PROBLEMS OF IMPLEMENTATION OF FIDUCIARY GUARANTEE IN CONSUMER FINANCING AGREEMENTS

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ABSTRACT

The world of law and business is an inseparable part, both civil and criminal, because in the implementation of business profit is the goal to be achieved. To achieve this profit goal, the parties are often suspected of committing fraud and violations or default, as well as in the field of consumer financing, the relationship between creditors and debtors often occurs in disputes.

Problems arise when installment payments are delayed or even come to an act of deliberately diverting the vehicle to another party without the approval of the financing institution. The creditor in carrying out the current execution must submit a decision to the Court, the problem is what if based on a court decision the object of financing can be executed but the debtor does not heed the court's decision.

Keyword: *Consumer financing, default*

1. INTRODUCTION

The development of the national automotive world and solutions to the high demand for motorized vehicles and other consumer goods have made the financial business of consumer finance institutions an option. Several national banks have also expanded their business by opening this business unit. The consumer finance business is still in great demand by the public because of the ease of requirements.

One example of an activity that includes the business sector of a financial institution is a finance company which is a non-bank financial institution.

The forms of business activities of the Financing Company include:

1. Lease (leasing)
2. Factoring (Factoring)
3. Business credit card (credit card)
4. Consumer financing (consumer finance)
5. Venture capital (venture capital)
6. Securities trading

The reason for effective and efficient services is that finance companies always use standard contracts, this is because the number of consumers who are given credit facilities is very large, so it will take a long time if they do not use standard contracts.

In Article 1313 of the Civil Code it is stated that:

"Agreement is an act by which one or more persons bind themselves to one or more persons".

Furthermore, Article 1320 of the Civil Code states 4 conditions for the validity of the agreement, namely:

1. There is agreement of those who bind themselves,
2. The ability to make engagements,
3. certain things,

4. A lawful reason.

Article 1320 of the Civil Code which is the principle of consensualism, namely where the agreement is valid if there is an agreement. This is related to Article 1338 paragraph (1) of the Civil Code which is also the principle of freedom of contract, so that the agreement made is binding on the parties because it creates rights and obligations for the parties themselves.

A good assessment of the party who will carry out the contents of the agreement is appropriate. Where propriety is a good faith that must be fulfilled in applying the principle of freedom of contract. This has been regulated in Article 1338 paragraph (3) of the KUH Per.

The basis of good faith contains the understanding that the parties have the freedom to make an agreement according to their wishes, but good faith limits the agreement.

The implementation of consumer financing agreements, in general, the agreement is drawn up in the form of a standard agreement. Where a clause in a standard agreement is made by one party and the other party only signs the agreement that has been made. If the party, in this case the consumer or debtor, does not sign the standard agreement then the consumer will not obtain the goods that are the object of the agreement. Consumer financing is an agreement based on the principle of freedom of contract as the basic principle of contract law. As stipulated in Article 1338 Juncto Article 1320 of the Civil Code.

In implementing the agreement, business actors generally have a stronger position than consumers who tend to have a weaker position. So that for the weak party only has two choices, namely if the consumer needs the services or goods offered to him, then he must agree to all the terms and comply with the proposed agreement regardless of whether the consumer knows and or understands the clauses of the agreement or not, and if they do not agree or there is no agreement on the conditions put forward to them, then they must cancel or not make an agreement with the business actor, so in general the business actor is not clear in explaining the contents of the agreement.

Standard agreements are often found to include clauses that regulate how to resolve disputes and exoneration clauses, namely clauses containing conditions that limit or even completely eliminate a responsibility that should be borne by the business actor. buy installments and rent. The arrangement is not explained in detail regarding the position of buyers and tenants.

In practice in the agreement, the leasing institution or finance company has a strong position when compared to the buyer or its customers, this is due to the risk that the finance company does not want to take if there are obstacles to not paying the installments that have been determined by both parties. Then a clause was made that gave the financing company the right to demand and withdraw the goods according to the agreement it did. If there is a problem, it is certain that what is drawn is the object of the agreement, whether carried out by employees of the company or using the services of a third party. The problem that then arises is that with the object of the collateral (motorcycle) being withdrawn, the debtor or consumer who wants the motor back to be his property, the consumer is given the choice:

1. Paying off all arrears (installments and fines) plus execution administration costs (repo fee)
2. Consumers can still continue their installments by paying arrears, fines and plus an execution administration fee (repo fee), so consumers don't have to pay off all outstanding obligations (Continue Pay)

