THE IMPLEMENTATION OF THE FREEDOM OF CONTRACT PRINCIPLES ON THE BANK STANDARD CONTRACT

I Gede Ketut Suharta Yasa, SH.,M. Kn

Law Science Program, Udayana University,
Denpasar Bali, INDONESIA.

igksuhartayasa@yahoo.co.id

ABSTRACT

In the common banking practice Indonesia, the commonly-used bank credit agreement is the standard contract, of which clauses have been prepared in advance by the banks. Thus the customers as potential debtors only have the option to accept the entire contents of the agreement or are not willing to accept the clauses either partially or wholly; resulting customers will not be eligible for the credits.

It is expected that credit agreements made with specific clauses can provide the security for the banks because public funds saved on the bank needs to be protected, and it should also be able to protect the customers as the debtor and to some extents, they are often in a weak position when faced with banks as creditors.

Keywords: Principles, freedom of contract, standard contract

INTRODUCTION

The term credit is sometimes likened to a debt or a loan, it has been known by the people since people recognize money as means of payment. At first a credit agreement was made orally and recognized by the each of the parties. Even then, without any consideration from the party giving the debt (creditors), provided that the debtor (debtor) may return the amount he or she owed. But along with the complexity of the problem, credits are also developing new patterns that no longer based on a mutual trust in the sense of mere humanity, but also it is more on the economic values. Activity of lending and borrowing money is now considered something very important by most people with the aim to improve their living standards and it can help the business activities being run by the community.

Bank is a financial institution specified by law to function as a supplier of credit to the public. Credit facilities extended by banks are better known by the general public. Indonesian Banking in the conduct of its business is based on economic democracy with the use of the precautionary principle. Its main function is as a collector and regulator of public funds, as governed by Article 3 of Law No. 7 of 1992 in conjunction with Law No. 10 of 1998, to carry out these functions, the efforts made by banks include:

a. Collecting funds from the public in the form of deposits e.g. demand deposits, time deposits, savings and other equivalent forms.

b. Providing credit.

c. Issuing debt recognition.

d. Conduct foreign exchange operations.

e. Transferring money either for themselves or for the benefit of customers.

f. Conducting receivable factoring, credit cards, etc.[1]

[1] Muhammad Djumhana, 2000, *Hukum perbankan di Indonesia*, PT. Citra Aditya Bhakti, Bandung, h. 288.

ISSN: 2307-3721, e ISSN: 2307-3713

Banking institutions as one of the financial institutions have a strategic value in the economic life of a country. The institution is intended as an intermediary of the parties that have surplus of funds with the parties of lack of funds. Thus the bank will be engaged in credit activities, and a variety of services provided, the bank serving the financing needs as well as the launch mechanism payment systems for all sectors of the economy. [2] Parties of surplus of funds have a relationship of mutual reciprocity i.e. the parties of surplus of loan expect to benefit from funds loaned while the parties of lack of funds may fulfilled their needs by obtaining loans.

Credit has also been manifested in a written agreement and ideally the agreement would have to be agreed by both parties that contains all the desires and all the mechanisms from the beginning to the end of the agreement, as well as the division of responsibilities of each if something happens outside of what has been agreed upon. The written credit agreement indeed gives more legal certainty for the parties. But in addition to that advantage, many debtors actually complain about credit agreements they made.

By the time the bank and the debtor sign the credit agreement, the credit agreement is binding on both parties, and it becomes the law for both parties. In terms of the implementation of the agreement as the law for those who entered into the agreement, has put the agreement into law. In this case, Roscoe Pound pointed out that the law is a balance.[3]

Article 1321 of the Civil Code stipulates that an agreement is reached due to an oversight on the nature of the goods which become the subject of the agreement or by force or fraud; it is considered there is no agreement. So that the agreement should take place in circumstances of the parties that are free and fair, no fraud, no coercion and no oversight.

To reach an agreement between the parties then in the delivery of each party will be done in a free state, and there is a process of seeking rapprochement between the will of the parties in the form of negotiations. Negotiation phase is a "crucial point" to formulate an exchange of rights and obligations of the parties that will be binding and obligatory to be fulfilled.[4]

Such agreements are often done by the bank against its debtors, the agreement is an agreement that is in the Dutch language is called the *standard voorwarden* or in English law is called the standard contract. [5] In Indonesia there is a term of *perjanjian baku*. At this agreement, the provisions in it are more determined by parties who have a stronger bargaining position than the other party, [6] while the party of lower bargaining power, it is unlikely to make changes to the provisions contained in the draft agreement. In a sense that the party receiving the offer is not in the position to choose from a vast selection but only to choose to accept or reject the offer.[7]

Faced with such circumstances, potential debtors are expected in the conditions of take it or leave it without any freedom for prospective debtors to decide their choices. That is to say if

---

[2] Ignasius Ridwan Widyadharma, 1997,*Hukum Sekitar Perjanjian Kredit*, Badan Penerbit Universitas Diponegoro, h.1

[3] Darji Darmodiharjo dan Shidarta,1996, *Pokok-pokok Filsafat Hukum Apa dan Bagaimana Filsafat Hukum Indonesia* (Edisi Revisi), PT Gramedia Pustaka Utama, Jakarta, h. 130

[4] Agus Yudha Hernoko,2010, *Hukum Perjanjian Asas Proposionalitas dalam Kontrak Komersial*, Kencana Prenada Media Group, Jakarta, h. 148

[5] Mariam Darus Badrulzaman, 1994, *Aneka Hukum Bisnis*, Alumni, Bandung, h. 46.

