PRINCIPLES OF SOCIAL JUSTICE IN THE COMPLETION OF CREDIT LOSS DUE TO CIRCUMSTANCES FORCE (FORCE MAJEOUR) IN INDONESIA

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ABSTRACT

This study aims: To know the basics in the disposal of pacta sunt servanda principle power by the principle of rebus sic stantibus; Knowing the basic policy in enforcing the settlement of non-performing loans due to the state of force that has occurred in Indonesia;and formulate the principle used in the settlement of bad debts as a result of force majeure (overmach).The form of research is descriptive qualitative by analyzing the settlement of bad credit due to the state of force that occurred in Indonesia. Is a normative juridical research and research data source through literature study by tracing secondary data in the Library and using the logic of deduction. The conclusion of priciple power principle of pacta sun servanda will be set aside in the event a fundamental force; the basis of the policy towards bad debts in the areas of natural disasters through credit restructuring shall be Bank Indonesia Regulation; the principle used as a principle in the implementation of restructuring is the principle social justice which is the basic value of the five principles Pancasila.

Key words: Force Condition; bad credit; social justice principle.

Introduction

Banking Law states are business entities that collect funds from the public in the form of savings and channeled to the community to improve the lives and welfare of the people. In conducting banking relationships with customers, there are principles such as partnership principle, fiduciary principle, prudential principle and confidential principle and know your customer principle,[1].

Based on the trust of the bank to get the customer deposit funds, then on the basis of trust also banks provide credit to customers(debtor) that the customer will be able to return the credit in accordance with the agreement[2].The agreement between the credit provider bank and the credit receiving customer is bound in agreement. The principle of the binding force in the treaty requires that the parties fulfill what has been their bond with each other in agreement called the principle of pacta sunt servanda. The principle set out in Article 1338 paragraph (1) of the Civil Code that all the agreements made in accordance with applicable laws as laws for those who make it.

In the implementation of the credit agreement may arise a wanprestasi (broken promise). Default occurs if the debtor does not implement what has been agreed in the agreement. If the debtor does not execute according to the agreement, it is said the debitor did a default, or do something that should not be done. The non-fulfillment of obligations under an agreement may be due to two reasons, either due to the deliberate misuse of the debtor or due to his negligence; 2) Because circumstances force*(*overmach / forcemajeur*)*.[3]

Circumstances force*(*overmacht/forcemajeur*)*according to Section 1244, 1245 Civil Code is where the hindered debtor fulfills the agreed achievements in the credit agreement due to unforeseen and unaccountable circumstances (natural disasters, fire). Due to overmacht: The creditor can no longer ask for fulfillment of achievement; 2) The debtor can no longer be said to be negligent and therefore not obliged to provide compensation; 3) The risk of not switching to the debtor; 4) the creditor can not demand the cancellation of mutual agreement.

The pacta suntservanda principle will be disrupted if there is an overmach. In the case of the implementation of what credit agreement is the agreement between the debtor and the creditor in the event of overmach will result in non-fulfillment of rights and obligations in accordance with the contents of the credit agreement.

The principle of rebus sic stantibus is when circumstances change then the agreement will fall. However, not all change of circumstances can be a proposition for termination of agreement[4]. Rebus sic stantibus is one of the principles to accommodate in the event of fundamentally changing circumstances that are unfavorable to one of the parties in the agreement.The court functioned, if the renegotiation of the agreement on the state rebus sic stantibus is not reached the intersection. If a difficult situation arises, the first step to be taken is to renegotiate by the parties for the sake of continuing the agreement. If the

[1] Djoni S Gozali dan Rahmad Usman,2012, *Hukum Perbankan*, Sinar Grafika: Jakarta
[2] Dora Kusumastuti. 2015. *Hukum Perjanjian Dengan Prespektif Asas Keseimbangan Dalam Perjanjian Kredit*. UNISRI Press.
[3] Dora Kusumastuti. 2016. Penyelesian Kredit Macet Akibat Keadaan Memaksa Pasca Kebakaran di Pasar Klewer. UNISRI Press. Surakarta
[4]Purwahid Patrik, *Dasar-dasar Hukum Perikatan*, mandar Maju, Bandung, 1994,hlm.14

renegotiation fails, then the court that takes the role to modify the agreement, even after the mediation offer by the court so that the parties themselves who make the modification of the agreement do not reach an agreement[5].

The credit agreement can run smoothly if the debtor is able to fulfill its obligation to pay monthly installments. At the moment the debtor happens to be forced (overmach) will result in debtors difficulty paying loan installments every month can even lead to bad credit.

