both oral and written. All are framed in legal relationships mutually protect, not kill each other.
That legal protection as a separate picture of the function of the law itself, which has the concept that the law provides for a justice, order, certainty, usefulness and peace. This becomes eensi of legal purpose in principle give serenity to the offender legal interactions.
In definitive, several experts to express their opinions about the definition of this legal protection. Between ameeka whose expression is:

1. According Satjipto Raharjo defines Protection Law is to provide shelter for human rights are harmed others and the protection given to the people so they can enjoy all the rights granted by law.
2. According to Philip M. Hadjon argues that legal protection is protection will be pride and dignity, as well as the recognition of human rights which are owned by the legal subject under the provisions of the law of tyranny.
3. According to the CST Kansil Protection Law is a wide range of legal remedies that must be provided by law enforcement agencies to provide security, both in mind and physical harassment and threats from any party.
4. According to Philip M. Hadjon Protection Law is as a collection of laws or rules that can protect a thing from another. In connection with the consumer, the law provides protection to the rights of the customers of something that resulted in non-fulfillment of these rights.
5. According Muktie, A. Fadjar Protection Law is a narrowing of the meaning of protection, in this case the only protection by the law alone. The protection afforded by the law, is also related to their rights and obligations, in this case that of humans as subjects of law in its interaction with fellow human beings and the environment. As the subject of human law has the right and obligation to make a legal action.

More details of the above, in the run and give legal protection needed a place or container in practice is often called by means of legal protection. Means of legal protection is divided into two kinds that can be understood as follows:

1. Means Preventive Legal Protection

In this preventive legal protection, legal subjects are given the opportunity to file an objection or opinion before a government decision received definitive form. The aim is to prevent disputes.
Preventive legal protection is of great significance for the acts of government based on freedom of action due to the absence of legal protection that is preventive compelled the government to be cautious in making decisions based on discretion. In Indonesia there is no special arrangement regarding the preventive legal protection.

2. Means Repressive Legal Protection

Protection of repressive laws aimed at resolving the dispute. Handling of legal protection by the General Court and Judicial Administration in Indonesia, including legal protection of this category. The principle of legal protection against government action rests and comes from the concept of the recognition and protection of the rights of man because, according to the history of the west, the birth of concepts about the recognition and protection of the rights of man are directed to such limitations and laying down the obligations of society and government.
The second principle underlying the legal protection against acts of governance is the rule of law. Associated with the recognition and protection of human rights, the recognition and protection of human rights a prominent place and can be associated with the purpose of state law.
In terms of legal protection of the consumer, that before the consumer protection explicitly recognized and growing understanding of consumers are more likely synonymous with the notion of the public in the development of the things that comes to industry, commerce, health and safety.
Whereas previously, legislation and regulations were drawn up at the time, on every konsiderannya mention the interests of the community or the health of the people / citizens in the broad sense. This includes understanding

the consumer, such as law No. 9 of 1960 on health subjects, Law No. 10 of 1961 on Goods, Law No. 11 of 1962 on Hygiene, and also in some of the rules below.
Government Regulation No. 7 of 1973 concerning the supervision of the circulation, irregularities and use of pesticides, the minister's decision 950 / PH 165 / b 1965 on provision of inspection and control of production and distribution, the decision of the Minister of Health No. 125 of 1971 on mandatory list of drugs, the decision of the Minister of Health No. 220 of 1976 on the production and distribution of cosmetics and medical devices, as well as various other legislations which includes the interests of these consumers.
All of the rules didmaksud basically provide protection to consumers who trade of goods and services. Including in relation to this transaction in the credit agreement that is raw, between the depositor and the bank in financial transactions.

