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Juridical Analysis Credit Agreement Made Under the Hand

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Abstract

An agreement as the regulation in the provision of Article 1313 in Civil Code Procedure stated that the agreement is an act where one person or more bind their self to the other person or more. An agreement that have been made by the side who had a legal consequences which bind the side who organize the agreement. Furthermore, an agreement can be done either spoken or written along it is agreed by all the side together. Kind of the practice of agreement is known to be numerous and one of the agreements which often happen regarding with the development of business, industry, economy, and banking is a credit agreement. Therefore, a credit agreement is the main agreement that contains of debts and receivables, terms, rights and obligations between creditor and debtor. Generally, credit agreement was done either by the Financial Institution or non-financial as the creditor with the public either individual or legal entity as the debtor. Moreover, credit agreement can be made by the writing form either deed under the hand or authentic deed which accordance with the requirements of an agreement in the provision Article 1320 of Civil Code Procedure. In addition, the cases which become the problems in this study are regarding how far the legal certainty and legal force for credit agreement that only made under the hand is.

Keywords: *Juridical Analysis; Credit Agreement; Deed Under the Hand*

Introduction

Credit application is the first occurrence which appears at the beginning of credit transaction giving juridically. The application had been used is referred to the applications that made and signed by the prospective debtor with the purposes to establish the credit agreement. The main principles of credit application are the confidence and ability to pay the credit accordance with the certain time had been decided. In order to establish the confidence towards the ability to pay, it is needed the procedure of credit giving. Furthermore, every bank has a different procedure of credit giving. Those differences happened because various considerations of the bank are written in the policy of credit giving to the customer is different from one bank and another bank. Then, credit giving is only differed to whom the credit will be given and the use of credit. The side who accepts the credit giving can be an individual or legal entity, meanwhile the use of credit can be in the form of consumptive and productive business. Because, the use and responsible of credit between individual credit and legal entity credit are different, thereby the procedure of credit application is also different between the two of them.

The purpose of bank is to seek the advantage of credit giving towards the customer that must be balanced with the purpose of the bank's liquidity and solvency; hence it is becoming a good guarantee of debts paying either in the short or long term. Furthermore, for decreasing the risks of credit giving, usually the bank will be careful to distribute the credit by investigating whether the customer can be trusted and able to repay the loan in accordance with the credit period or not. Moreover, credit analysis of bank can be done by using the five-C principles such as Character (the characteristic of prospective debtor), Capital (authorized capital of prospective debtor), Capacity (an ability of the debtor), Collateral (guarantee provided), and Condition of Economy. (Suharnoko, 2015)

In the legal term, public is given the freedom to establish the agreement which can be contained of any agreement as long as it is not violence the public order and decency. Because contains of agreement can be decided according to the sides, hence, the articles of the legislation are not needed in the agreement can be deviated from its existence. In addition, all sides can be established the agreement which is not regulated by the legislation even the sides can be negated the legislation. (Subekti, 2008)

It is allowed because the characteristic of legal agreement is completed the legal regulations which existed in the public. The evidence of legal agreement had the complementary characteristic, it can be seen in the legislations which is not regulate the price of an item, but in the implementation of transaction between buying and selling, each side which had the transaction can be established an agreement with considering the amount of the price, place to do the transaction, and the way to pay an item. This matter can called as freedom of contract principle. (Harun, 2010)

According to the provision of Article 4(11); Legal Banking, which is stated that an agreement or consent of borrowing is a form of credit agreement; hence the name of an agreement can called as credit agreement. Despite in general an agreement is not needed to be written, but an agreement towards credit agreement which usually happened in the bank better in the form of written agreement.

Furthermore, this provision also written in the Article 8 of Legal Banking which is explained about the obligation of bank which is become the side who give the credit to make an agreement in the form of written. The necessity of banking agreement must be in the form of written which is in accordance with the main provision of credit that had established by Bank of Indonesia as it was written in the Article 8(2) of Legal Banking.