In some of the settlement of bad debts due to overmaches occurring in the event of the tsunami disaster in Aceh, natural disasters due to the earthquake in Jogjakarta, and the events of Merapi volcano in Jogjakarta and Central Java, as well as some of the circumstances considered to be a state forcing a treatment that deviates from the terms of the credit agreement that has been made. The power *of pactasuntservanda* principle is ruled out by *principle Rebus sic stantibus.*

Based on the aforementioned problems researchers interested in studying why the strength of the principle pacta sunt servanda can be ruled by the principle ofrebus sic stantibus, and know the basic policy the enforcement of the settlement of bad debts as a result force majeure that has ever happened in Indonesia and principles are used in the settlement of bad debts due to the circumstances of force(overmach).

Formulation of the problem

1. Why is the power of pacta sunt servanda principle can be ruled out by the principle of rebus sic stantibus?
2. What is the basic policy in enforcing the settlement of non-performing loans due to the forcing conditions that have occurred in Indonesia?
3.Which issues are used in the settlement of bad debts due to coercive circumstances*(*overmach)?

Research purposes

1. Knowing the basic disregard of pacta sunt servanda principle power by the principle of rebus sic stantibus.
2. Knowing the basic policy in the implementation of the settlement of non-performing loans due to the situation of force that ever occurred in Indonesia.
3. Formulate the principles used in the settlement of bad debts due to the circumstances of force*(*overmach*).*

Research methods

The form of research is descriptive qualitative by analyzing the settlement of bad credit due to the state of force that occurred in Indonesia. Is a normative juridical research or doctrinal legal research because it examines secondary data in the form of settlement of bad debts due to coercive conditions that occur in Indonesia. Sources of research data through literature study by tracing secondary data in the Library. Data Analysis Techniques used in this study use the logic of deduction to draw a conclusion from major premise to minor premise.

Result and Discussions

1. The Power of Pacta Sunt Servanda Principle and Boil Sic Stantibus Principle In Debt Credit Settlement.

The principle of pacta suntservanda is one of the principles of covenant, this principle has consequence that an agreement binds the parties that make it. In accordance with nature of the open book III which is meaningful to whom is free to make an agreement with any contained as long as it is not contrary to decency and law.The principle of legal certainty or so-called pacta sunt servanda principle is a principle relating to the effect of agreement. The principle of pacta sunt servanda is the principle that judges or third parties must respect the substance of the treaty made by the parties, as appropriate by law. They shall not interfere with the substance of the treaty made by parties.The principle of pacta sunt servanda contained in Article 1338 paragraph (1) of the Civil Code. The principle of pactasunt servanda is defined as pactum, which means unanimous agreement with oath and other formality acts.

This principle of pacta sunt servanda teaches that against a covenant made legally and in accordance with applicable law, as well as customs and feasibility and good faith, clauses in the treaty bind parties that make it, equivalent to the binding force of a law so that the execution of treaty shall not harm counterpart in the treaty nor harm any third party outside parties to the agreement. If such a treaty is not fulfilled by one of the parties without a justifiable reason by law, the parties has made a default so as to compensate the other parties in accordance with applicable law, which may be enforced through intervention of the court or intervention of parties the other competent.

The application of principle of pactasuntservanda by the Supreme Court of the Republic of Indonesia can be observed in the decision of 22 July 1972 No.289 K / Sip / 1972, “the loan interest rate is as promised. “Furthermore, in the decision of 7 October 1972 No.401K / Sip / 1972, with consideration “...in accordance with the jurisprudence of the Supreme Court concerning interest on debt, any amount of interest, provided that it has been agreed to be fulfilled,”Similarly, in the decision of 26 February 1973 No.791K / Sip / 1972, with the consideration of "Article 1338 of the Civil Code remains in force in the law of the treaty,

[5] Latifah Hanim. 2015.Perjanjian Kredit dan Force Majour. UNISULA: Semarang

therefore according to the Court of Appeal Decisions the parties must obey what they have agreed to, has been confirmed in an authentic deed".

Of the three decisions of Supreme Court the rejection of agreement on the aspect of binding power treaty(pactasuntservanda),in the sense that the Supreme Court is bound to recognize what is firmly agreed upon by the parties in their agreement. The decision of the Supreme Court is considered to have excluded existence of the principle propriety and goodwill.[6]

On October 14, 1976 Supreme Court ruling changed at No.1253K / Sip / 1973. Supreme Court Considerations that:Approved interest rate of 20% a month on the consideration of humanitarian and interest is granted 3% per month, in accordance with the loan at state banks at the time the agreement was held.Understanding the verdict can be interpreted that 'humanitarian and justice considerations are nothing but decisions based on good faith and decency.