The problem that arises and develops at this time is that creditors in making withdrawals of the object of the agreement are increasingly blind, they cooperate with external debt collectors who do not understand the debtor's payment history, they only know that the debtor is late and withdraws the object of financing wherever they are. The basis for making a withdrawal can actually be justified if the agreement has been registered until the issuance of a fiduciary certificate, because the value is the same as a court decision, there is executive power and has a parate of execution . The reality is that in one branch office of a finance company the number of bad loans reaches thousands, so that withdrawals made on the road are more effective, because generally the object of financing has been transferred, and if it has to go through a fairly long civil court process, it is not comparable to the value of the object of financing, especially often the object of the agreement has been stripped down or the spare parts have been replaced with fake ones.

The longer the anxiety arises in the community because the withdrawals made tend to use violence and threats, where it has entered the realm of criminal law, on that basis then the state tries to be present by giving directions in the form of the Decision of the Constitutional Court (MK) Number 18/PUU-XVII/2019 against consumer financing institutions, in the decision the creditor must obtain a court order in withdrawing the object of financing, or the creditor can make a direct withdrawal if, first , the debtor voluntarily surrenders his vehicle, the second debtor admits that he is in default.

2. LITERATURE REVIEW

The provisions of Article 1233 of the Civil Code begins with the provisions of Book III of the Civil Code by stating that the engagement was born because of an agreement or because of the law.
Furthermore, in the next provision, namely in article 1234 of the Civil Code, it is stated that:
Each engagement is to give something, to do something, or not to do something.
From the two simple formulations, it can be said that the engagement creates obligations to certain individuals or parties which can be manifested in one of the following three forms, namely:
1. Giving something;
2. Doing something; and
3. Don't do anything.
The term obligation itself in law is known as achievement, then the party with the obligation is called the debtor and the party entitled to demand the implementation of the obligation or achievement is called the creditor.
Although not the most prominent, in general, which is in tune with the characteristics of Book III of the Civil Code which is open, the engagement born of the agreement is an agreement that is widely used and which also turns out to be widely studied by legal experts and widely developed into regulations. positive law rules written by legislators.
The definition of a limit agreement has been regulated in Article 1313 of the Civil Code which states that an agreement is an act by which one or more people bind themselves to one or more other people.
The definition of an agreement based on Article 1313 of the Civil Code is actually incomplete, because it only regulates a unilateral agreement and is also very broad. The definition of an agreement has been interpreted by several experts, namely:
According to R. Setiawan, the definition of an agreement (agreement) is a legal act in which one or more people bind themselves or bind themselves to one or more people.
Meanwhile, according to Abdul Kadir Muhammad, reformulated the definition of Article 1313 of the Civil Code as follows, that what is called an agreement is an agreement between two or more people who bind themselves to each other in order to carry out something in the field of wealth.
If you pay attention to the formulation given in Article 1313 of the Civil Code, it implies that from an agreement comes the obligations or achievements of one or more people (parties) to one or more other people (parties), who are entitled to these achievements. This gives an understanding that in an agreement there must be two interrelated people where one party is the party who is obliged to perform (the debtor) and the other party is the party entitled to the achievement (the creditor). Each party may consist of one or more persons, and with the development of legal science, the party may also consist of one or more legal subjects.
Furthermore, in Articles 1314 and 1313 of the KUHPer, if it is further explained by stating that for the achievements that must be made by the debtor in the agreement, the debtor who is obliged to do so may request that the counter-achievement of his opponent be made or with terms with or without burden.
The two formulations above provide meaning for legal science, which clearly and in detail describe that basically an agreement can give birth to a unilateral engagement (where only one party is required to perform) and a reciprocal engagement (with both parties performing).

Types of Agreement

Agreements can be distinguished in various ways. The differences are as follows:
a. Reciprocal agreement;
An agreement that creates basic obligations for both parties, for example a sale and purchase agreement.
b. Free agreement and agreement on burden.
A free agreement is an agreement that gives a profit to one of the parties, such as a grant.
An agreement on burden is an agreement for the performance of one party, there is always counter performance from the other party and there is a relationship between the counter performance according to the law.
c. Named agreement (benoemd specified) and unnamed agreement (onbenoemd unspecified).
A named (specific) agreement is an agreement that has its own name. The meaning is that the agreements are arranged and given names by the law makers, based on the types that occur the most every day, the most named agreements are found in Chapters V to XVIII of the Civil Code.
Outside of named agreements, namely agreements that are not regulated in the Civil Code but are found in the community. The number of these agreements is not limited. The birth of this agreement is based on the principle of freedom to enter into agreements or autonomous parties that apply in contract law, one example of an agreement is a lease agreement. buy.
d. Mixed agreement.
A mixed agreement is an agreement that contains various elements of the agreement, for example hotel owners who rent out rooms (lease) but serve food (buy and sell) and also provide services.
There are various understandings of this mixed agreement, including:

1. The first view, says that the provisions of the special agreement are applied analogously, so that every element of the special agreement remains (contractus sui generis).
2. The second understanding, says that the provisions used are the provisions of the most decisive agreement (absorption theory).
3. Third understanding, says that the statutory provisions applied to the mixed agreement are the statutory provisions that apply to it (combination theory).

e. Obligatory Agreement.

Is an agreement between parties who bind themselves to make submissions to other parties (agreements that give rise to an engagement). According to the Civil Code, the sale and purchase agreement alone has not resulted in the transfer of property rights from the seller to the buyer. In order to transfer ownership rights to the object, another institution is still needed, namely submission. The sale and purchase agreement is called an obligatory agreement because it imposes obligations (obligatory) on the parties to make the delivery (levering). The submission itself is a material agreement.

f. Material agreement (zakelijke overeenkomst).

A material agreement is an agreement that the rights to the object are transferred or handed over (transfer of title) to another party.

g. Consensual agreements and real agreements.

Is an agreement between the two parties who have reached an agreement of will to enter into an engagement. According to the Civil Code, this agreement already has binding force (Article 1338 of the Civil Code), however, in the Civil Code there are also agreements that only apply after the delivery of goods, such as an agreement for safekeeping of goods (Article 1694 of the Civil Code), borrowing and use (Article 1740 of the Civil Code).

h. The special agreements are :

1. Liberatoir Agreement; namely the agreement of the parties to free themselves from existing obligations, for example debt relief (kwijschelding) Article 1438 of the Civil Code.
2. A proof agreement (bewijsovereenkomst) is an agreement between the parties to determine what evidence applies between them.
3. Chance agreement for example insurance agreement Article 1774 of the Civil Code.

Public agreements, namely agreements that are partially or wholly controlled by public law because one party acts as the ruler (government), for example, service bond agreements and government goods procurement agreements (Keppres No.29/84).

Valid Terms of Agreement

Every agreement has a foundation of formation. Legal science recognizes four main elements that must exist so that a legal act can be called a (legitimate) agreement, the four elements are regulated in Article 1320 of the Civil Code, namely:

1. Agree on those who bind themselves.

The agreement of those who bind themselves implies that the parties who make the agreement have agreed or there is a conformity of will or mutual agreement of the will of each party born by the parties without coercion, error and fraud. Which consent can be expressed expressly or tacitly.

2. The ability to make an agreement.

In general, people are said to be capable of carrying out legal actions when they are adults, meaning they are 21 years old or married even though they are not yet 21 years old.

According to the provisions of Article 1330 of the Civil Code, those who are said to be incapable of making agreements are:

1. Immature people.
2. Those who are put under custody.
3. Women in matters stipulated by law have been prohibited from making certain agreements.

Both minors and those who are placed under guardianship when carrying out legal actions must be represented by their guardians. The provisions concerning a married woman or wife who in carrying out legal actions must obtain permission from her husband are declared no longer valid in Articles 108 and 110 of the Circular Letter of the Supreme Court number 3 of 1963 which is strengthened by Article 31 of Law Number 1 of 1974 concerning Marriage.

3. A certain thing.

The third condition for the validity of the agreement is that an agreement must be about a certain thing which is the subject of the agreement, namely the object of the agreement.

Based on Article 1333 of the Civil Code, an agreement must contain the principal of an item whose type has been determined and does not become an obstacle that an item is not specified or certain, provided that the amount can

then be determined or calculated. Furthermore, in Article 1334 of the Civil Code it is also stated that goods that will only be available at a later date can be the subject of an agreement . Thus it is clear that what can be the subject of the agreement are goods or objects that already exist or goods that will only exist.

4. A lawful cause.

A halal reason or causa referred to in Article 1320 of the Civil Code is not a reason in the sense of causing or encouraging people to enter into an agreement, but rather a reason in the sense of the content of the agreement itself, which describes the purpose to be achieved by the parties, is it contrary to public order and decency or not.

As a result of the law, an agreement that contains causes that are not halal is null and void by law. Thus, there is no basis to demand the fulfillment of the agreement before the judge because from the beginning it is considered that there was never an agreement. Similarly, if the agreement is made without causa then it never existed (Article 1335 of the Civil Code).