The main provisions which had established by Bank of Indonesia is contained of several regulations as follows: a. according to the *syariat* (application or determination based on Islamic regulations) principle, credit giving or financing must be in the form of written agreement; b. the bank should have the confidence towards the capability of debtor customer which can be seen from an exact assessment towards character, ability, capital, collateral, and business prospects from debtor customer; c. the obligation of bank for compiling and implementing the procedure of credit giving or financing based on *syariat* principle; d. the obligation of bank for giving the information clearly about the procedure and requirement of credit or financing which based on the *syariat* principle; e. the prohibition of bank for giving the credit or financing, which based on *syariat* principle but with different requirement to the debtor customer and/or to the side who had been affiliated; f. dispute completion.

In the implementation of banking, credit agreement that made in the form of written can be divided become two, such as the deed under the hand and authentic deed. According to the background above, the existing problem that will be analyzed is related to the legal certainty and legal force towards the credit agreement which made under the hand or in the form of written.

Method

The method of this study is using normative, which usually used in the doctrinal legal research or library research. Named as doctrinal legal research because this study only intended to the written regulations, thereby this study having a close relation to the library research because it needs the secondary data in the library. From the legal research, legal normative can be studied from various aspects such as theory, philosophy, ratio, structure/composition, consistency, general explanation, explanation about related article, formality, the power which bind the regulations and the language which used is legal language. The approach method which used by the researcher is juridical normative. Furthermore, according to the Soerjono Soekanto, juridical normative approach is legal research which done by researching the library materials or secondary data as the basis to be researched with establishing the research towards the regulations and literacies which related to the problems research (Soekanto & Mamudji, 2001). In addition, the researcher will explain and analyze about the legal certainty and legal force in the credit agreement which made under the hand or in the form of written.

Theoretical Review

1. Agreement

An agreement is an occurrence where someone promises to another or two people promise each other to establish something. From this occurrence, it can generate the relation between two people that called as binding/*verbintenis* (a relation between the side who demand the things must be fulfilled and the side who had the obligation to fulfil the agreement). This agreement can be brought out the relation between two people who made an agreement. Furthermore, an agreement usually in the form of word sequence that contains of various agreement or capability either spoken or written. As the result, a relation between bind and agreement is an agreement which generates the binding/*verbintenis*. Moreover, an agreement is the source of bind beside of other sources. An agreement can be called as the consent because there are two sides who agree to do something which is related to the agreement. It can be said that two words between agreement and consent have had the same meaning. In the term of contract, it can be more narrowed because it has a purpose to an agreement or consent that had been written. Therefore, an agreement is an important source which can generate the binding. In addition, most of the binding exist because the agreement, however as the explanation before, there are other sources which can generate the binding. Those sources, including the regulations name, hence, the binding can exist from an agreement and there is a binding which exist from the regulations. (Subekti, 2008)

Binding/*verbintenis* can be existed either from an agreement or regulation, especially in the Article 1233 of Civil Code Procedure. An important source of the binding is an agreement, especially the obligatory agreement that regulate in the Second Chapter of the Third Book in the Civil Code Procedure about the binding which exist from the contract or agreement.

All the binding actions either happen because the regulation or an agreement as the legal fact. Furthermore, the legal facts are the occurrences, acts, or conditions that can generate, switch, change, or end of the right. In the short, the legal fact is the fact which exist because the legal consequences. Usually, the form of this fact is an act and also in the form of other facts such as the *blote rechtsfeiten* (common legal) such as birth, death, maturity or immaturity, kinship, or the passed time or expiration.