Based on the decision of the Supreme Court, has been a shift towards the interpretation of the power of pacta sunt servanda that the agreement binds the parties who made it when the agreement was made not contrary to good faith and decency.

Good faith as well as propriety not only on material that is agreed, but also in the stage of preparation of the agreement must be based on the good faith of the parties and not contrary to the propriety.

The principle of rebus sic stantibus is when circumstances change then the agreement will fall.However, not all change of circumstances can be a proposition for termination of agreement. Wallace[7]states the principle of rebus sic stantibuscan not be made a proof in the case of a regulation or determination of a country that causes a fundamental change.Rebus sic stantibusis one of the principles to accommodate in the event of fundamentally changing circumstances that are unfavorable to either party in the agreement.

The parties who are bound by the agreement in accordance with the principle of pacta suntservanda if the implementation of the agreement is disrupted because there is wanpestasi resulting from a fundamental change of circumstances, then the strength of pacta sunt servanda principle will also be disrupted.Based on these statements the power of pacta sunt servanda principle can be ruled out by principle rebus sic stantibus.

2. Basic of Policies for Enforcing Bad Debt Settlement as a Result of Force Condition in Indonesia.

Article 1239 The Civil Code places the accountability as the principle, when the debtor neglects the duty of his contractual obligation (causing a broken promise) to cause him to bear the burden of paying compensation. Against this provision the law also makes an important exemption, Article 1244 of the Civil Code determines that the debtor may be required to pay compensation "whenever he can not prove that neither the execution nor the timely execution of the treaty is caused by an unexpected cause at all , for such an event he can not be blamed ".Section 1245 of the Civil Code provides for the same thing as releasing the debtor from the payment of damages, if he is due to a force majeure or for any unforeseeable event, has prevented the debtor from giving something or done something which he must do or have done forbidden to do. When the debtor faces such a situation so that he can not do otherwise for the act which causes the loss, and therefore the debtor has no false effect on the occurrence of such event, the debtor can not be held accountable for the consequences of the losses incurred, or by any other term, a person can not be punished on the basis of a fact of what to do by being forced byforce majeure(overmach). That is, an act that is essentially in contravention of the law will lose its unlawful nature if the offender has acted under force majeure. Matters relating to force majeure, there are juridical implications regarding the burden of proof and the imposition of the risk, because force majeure intended to free the debtor from accountability

The relationship between Article 1244 of the Civil Code and 1245 Civil Code can be summarized, "by an unexpected cause, for which the debtor is not to be blamed", can be seen as further explanation of "force majeure" is accidental, "and which is assumed to be the cause - cause of default. Article 1245 of the Civil Code, namely "as a matter which is hampered by "force majeure" gives the impression of absolute impossibility of accomplishment, the initial assumption is first and foremost. Article 1244 The Civil Code places the principle of legal responsibility on the leading position, and also places for the things in which achievement is not impossible at all, but includes causes that are very burdensome to the debtor.

Based on the scope of force majeure in legislation, in general the causes of force majeure can be grouped into five, namely: (1) force majeurebecause of natural factors, namely force majeure caused by natural circumstances that cannot be predicted and avoided by everyone because it is natural without the element of deliberation eg floods, landslides, earthquakes, and others caused by nature; (2)force majeuredueto social conditions and emergencies, ie force majeure caused by unusual circumstances, special circumstances that are immediate and short-lived without predictability, for example war, rebellion, military operations, sabotage, blockade, strikes and disputes labor, fire, epidemics, terrorism, explosions, explosions, riots, and other conditions set by the government; (3) force majeurebecause the economic situation (monetary), namely force majeure caused by the existence of changing economic situation, there is a certain economic policy, or anything related to the economic sector; (4) force majeurebecause of policies or regulations established by the government, namely force majeure caused by a situation in which there is a change of government policy or remove the issuing of a new policy, which impact on the ongoing activities; (5) force majeuredue to unforeseen technical circumstances, ie, ance majeure caused by the occurrence of damage or reduced function of technical or operational equipment that play an important role for the continuity of the production process of a company, and it is

[6]*Ibid*,hlm.233
[7]Rebecca M.M. Wallace,*op.cit*,p.237.

unpredictable that there will be an example of the failure of the national banking orientation system, circumstances technically impossible to circumvent by the driver, such as sudden movement of people and / or animals, damage to machines that greatly affect the company's activities.