Basics of the Agreement

According to Gunawan Widjaya and Ahmad Yani, the general principles in the agreement include:

a. Fundamentals of freedom of contract

Every agreement made legally applies as law to its makers. This formulation can be found in Article 1338 paragraph (1) of the Civil Code, which is reaffirmed by the provisions of paragraph (2) which states that the agreed agreement cannot be unilaterally withdrawn by one of the parties.

The agreement without the consent of the opposing party in the agreement, or in cases where the law states that there is sufficient reason for that. In general, legal scientists relate and treat the provisions as stipulated in Article 1320 of the Civil Code in conjunction with Article 1338 paragraph (1) of the Civil Code as the principle of freedom of contract in contract law.

b. Principle of Consensuality

The principle of consensuality is the embodiment of the open system book III of the Civil Code. Contract law provides the widest opportunity for the parties to make an agreement that will bind them as law, as long as and as long as an agreement can be reached by the parties. An oral agreement between the parties has bound the parties who have agreed orally and because this provision regarding an oral agreement is regulated in Article 1320 of the Civil Code, the formulation is considered as the basis for the principle of consensuality in contract law.

c. Personnel Principle

We can find this personnel principle in the formulation of Article 1315 of the Civil Code which is further emphasized by the provisions of Article 1340 of the Civil Code, from the two formulations we can see that basically the agreement will only give birth to rights and obligations. obligations between the parties who make it. Basically, a person cannot bind himself for the benefit or loss of a third party, except in the event of an underwriting event (in such case the guarantor remains obliged to form an agreement with whom the insurance will be given and in such case the guarantee agreement will bind the insurer with the third party). borne in the insurance agreement). This means that the agreement made by the parties, by law will only bind the parties who made it.

End of Agreement

The agreement ends because:

a. It is determined by the parties themselves in the agreement, meaning that the agreement will end because the parties want it
b. Ends by law, meaning that the validity limit of an agreement has been determined by law. For example, in Article 1066 of the Civil Code that the heirs can enter into an agreement not to split the object of inheritance or property within a certain period of time, which is binding only for 5 years.
c. The parties or the law determines that the agreement ends with a certain event, which means Overmatch in articles 1244 and 1245 of the Civil Code. Another example is in article 1603 of the Civil Code that the work agreement will end with the death of the worker.

3. METHODS

This research is a field research or often called juridical law research empirical. The specifications used in this research are in the form of case study research with an analytical descriptive description of what is currently applicable and what should apply.

The specifications in this study are descriptive, because the data obtained from the research tries to provide an overview of the process and the problems that exist in the implementation of the leasing agreement and analyze it so that a general conclusion is drawn.

Approach Method

Based on the problem formulation and research objectives, the approach method used is the empirical juridical approach. The empirical juridical approach method is an approach that examines secondary data first and then continues by conducting primary data research in the field.

The juridical factor is a set of rules of civil law in general and regulations related to the field of contract law as a branch of legal science and is closely related to the material of this research, while the empirical factor is consumer finance companies that enter into agreements with consumers.

Research Subjects and Objects

The subjects and objects in this study are consumer finance companies, as research subjects because they are companies that enter into consumer financing agreements. As the object of research because in this company the authors get the data.

The respondents in this study are as follows:

a) Finance Company Employees

b) Debtor

Data Types and Sources

The data collected includes primary data and secondary data.

1) Primary data, is data obtained directly from the source, observed and recorded for the first time. In this study, primary data were collected by means of interviews conducted with company leaders, the legal department of leasing companies, consumers who experienced problems according to predetermined themes as respondents in this study. Interviews were conducted using a list of questions. The preparation of this list of questions is expected to facilitate the question and answer process and obtain data and information.

2) Secondary data, is the acquisition of data by document study which includes:

a. Primary Legal Materials are binding legal materials consisting of:

1. Code of Civil law;
2. Presidential Decree Republic of Indonesia Number 61 of 1988 concerning Financing Institutions .
3. of Finance Decree Republic of Indonesia Number : 446 /KMK.01 7/1988 concerning Provisions and Procedures for Implementation of Financing Institutions .
4. of Finance Decree Republic of Indonesia Number 172 /KMK.0 6 /200 2 about Financing Companies .
5. Financial Services Authority Regulation, POJK No:1/POJK.07/2013

b. Secondary Legal Materials are legal materials that provide explanations on primary legal materials consisting of books on consumer financing agreements, fiduciary guarantees.