There are two forms of human act, such an act which has legal consequences and an act which has not legal consequences. Furthermore, the legal consequences can be existed because of the statement of the people who intended to the existing legal happens or consequences; or in another word the occurrences of legal consequences is the purpose of people willing and those acts named as legal actions. Therefore, the occurrences of legal consequences, either any purposes or not, hence those acts known as

material act. A material act is not a legal action, such as an action to against the legal (Article 1365 of Civil Code Procedure) and found the treasure (Article 587 of Civil Code Procedure). The legal acts divided into unilateral and bilateral legal action. Those differences depend on the several people/side which related to the occurrences of legal action. Moreover, unilateral legal action is the actions which done by one person which can create, change, and end the right, such as testament letter making, refusal of inheritance, and children recognition (out of marriage). In another hand, bilateral legal action is the cooperation between two or more people/side that can generate legal consequences. (Budion, 2010)

2. Credit

The term of credit came from Greek language "*credere"* which means belief. It refers to the side who giving the credit believe to the side who receive the credit that the credit giving can be repaid in accordance with the agreement. Furthermore, for the credit giving recipient means they also had been receiving the belief; thereby it is such an obligation to repay the credit according to the time has decided. As the result, the term of credit having a specific meaning as loan the money. (Widjanarto, 1998)

According to the explanation above, credit refers to the belief which came from Greek language "*creditus"* that is past participle of *"credere"* which had the meaning of "belief". In every words of "credit" had contained the "belief" aspect. Even though, the meaning of credit is actually not only about the beliefs. (Fuady, 1996)

The term of credit also written in the Great Dictionary of the Indonesian Language or KBBI, it has various meanings about the credit which can be interpreted as the way for selling an item with cash withdrawal payment (payment can be deferred or in installments). In addition, credit also can be interpreted as loan money with the repay which can be done in installments and credit as limited in certain loan that in accordance with the permission of Bank or other entity.

In general, banking credit almost had equated with the term of debts. However, according to the rules of civil law, between debt and credit are different legal actions and also had different juridical consequences. Usually, debt is known as the use of loan or can be called as *verbikleen* in Dutch language which had further meaning as loan to replace. According to civil law, loan to replace are consist of the side who loan the amount of money or certain item to the side who will use the loan with the requirement such the use of money or certain item can be repaid as the amount of money had given, in the same condition, and under the same circumstances (Harun, 2010). The provision in Article of 1757 Civil Code Procedure stated that if the debtor can not pay the interest and loan thereby the creditor can not demand the nullification of the previous agreement. In another word, there is no interest in the debt transaction if there is no an agreement by the sides.

Analysis and Discussion

Legal certainty can be interpreted as norm clarity, thereby it can become a guidance for the public because the existing of this provision. The meaning of this certainty can be understood that the existence of clarity and assertivity towards the implementations of legal in the public. Hence, there will be not generated misinterpretation (Wijayanta, 2014). Furthermore, according to the Lawrence M. Wriedman, a Professor at Stanford University stated that to realize the "legal certainty", it has needed the support from the aspects such as legal substance, legal apparatus, and legal culture. (Ismail, 2011)

In the book under the title "Rechts geleerd Handwoorddenboek" by S.J. Fockema Andreae, discussed about the "*acta*" which came from the Greek language that had the meaning of "*geschrift*" or letter. Meanwhile, R. Subekti and Tjitrosudibio in their book "*Kamus Hukum*", they discussed that "*acta*"

is the plural word from "*actum*" that also came from the Greek language which means the actions. Furthermore, according to the A. Pitlo, the meaning of deed is the letter which signed, made to use for the evidence and to use by any people with specific purposes. Moreover, Sudikno Mertokusumo, deed is the letter that is given by the signed contains of various occurrences as the basis of the right or bind; made since the first time it existed for the evidenceness. A deed is consisting of the writing which consciously made to use for the evidence about an occurrence and had been signed. Hence, all important aspects for a deed are an intentional for creating the written evidence and the signed for the written. From the statements above, it can be concluded that not all letters are called as deed, meanwhile only the letters which qualify certain requirements can be called as deed. In addition, there are specific requirements to be qualified in order to change the letters can be called as deed, as follows: 1. had been signed, 2. contains of occurrences that become a basis of the right towards the binding, and 3. had purposed as the written evidence. (D. Naja, 2012)