Nonperforming loans are loans classified as substandard loans, doubtful loans and bad debts. The term "non-performing loans" has been used by Indonesian banks as a translation of the problem loan which is a term commonly used in the international world. Another term in English commonly used for the term problem loans is non-performing loan.

Even if the bank in giving credit through the principle of prudence, the risk of the occurrence of problem loans is a reality, and the bank will make every possible preventive effort to prevent credit is not a problem. If there is a problem loan then the bank will conduct credit rescue, if the effort is not successful also rescue credit, then the bank will take the effort of billing.

As an effort to minimize the potential loss from non-performing loans, banks can also restructure credit for debtors who still have business prospects and ability to pay after restructuring. For exposure to the provision of funds that have no business prospects and ability to pay or have been categorized as a standstill and the bank has made various attempts to recover the provision of such funds, the bank can delete book or write off.

Bank Indonesia regulations on non-performing loans caused by natural disasters in Indonesia. PBI Number 7/5 / PBI / 2005 concerning Special Treatment of Commercial Bank Credit after National Disaster in Province of Nangroe Aceh Darusalam and Nias (North Sumatra Province) through credit restructuring. PBI No. 7/17 / PBI 2015 on the special treatment of Rural Banks (BPR) in the aftermath of natural disasters in Nangroe Aceh Darusalam and Nias Provinces by rescuing credits through restructuring, reconditioning and rescedulling.

PBI Number 8/10 / PBI / 2006 Concerning the special treatment of credit in Special Province of Yogyakarta (DIY) and the surrounding area after the eruption of volcano through credit restructuring. PBI Number 8/15 / PBI / 2015 Concerning the special treatment of loans to banks for certain areas classified as disasters through credit restructuring. Through credit restructuring 11/27 / PBI / 2009 About the amendment of PBI 8/10 / PBI / 2006 Concerning the special treatment of credit in D.I.Jogjakarta and its surroundings through credit restructuring.

Based on Bank Indonesia regulation on banks in several regions in Indonesia experiencing natural disasters is taken a persuasive effort that can improve the condition of debtors after the disaster and is expected to still be able to return the credit to the bank.

Efforts to repair or smoothen credit that was originally classified as doubtful or stuck, the bank took action to rescue credit that was originally classified as doubtful or stuck to become smooth again. Credit rescue actions by banks are listed or set forth in the credit rescue contract. The form of credit rescue can be:

1. Rescheduling,namely changes in credit terms that only concern the payment schedule and / or timeframe;
2. Reconditioning,namely a partial or complete change of the terms of the credit, which is not subject to changes to the repayment schedule, duration, and / or other terms to the extent that it does not concern the maximum change in credit balances.
3. Restructuring, is changes to the terms of credit concerning: the addition of bank funds and / or the conversion of all or part of the interest arrears to the new principal, and / or the conversion of the whole or part of the credit to the participation in the enterprise, which may be accompanied by rescheduling and / or requirements back.

3. Principles Used In Debt Credit Settlement Due To Force Condition *(overmach)*.

Pancasila is the foundation of the state, the ideology of nation, and the way of life the Indonesian people. Pancasila as the nation's life view is interpreted through sociology and philosophy, Pancasila as the national ideology using the founding interpretation of the nation, and Pancasila as the basis of the state using juridical and philosophical interpretation.

In Indonesia, the philosophical foundations are Pancasila which means five precepts, or five principles in which each sila animates the other precepts. The five precepts are used as ideological philosophical basis to realize the four goals or ideals of the ideal state[8],protecting the entire Indonesian nation and the entire Indonesian blood sphere, improving the general welfare, and educating the life of the nation and state, and participating in the implementation of world affairs based on freedom, eternal peace and social justice.

Pancasila as the basis of the state as well as the philosophy of life of the Indonesian nation is essentially a value systematic, fundamental and comprehensive[9]. The precepts of Pancasila are whole, one and complementary. Every Pancasila precepts are imbued with the other precepts. When described, the value of Pancasila shaped pyramidal round and intac.

The value of Pancasila is objective and subjective, it means that the value of Pancasila is universal, namely: divinity, humanity, unity, democracy, and justice. The objective value of Pancasila is the essence of its meaning which is a value, and that value will

[8] Jimli Asshiqie. *Op cit* hal 15

[9] Dora Kusumastuti. 2016.*Developing Subsidized Mortgage Agreement Based on the Justice Values of Pancasila(Indonesian State Philosophy), Journal of Advanced Research in Law and Economics*, (Volume VII, Winter), 8(22): 2079–2085,DOI: 10.14505/jarle.v7.8(22).19:http://journals.aserspublishing.eu/jarle/issue/archive

always exist along the mass, and the Pancasila contained in the Preamble of the 1945 Constitution qualifies as the fundamental principle of the rule, thus constituting a source of positive law in Indonesia.[10]