The legal status of Baku Bank Credit Agreement
In general, the raw agreement begins with an analysis bank Credit Credit to credit applicant / customer. Gaspar GANGGAS (2009) by citing Sutan Remy Sahdeny, said there are two kinds of credit analysis, namely:
First, the traditional credit analysis:
a. Character: Integriats moral personality
b. Capacity: The ability to control the business
c. Capital: Module that existed before the loan is approved
d. Condition of economic: state / Prospects will be financed by credits
e. Collecterral: Goods mortgage loans pledged as collateral by the debtor
Second, modern credit analysis (Roger H. Hale)
a. Seeing the nature of business debtors
b. Viewed Companies Cash Flow
Objective analysis of the nature of the business:
1) To determine the comparative market position of the company's debtors
2) To know the pressures that come from the competitor / competitors
3) To know the structure of the risks and rewards that can be expected and the industry sector concerned
4) To determine the barriers to entering the market sector and industry
Objective analysis of cash flow:
To find out the movements seen from the company's cash resources and their uses of cash that will come can be estimated properly. Once a potential customer is analyzed by banks and rated deserve credit, we then made the credit agreement. The credit agreement contains the amount of credit agreements and loan repayment terms and promises with regard to the collateral credit. The credit agreement is an agreement in principal in the sense of a free form can be made by deed under hand or an authentic deed.
Besides the terms creditworthiness, bank credit agreement must also fulfill the terms of a legal contract as provided for in Article 1320 BW / Book of the Law of Civil Law, namely:
First, the agreement of those who bind themselves (toesteming)
Second, their ability to hold a tie (bekwaamheid)
Thirdly, regarding a particular object (bepaal onder een-werp)
Fourth, the cause of which is permitted (gerrloof-de-oorzaak).
These requirements can be read in Article 1320-1337 BW / Book of the Law of Civil Law.
Bank issues credit agreement in the form Baku Treaty (Standard) or the "Bank Credit Agreement Baku", as the raw deal in general there has been a major concern in a meeting of the Association of Dutch Law degree in 1957. At first there are pros and cons among the Bachelor's opinion about the existence and position of the raw deal. The issue is whether the agreement meets the requirements of raw validity of a treaty, among others, to meet the principle of freedom of contract responsible. There are two notions that give answers to the question whether the agreement violates the basic principle of freedom of contract or not (Aloysius R. Either, 2007).
Sluijter (1972), said raw agreement is not a treaty, because the position of the operator in the agreement it is like private law makers (legio particuliere wetgever). The terms specified in the agreement employers are not treaty law.
Pitlo, saying it forced agreement (dwang contract), although theoretically-juridical, this standard agreement does not comply with the law and by some legal experts rejected. But the reality, the needs of people running in the opposite direction with the wishes of the law.
Stein, tried to solve this problem by argue that the standard agreement can be accepted as an agreement, based on their willingness and confidence fiction (fictie van wil en vertrouwen) that evokes confidence that the parties committed themselves to the agreement. If the debtor received the document in the deal, meaning he voluntarily agreed on the content of the agreement.
Asser Rutten, said also that "every person who signed the agreement responsible for the content and what is signed, if the person who put his signature was the belief that he knows and mnghendaki signed form".

Hondius, in his dissertation maintains that the standard agreements have binding force based on the "custom" (gebruik) prevailing environment of community and trade traffic.
Credit Agreement as the standard agreement can be characterized as follows (Aloysius R. Either, 2007): First, it is prepared unilaterally by the parties economic position / psychic stronger, in this case made by the bank. Second, the general public (debtor) did not participate together employers / banks determine the contents of the agreement. Third, driven by the needs of the debtor was forced to accept the agreement. Fourth, the specific form (written), and Fifth, prepared first mass and convective by the employer / bank.

Standart Clause Clause is Unbalanced

Characteristics of raw agreement is the clause eksonesasi. One party to limit or even completely exclude accountability. Hukumya issue is to what extent the attachment of the parties to the agreement and the extent to which the eksenerasi clause applies power ?.
The term "exoneration clause" (Aloysius R. Either, 2007) is a translation Exoneratie clausule (Netherlands), Exoneration Clause and Clause Exemption (England). Among the scholars there who use the translation "the terms of the exoneration", "Clause penyampingan", and "Clause Eksemsi", which is a clause in the agreement that it limits the responsibility, or the freeing of responsibility, or diminish the responsibility, or alleviate the responsibility, or the freeing of responsibility one of the parties. Eksoneratie word comes from the Latin word meaning ex out and the onus means the load. So Exonaratie means freed from a burden.
Particularly in raw forms of bank credit agreements, common clauses are disproportionate burden of the debtor, including the exoneration clause / clauses eksemsi, as described below (Elizabeth Agustina, 2009):
First, the bank's authority at any time without any reason and without prior notification at unilaterally terminate permit credit pull.
There was encountered in the credit agreement, clauses, the bank authority to unilaterally reject the withdrawal of credit with or without a subsequent act of stopping a credit agreement before the expiry date, without prior notice to debtors. Thierbach, giving bneberapa guidelines that should be considered by the lender (bank) before the lender (bank) to stop the pull permits and collect the loan (credit) on receipt of the loan (the debtor) as follows:

a. Acceptance of loans should remain informed about the real intentions of lenders and credit providers about whether to stop or continue to provide credit.
b. Give adequate written notice to the borrower before the loan is declared until the deadline or before the loan is no longer going to be continued so that the borrower has a decent chance to get other financing alternatives.
c. Avoid doing about the threats of default so that the recipient is prepared to follow instructions lender
d. Avoid personal conflicts with the borrower and act profesioanal.
e. Convey proper written notice before performing actions against the borrower.
f. Pour in writing all the promises that have been given to the recipient.
g. Keep records of all loan files (loan files) of the recipient
h. Do not ever give instructions to a recipient which can be interpreted as an act of control over the business.