Credit agreement which made under the hand also can be categorized as the deed under the hand. In the implementation of it, the deed under the hand is the deed which only made between the sides who did the deed or in another word without an involvement with another person beside the sides, even usually to sign the deed under the hand is not needed the witness to become the side who participate when the agreement will be signed. The fact, the witness is known as the side which needed in the implementation of credit agreement as the evidence in the civil cases. Regarding the deed under the hand, there are several matters that must be known as well as the regulation which is written in the Article 1877 of Civil Code Procedure; if a person denies the writing or signing of the agreement, thereby the judge must be commanded about the truth of the writing or signing to be investigated in front of the court. It means, there are at least two deficiencies or frailties towards the deed under the hand. First, there is no witness who participates in the deed under the hand, it will be experienced the difficulty to prove. Second, if there is one side who deny the sign, hence the truth of the deed under the hand must be proven in front of the court. Because the deficiency and frailty which existed during the process in the court, become one of the considerations that the public from time to time more choosing the authentic deed for various transactions they had. In addition, the concern of the deed under the hand is not regulated in HIR or *Herzien Inlandsch Reglement* (procedural law in the assembly of civil and criminal cases which establish in the area of Java and Madura), but it was regulated in Rbg or *Rechtreglement voor de Buitengewesten* (procedural law in the assembly of civil and criminal cases which establish out of the area from Java and Madura) specifically in the Article 286 until 305, and it was regulated in Civil Code Procedure especially in the article 1874 until 1880, also written in Stb. 1867 No. 29. (D. Naja, 2012)

The power of evidence from the deed under the hand, according to the statement of Subekti in his book under the title "*Pokok-Pokok Hukum perdata*", a deed under the hand is made without an intermediary of public official, which is the prove of the deed will have the power of evidence that equal with the authentic deed (argumentum per analogiam), which means the side who sign the agreement letter is not denying their signed or in another hand they are not denying the truth of what already written in the agreement letter. However, if between the sides who made an agreement are denying the sign, thereby the side who propose the agreement letter is not having an obligation to prove the truth towards the signed or the content of the deed. (Subekti, 1984)

The provision towards the authentic deed is regulated in the Article 165 of HIR, which is written the same as the Article 285 of Rbg that stated: authentic deed is a deed that made by or in front of the officer which had an authorization to do the deed, it is also the complete evidence between the sides from the heirs and those who receive the rights thereof regarding the content and even as mere information, but the end of this is the only information that related to the deed. Furthermore, in the article 165 of HIR and 285 of Rbg above are contains of the explanation and the powerful evidence of authentic deed. The explanation of authentic deed is regulated in the Article 1868 of Civil Code Procedure, stated that an authentic deed is the deed which made in the form that already regulate in the regulations, which made by

or in front of the officer that had an authorization and the place to do the deed. Moreover, Tan Thong Kie (2007) gave the several notes regarding the definition of deed under the hand and authentic deed, such as: 1. the differences between the deed under the hand and authentic deed are located in the signed which showed under the writing. 2. Article 1874(1) of Civil Code Procedure stated that the elements that can call as the written under the hand are the deed under the hand, letter, register, household letter, and other letter which made without public officer intermediary, 3. Article 1867 of Civil Code Procedure decides that the authentic data and the writing under the hand can become the written evidence. According to the definition, the first requirement that must be qualified is authentic data should be in the form which is in accordance with the regulations.