Conversely the subjective value of Pancasila can be interpreted that the existence of Pancasila values is dependent on the Indonesian nation itself. This understanding can be explained as follows: Pancasila values arise from the Indonesian nation(causa materialis)and the value of Pancasila is the philosophy (view of life) of the Indonesian nation is the identity of the Indonesian nation, and the value of Pancasila values contained in the seven spiritual values.[11]

Pancasila has an abstract and general understanding, and is universal, unchanging always fixed, and will remain attached to the survival of the nation and the State. Notonagoro[12]the meaning of justice contained in the fifth precept is: a) the state wants to bring about social justice for all the people of Indonesia, b) the purpose of the State is to promote the general welfare, c) the economy is constituted as a joint effort based on the principle of kinship, d) the poor are kept by the State; e) private proprietary rights are recognized, and their utilization shall not be contrary to the public interest; f) National development aims to achieve a just and prosperous society; g) every citizen shall be entitled to enjoy the proceeds of development fairly in accordance with the value of humanity; h) avoid the democratic ethic of monopoly, monopoly, monopsony; i) realize a more harmonious, just and equitable inner and outer welfare.

The meaning of this fifth precept is a just and prosperous society of the body of the born and the inner. In the form of the implementation of the fifth precept is that every citizen should develop a fair attitude toward others, maintain balance, harmony, harmony between rights and duties and respect for the rights of others.

In the settlement of non-performing loans due to force majeour in some areas in Indonesia such as earthquake in Jogjakarta, Lapindo mudflow event, tsunami in Aceh and some forced conditions that ever happened in Indonesia using 3R policy (Restructuring, Reconditioning and Resceduling).

Rescheduling, ie changes in credit terms that only concern the payment schedule and / or timeframe; Re-reconditioning requirements, changes in some or all of the credit terms, are not settled on changes to the repayment schedule, duration, and / or other terms as long as they do not concern the maximum change in credit-credit balances. Restructuring of restructuring, ie changes in terms of credit concerning: the addition of bank funds and / or the conversion of all or part of interest arrears to new principal loans, and / or conversion of all or any part of the credit to inclusion in the company, which may be accompanied by rescheduling and / or return requirements.

The principle of pacta sunt servanda principle which is distorted by the principle of rebus sic stantibus that "the Treaty determines the subsequent actions to carry out in the future must be interpreted subject to requirement that environment and circumstances of the future remain the same." Based on the provisions of principle that agreed will be subject to change in the event of changing circumstances.

3R Principles born because of the value of social justice contained in the fifth principle of Pancasila, which means social justice for all Indonesian people.

In principle, the funds borrowed by the bank to debtor is third parties funds that must be returned by the debtor, but because there is state of force on the creditors of the existence of a policy that is easing the obligations of debtors without having to neglect the obligation to pay the loan to the bank.

Conclusions

1. The basic principle of pacta sun servanda which binds the parties in a credit agreement will be disregarded if there is a fundamental condition of force, and the principle to be used is the principlerebus sic stantibus.

2. Rebus sic stantibuspriciple which is used in the form of rescheduling,namely changes in credit terms that only concern the payment schedule and / or timeframe; reconditioning, that is, a partial or complete change of the terms of the credit, which is not limited to changes to the repayment schedule, duration, and / or other terms to the extent that it does not concern the maximum change in credit-credit balances. Restructuringnamely changes in credit terms that only concern the payment schedule and / or timeframe; reconditioning, that is, a partial or complete change of the terms of the credit, which is not limited to changes to the repayment schedule, duration, and / or other terms to the extent that it does not concern the maximum change in credit-credit balances. Restructuring, the change in credit terms concerning: the addition of bank funds and / or conversion of all or part of the arrears of interest will be the principal new loans, and / or conversion of all or part of the credit to investment in the company, which may be accompanied by rescheduling and / or return requirements.

3. The 3R principle used as a policy by Bank Indonesia comes from the 5th principle of social justice for all Indonesians, so it is called the principle of social justice. With the principle of social justice is expected to provide opportunities for debtors to

[10]Kaelan, *op cit* hal 64
[11]Lihat Darji Darmodiharjo, *Pokok Pokok Filsafat Hukum*, Gramedia Pustaka Utama,Jakarta,1996,Hal 55.
[12] Suhadi *op cit* hal 11

be able meet obligations to creditors in the presence of policies in the form of reordering, scheduling and credit requirements in order to realize a just and prosperous society.

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