Second, the bank authorized to unilaterally determine the selling price of goods collateral where the collateral for the credit agreement goods debtors jammed.
Should correspond to the upper bank kepatutuan and good faith does not determine your own selling price of goods in the framework of collateral loan resolution debtors. Should the interpretation of the price of an appraisal conducted by an independent company and has had a good reputation. In addition, it is also the law has determined how to sell the items of collateral based form of binding guarantee.
Third, the debtor's obligation tunduik to all instructions and bank regulations that already exist and are still to be determined later by the bank
This clause is contrary to the basic rules that must be observed for the binding terms and sayarat a raw deal as described earlier. Other than that, the agreement contains a clause like this is not valid under Article 1320 paragraph (3) and Article 1333 of the Civil Code. According to Article 1320 of the Civil Code is only valid if the agreement qualifies the form of "the existence of a certain" other than the terms of "the parties agreed" prowess of the parties to make an engagement and the existence of "a lawful cause". Terms of "the existence of a specific case" means that there should have been there first "something" contracted it. With the inclusion in a loan agreement clause that the debtor is subject to "all the instructions and regulations of the bank will still be determined later by the bank that they will be determined later by the bank clearly a matter that will be agreed it was not yet known, because the instructions or regulations banks are still will be determined later by the bank, therefore, pursuant to Article 1320 of the Civil Code clause as it is unlawful and therefore not binding for debtors.

In line with that, then if the bank wants that all the instructions and regulations existing bank it also binds the debtor, should all the instructions and regulations of the bank must be submitted in advance to debtors to known and understood. Without first known and understood, then when the debtor also affix his signature, according to the author of the agreement were not there purely agreement between the parties. Given the entry into force of the principle konsensualisme for the entry into force of an agreement as provided in article 1338 of the Civil Code, the instructions and regulations previously unknown bank, understood and approved by the customer are not binding.

Fourth, the necessity of debtors to be subject to the terms and provisions of public relations newspaper accounts of the bank concerned but without previous debtor is given the opportunity to know and understand the terms and provisions of public relations of the newspaper accounts

Fildier, in his Sheldon and Didler's pratice and Law of Banking in great detail put forward what are the rights and obligations of both customers and banks, among others:

a. The rights of customers

1) The right to obtain repayment (right to repayment)
2) The right to draw a check (right to raw checks)
3) Right to Interest (right to interest)

b. Customer's obligations

1) The obligation to carefully draw a check (duty of reasonable care in drawing checks)
2) The obligation to disclose the occurrence of forgery (duty to disclose forgeries)

c. The rights of the Bank

1) The right to earn a commission (right to commission)
2) The right to earn interest (right to interest)
3) The right to set-off or compensation (right to set-off)

d. Obligations Bank

1) Obligation to receive money to customer accounts (duty to receive money for his customer's account)
2) The obligation to pay checks from customers (duty to honor his costumwer's chques)
3) The requirement for confidentiality (duty of secrecy)
4) Obligations with respect to garnishee orders (duty with regard to garnishee orders)

Fifth, the inclusion of a clause-a clause that frees banks from the eksemsi compensation claim by the debtor on the losses suffered by it as a result of bank actions

This clause can not necessarily bind the debtor even if the debtor has signed a credit agreement. The principle of propriety in the Civil Code requires that judges continue to consider the issue case by case basis. If it acts in the form of bank eg termination pull permits on disponibilitas of credit as a result of government action as has been diterngkan in advance, then this clause eksensi acceptable. But when the action of the bank based on the needs of the bank's funds bagipembayaran mengerhakan price of land for the establishment of a new head office building, then it is not acceptable eksemsi clause. Similarly, if the license termination action pull on disponibilitas of credit it is as the rush of customers deposit funds as a result of the collapse of public confidence in the banks because of the occurrence of mis management, then eksemsi clause is not acceptable. In other words, the inclusion of such a clause when it should be confronted with on merit and other articles of the Civil Code, for example, Article 1267 and Article 1365, has no meaning.