The word of "form" here refers to the translation from Dutch language "*vorm*" and it does not mean round, oval, long, and etc, but it means that the deed making must be in accordance with the provision of regulation. The second requirement of authentic data is an obligation to do the deed in front of or by public officer. The word of "in front of" shows that the deed can be made for certain necessity, meanwhile the deed which made by officer because there are an action, investigation, decisions and etc, (acceptance official report, money order protest, and etc.). Furthermore, the third requirement is the public officer who had an authorization to supervise the deed to the place the deed will make. The authorized (*bevoegd)* in this case especially to the concern of: 1. Position and kind of the deed will be made; 2. day and date of deed making; 3. the place for deed making. Along with the explanation above, G.H.S. Lumban Tobing (in Victor M. Situmorang and Cormentyna Sitanggang, 1993), if an authentic deed will receive the authenticity stamp, which is occur from Notarial Deed, thereby according the regulations from Article 1868 of Civil Code Procedure stated that the related deed must be qualified the requirements as follows: 1. the deed must be made "by" (door) or "in front of" (tenoverstaan) from public officer. The public officer who makes the authentic deed is the officers who receive an authorization based on the regulations in the authorization limitation that has been firmly established, such as Public Notary. A deed is an authentic which is not because the establishment of the regulation, but a deed is made by or in front of public officer. From the description before, it can be concluded that authentic deed can be divided as follows: 1. the deed which made "by" such *ambtelijke aktan, procesverbaal acta, akta relaas* or the deed of officer and 2. the deed which made in front of the public officer (*aktannoverstaan*) by the side who needed (*partij* actant).

In *partij* actant, officer who made the deed do not have the initiative, meanwhile the public officer who made *ambtelijki* actant (the deed of officer) often start the initiative to make a deed. Furthermore, *partij* actant must be signed by the sides with threat will be lost the authentic, meanwhile the signed for *ambtelijki* actant is not an obligation. *Partij* actant contains the description about the willing from the side who made the deed or the side who asked to made the deed, in another hand *ambterlijke* actant will contain of written description from the public officer who did the deed. The truth of *ambterlijke* actant can not be bothered, except by accusing that the deed is false. As it was regulated in the Article 1868 of Civil Code Procedure that an authentic deed which had the form determined by the regulations, which made by or in front of public officer who had the authorization in the place where the deed is done. Moreover, it had also regulated in the Article 1869 of Civil Code Procedure an authentic deed can be lost the power if the form is not qualified the requirements or can be said as deed of deformed, however it will have the power as the written under the hand if the deed signed by the sides. In addition, the deed is must be made in the form which determined by the regulations that can be seen in the Notary Office (UUJN) especially in the Article 38 until 53, thereby it will be discussed in this study.

Regarding the authorization as public officer or in front of the side where the deed done, it can be found in the Article 1(1) Notary Office (UUJN) that stated notary is the public officer who had the authorization to do an authentic deed and other authorization as it was written in the regulations. The authorization of notary concerning 4 (four) aspects as follows: 1. notary had an authorization to the deed was made; 2. notary had an authorization towards the sides for whom the deed was made; 3. notary had

an authorization regarding the place where the deed was made; 4. notary had an authorization to the time when the deed was done. If a deed made by or made in front of the public officer who had not an authorization towards the deed, thereby the deed can not be called as an authentic deed, meanwhile the deed will only apply as the deed under the hand if the sides have signed, as it was regulated in the Article 1869 of Civil Code Procedure. (H. R. D. Naja, 2012)

Authentic deed is having the power as the perfect evidence, because an authentic deed is made by the public officer who had an authorization. The word of perfect here refers to the evidence which is can be proved as the authentic deed, it can be proven the truth whether the deed had the witness by the public officer or not, and the deed can be applied as the truth between the sides and the heirs from the sides. In addition, if an authentic deed is used in the court it will become enough evidence to the judge without command the other evidence to be proven. (HS, 2011)