Data collection technique

As for the techniques in obtain data used by the author, namely:

a . Primary data obtained from:

Field data collection is done by means of interviews, both structured and unstructured. Structured interviews are conducted based on the list of questions that have been provided by the researcher, while unstructured interv iews are interviews conducted without being guided by questions, but are expected to develop according to the answers and the ongoing situation.

Observation is, before conducting interviews, researchers make observations on the company Financing

c. Secondary Data

Secondary data is obtained from browsing library materials such as books and other laws and regulations

Data analysis technique

Data analysis in this study was carried out qualitatively, ie all the data obtained were then compiled systematically and analyzed qualitatively, to achieve clarity on the issues to be discussed. Qualitative data analysis is a research method that produces descriptive data analysis, namely what is stated by the respondent in writing or verbally and also his real behavior is researched and studied in its entirety.

The definition of analysis is intended as an explanation and interpretation in a logical, systematic manner. Systematic logic shows how to think inductively and follow the rules in writing scientific research reports. After the data analysis is complete, the results will be presented descriptively, namely by telling and describing what is in accordance with the problems studied. From these results then a conclusion is drawn which is the answer to the problems raised in this study .

4. RESULT

Implications of the Decision of the Constitutional Court (MK) Number 18/PUU-XVII/2019 on consumer finance institutions.

The decision of the Constitutional Court (MK) Number 18/PUU-XVII/2019 states that Article 15 paragraphs (2) and (3) as well as the Elucidation of Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees apply conditionally unconstitutional). That is :

1. The terms of default/breach of contract must be agreed between the creditor and the debtor.
2. if the debtor defaults/breach of promise, the debtor must voluntarily submit the guarantee.
3. If the debtor cannot submit the guarantee (obedient to submitting the guarantee) it cannot be forced, but must go through a lawsuit to the district court/execution of the fiduciary guarantee certificate.

So that the Constitutional Court's decision has required the parties to the consumer financing agreement in making a fiduciary guarantee deed (notary) agreement to make the following clauses:

1. breach of contract/default agreement.
2. the debtor's agreement and voluntarism to submit collateral to the creditor if the debtor is in default/default.

so there must be a change in the fiduciary guarantee deed relating to the three things mentioned above.

The opinion of the APPI Chairman on the infobanknews.com page on 11 February 2020 said that the Constitutional Court (MK) decision related to the object of Fiduciary Guarantee is not "doomsday" for leasing companies (multi). Multi-finance companies that involve a business of Rp443 trillion and involve the motorcycle and car industries that are full of labor must be strengthened. The Constitutional Court's decision related to fiduciary seems to emphasize that the execution of guarantees must go through the courts. In fact, leasing can still attract vehicles.

According to Suwandi Wiratno, General Chairperson of the Association of Indonesian Financing Companies (APPI), the Constitutional Court's decision makes it clearer. The Constitutional Court's decision clarifies Article 15 of Law (UU) No. 42 of 1999 concerning Default or Default between Debtors and Creditors. So, leasing can still attract vehicles from bad debtors who have previously been warned. With a note, the procedure has been carried out. Currently there is confusion in the community after the Constitutional Court Decision No. 18/PUU-XVII/2019 dated January 6, 2020 regarding Fiduciary, that it is as if fiduciary rights holders (leasing) are not allowed to carry out the execution themselves, but must submit an application for execution to the district court.

In fact, that's not the case. Leasing companies can still withdraw vehicles from bad debtors without trial. The Constitutional Court's decision cannot be read in pieces. There is a wide scope for executing bad debtor's guarantees. Just look at the decision of the Constitutional Court, leasing companies are still allowed to carry out executions without going through a court on the condition that the debtor admits that there is a default. "As long as the fiduciary rights giver (debtor) has acknowledged the existence of a 'breach of promise' (default) and voluntarily surrenders the object that is the object of the fiduciary agreement, then it becomes the full authority of the fiduciary recipient (creditor) to be able to carry out his own execution (parate execution)" . That's the decision of the Constitutional Court.

5. CONCLUSIONS

Based on the research and discussion above, the implementation of rights and obligations between creditors and creditors may still have problems or have positive and negative consequences, depending on each party in responding and interpreting. The easier conclusion is:

1. Creditors must obtain Court permission before executing the object of financing
2. Self-execution without court permission may be carried out if the debtor submits voluntarily
3. Good faith remains the main guarantee in consumer financing agreements.

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