Regarding the legal force clause eksenerasi / eksemsi clause:

First in Indonesia:

Judicial still adheres to the principles Pacta sunt servanda means what is defined in the agreement that has been signed by the parties binding as law for those who make it (Article 1338 KUH.Pdt).

Second, in the United States:

a. Before 1960: US Justice together with Indomesia - because it adheres to the legal doctrine Caveat Emptor (Let the buyer beware).

b. After 1960: Justice in the United States to leave the legal doctrine Caveat Emptor and began to enter the new tahab melaukan kadaan surveillance abuse by implementing the concept of the new doctrine is the doctrine Unconscionsability (Sutan Remy Sahdeini - page 70).

c. Unconscionsability doctrine authorizes a judge to set aside some even the whole agreement in order to avoid things that are perceived as being contrary to conscience (agreement aggravating one of the parties, misuse of state (misbruk van omstandig Heden).

Legal Protection for Customers / Debitors

In Indonesia after the entry into force UndangnUndang Law No. 8 of 1999 on Consumer Protection, explicitly regulates the rights and obligations of consumers (chapters 4-5), the rights and obligations of businesses (chapters 6-7), prohibited for businesses (Article 8 -17), the provisions of the inclusion of standard clause (article 18), the responsibilities of business operators (article 19-28). Generally Law No. 8 of 1999 on Consumer

Protection is an umbrella for all aspects of consumer protection, including legal protection of the customer / debtor.

One of the efforts of legal protection in the Consumer Protection Law No. 8 of 1999 set forth in Article 18 of BFL of the inclusion of standard clauses, elaborated that:

First, businesses in offering goods and / or services intended for trading are prohibited from creating or listing standard clause in every document and / or agreement if:

a. Declare the transfer of the responsibility of business operators:

a. Stating that businesses are entitled to reject the handover to the goods bought by consumers

b. declrarate that businesses are entitled to reject the handover to the money paid for the goods and / or services bought by consumers

b. Stating authorization from consumers to businesses either directly or indirectly to carry out unilateral actions relating to goods purchased by consumers in installments.

a. Arranging concerning proof of loss of use of goods or utilization of services purchased by consumers

b. Entitles businesses to reduce the benefits of the services or reduce the wealth that was the object of sale and purchase services

c. Stating the submission of consumers to the regulations in the form of new rules, additional, secondary and / or advanced conversion made unilaterally by businesses in the future consumers utilizing the services that they purchase.

Secondly, businesses are prohibited include standard clauses that the position and shape is hardly visible or can not be read clearly, or the disclosure of which is difficult to understand.

Third, any standard clause that has been set by the business on a document or agreement which meets the requirements referred to in paragraph (1) and paragraph (declared null and void.

Fourth, business operators are required to adjust the standard clause that is contrary to law.

In connection with article 18 of Law No. 8 in 1999, to bank credit default agreement then the agreement good credit (Gaspar Ganggas, 2009):

First, the clauses of the credit limit, the credit period, the purpose of credit, credit and pull the permit limits.

Second, the clauses of interest, commitment fees and fines excess drag.

Third, the clause of the power of the bank to make charging for checking accounts and loan accounts of debtors.

Fourth, on representations and warranties clause is a clause which contains a statement of the debtor about the facts concerning the legal status, financial situation and assets of the debtor at the time credit is granted, namely that became asumsi2 for banks in taking the decision to grant the loan.

Fifth, the clause on the Condition precedent, namely the clause on syarat2 tough that must be met first olh debtor prior to the bank is obliged to provide funds bag credit and debtor is entitled for the first time using the credit.

Sixth, the clause of collateral for credit and goods insurance guarantee.

Seventh, the enactment clause of the terms and conditions of the relationship, the current account for the credit agreement concerned.

Eighth, the clause on affirmative covenants are clauses that contain debtor promises to do certain things during the credit agreement is still valid.

Ninth, a quiet clause negative covenants are clauses that contain debtor promises not to do certain things during the credit agreement is still valid.

Tenth, the clause on financial Covenants are clauses that contain debtor promises to submit financial statements to the bank and maintain its financial position on a minimal extent.

Eleventh, the clause about the actions that can be taken by the bank in the context of supervision, protection and rescue and settlement.

Twelfth, the clause concerning an event of default is a clause that specifies an event or events that the event entitles the bank to unilaterally end the credit agreement and to instantaneously da simultaneously charge the entire outstanding loan.

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