After the legal decision regarding the agreement, there are requirements that should be concerned as follows: 1. the sides should be agreed to the binding, means the elements of coercion, fraud, and oversight are not allowed to be existed. An agreement must be made in the sense of willing and sincere between the sides who did the deed; 2. the proficiency to make the binding, means the sides who made an agreement in the legal subject have been mature, married, or the sides who had an authorization to do the agreement; 3. a certain situation, means the object which was regulated is obvious, at least it can be decided. In an example: in the agreement of house transaction, it should be considered about the price and the existing house that will be sold; 4. a *halal* cause, means the contains of agreement can not be contradicted with the regulations, can not be contradicted with the legal, decency, public interest and order, example: an agreement towards the baby transaction, it can become invalid if the agreement have contradicted with the norms above. The requirements of the first and second points are the objective requirements; meanwhile the third and fourth points are the subjective points. If the objective requirements can not be fulfilled hence the agreement which made by the sides will be cancelled according the legal, since the happening of legal action have not the legal consequences, meanwhile if the subjective requirements can not be fulfilled hence the agreement which already made will be cancelled if one of the sides asking for cancellation through the court or judge. (SDB, Burhanudin Ali, 2009).

A person or more agree with the other person or more and promise each other to establish something. This matter is an occurrence that generates one legal relation between the person who made an agreement, means that the sides who concern about their rights to be guaranteed and protected by legal or regulations, thereby if there is one side whose their rights are not being fulfilled hence they deserve to demand the other side through the court. (Widjaya, 2002).

In the agreement making, there are 3 (three) parts that must be concerned in order to giving an agreement to the legal force, such as: 1. essentialia part is the part of the agreement that had the aspects to be written in the certain agreement or the legal rules which had coercive, example: in the lease agreement thereby there must be an object and the lease price; 2. naturalia is the part of agreement because the characteristic of the certain agreement considered can be existed even without specific agreement by the sides. Example: the side who rent an item or something can not change the shape and structure during the rent period (Article 1554 of Civil Code Procedure); 3. accidentalia part is the part from the agreement that consist of the provisions which added specifically by the sides. (Budion, 2010) dikutip oleh (Dewi & Diradja, 2011)

According to the provision in the Article 1(10) of *Undang-undang Perlindungan Konsumen* (UUPK) or the Regulations of Consument Protection, standard agreement is every regulations or provisions and requirements that was prepared and established previously by the business owner unilaterally that written in the document and/or agreement which bind and must be fulfilled by the consumes.

The definition of credit agreement has not explicitly written and regulate in the regulations. In the Article provision 1(11) of regulations No. 10/1998, credit can be interpreted as provision of money or bills which had the same equality, according to the loan agreement between the bank with other side that giving an obligation to the lender to pay the debt in accordance with time decision with interest giving. Regarding the definition before, credit agreement can be interpreted as loan agreement between the banks as creditor with other hand as debtor who had obligations to repay the debt in the certain time with the interest giving.

Generally, credit agreement is made in the form of written under the hand with the standard agreement. The definition about the standard agreement is an agreement that almost all clauses which already standardized by the side, hence the other side do not have the opportunity for discussing or asking the changes. (Sjahdeni, 1993)

In addition, credit agreement which made under the hand with the standard agreement which imposed by the creditor and made unilaterally, where the debtor have been signed the credit agreement hence the debtor considering agreeing to what already written in the agreement that includes to the existence of legal consequences.

Conclusion

There are several aspects in the agreement which need to be concerned as follows: a. the word of agree from both of the sides or more; b. the word of agree that have been achieved must depend on the sides; c. the desire or goal and legal consequences; d. legal consequences for the benefit of one side and the expense of the other or reciprocal; e. credit agreement which made as the provision of the regulations. At the end, credit agreement must be consisted of agreement aspects such as the explanation before. Credit agreement can be made in the form of written as the legal protection for the creditor and debtor. Furthermore, credit agreement can be written under the hand as the provision of regulations that are applicable. Then, credit agreement also can be made under the hand which had the legal force, also can become the evidence if the agreement fulfills the requirement as the Article provision in 1320 of Civil Code Procedure. Thereby, the fulfilment towards the 3 (three) parts such essentialia, naturalia and accidentalia in the agreement can not be denied by the sides, hence the agreement have the legal certainty and become the regulations for the sides who made the agreement, except if there is side who deny the truth of agreement making under the hand, then another side will be felt, it must be proven in front of the court.

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