[6] Ibid

[7] M Faiz mufidi, Disertasi, *Perjanjian Alih Teknologi Dalam Bisnis Frenchise sebagai Sarana Pengenbangan Hukum Ekonomi*, h. 13

ISSN: 2307-3721, e ISSN: 2307-3713

there is a deal in which the agreement occurs, it is merely because they had to. Approval given by coercion is contradiction in terms. Coercion shows no agreement.[8]

Not to mention the presence of the exoneration clause which further minimizing or even removing the responsibility of banks as creditors. Finally potential debtors "reluctantly" have to sign the contracts with the hope that the loans will be able to resolve economic problems and rerun their businesses which had been halted. But in reality it is only a temporary relief.

Formulation of the Problem

Based on the conceptual background that has been delivered, the problem posed is: Is the standard contract in the granting of credit already complies with the principle of freedom of contract?

LITERATURE REVIEW

Definition of Agreements and terms of validity of an agreement

Agreements and legislations are the sources of engagement. As a source of engagement that all of the terms of an agreement is a prerequisite for the engagement because of the agreement. So that any agreement made, the reference is the general provision of engagement as set forth in Article 1233 until 1456 of BW.[9]

Definition of agreement is generally defined in Article 1313 of the Civil Code, which states that "An agreement is an act by which one or more persons bind themselves to one or more people". In addition to the general definition that exists in the Civil Code, there are also some definitions from the scholars on agreement.

According to Subekti, agreement is an event where someone promises to implement something. [10] While Wirjono Projodikoro, an agreement is defined as a legal act concerning possessions between the two sides, in which one party promises or is considered promises to do something or not to do something, while the other party has the right to demand the implementation of that promise. [11] Meanwhile, according to M. Yahya Harahap, agreement (*verbintenis*) implies a legal relationship of wealth or possession, between two or more people who give the power of the rights on one or more persons who earn performance and at the same time require the other party to undertake the performance.[12]

Based on the description above, it can be concluded that the agreement or contract is an agreement between two parties or more on any particular matters. Agreement made is an agreement over the common will or interest as a consensus over the the fulfillment of the will of each party on a matter which is permitted or not prohibited by law (*rechmatigedaad*).

Understanding of the meeting point of the will indicates that the will of the parties must be declared. Disclosure of the will and its remarks is qualified as offer and acceptance process in the agreement. In the process of offer and acceptance, it is needed the attainment of a shared perception of the object of agreement. It really depends on the will and the declaration of the will.

---

[8] Sutan Remy Sjahdeini, 2009, *Kebebasan Berkontrak dan Perlindungan yang Seimbang Bagi Para Pihak Dalam Perjanjian Kredit Bank di Indonesia*, PT. Pustaka Utama Graffiti, Jakarta, h. 52 (Sutan Remy Sjahdeini I)

[9] Ahmad Miru dan Sekka Pati, 2008, *Hukum Perikatan Penjelasan Makna Pasal 1233-1456BW*, PT. Raja Grafindo Persada, Jakarta, h.1

[10] R. Subekti,1975, *Hukum Perjanjian*, Intermasa, jakarta , h.1

[11] Wirjono Prodikoro,1960, *Asas-asas Hukum Perjanjian*, Sumber, Bandung, h. 6.

[12] M. Yahya Harahap,1985, *Segi-segi Hukum Perjanjian*, PT. Intermasa, Jakarta, h.5

ISSN: 2307-3721, e ISSN: 2307-3713

Not all of the will of the parties to the agreement will result in an agreement. Only those which meet certain requirements would lead to agreement. Therefore, Article 1320 of the Civil Code states that for the validity of the agreement, it needs four conditions:

1. They agree to bind themselves;
2. Ability to make an engagement;
3. Any particular thing;
4. Any genuine and legitimate reason.

The first and second terms are called subjective terms, therefore, the condition is more concerned on the person. While the third and fourth conditions are objective requirements because it concerns with the object of the agreement. The first condition means that in an agreement the parties should have reached an agreement. The agreement is a manifestation of the agreement of parties' will as measured by the absence of coercion, oversight and absence.

Law of agreement stipulated in the Civil Code adheres to the principle of consensus, namely that to make an agreement, simply by words of agreement. With the words then at this moment the agreement is binding on the parties who make an agreement.

Regarding the principle of consensus, Subekti argued that the principle of consensus can be summed up by Article 1320 of the Civil Code, namely, article governing the terms of the validity of agreement and Article 1338 (1) of the Civil Code that is intended to express the power of agreement, that its power is equated with the power of a law. The power is given to all valid agreement.[13]

On an agreement that contains clauses that could incriminate one of the parties and may result in losses to one of the parties. In connection with that, the law of contract recognizes a doctrine called the unconscionable doctrine that makes such agreements become void and null.

Usually this unconscionable doctrine refers to the biased bargaining position because there is no choice for the injured party, but to accept a clause in the contract that is very unfair, so the benefit is not fair to the other party.

There are several reasons to use the principle of this injustice that can make an agreement becomes null and void or can be canceled, namely :[14]

a. Non-fulfillment element of the agreement of will (Article 1320 of the Civil Code).
b. Agreements or contracts that violate the public order (Article 1337 of the Civil Code)
c. Agreements or contracts that violate decency (Article 1337 of the Civil Code).

This unconscionable doctrine is divided into two, namely Procedural Unconsionability and substantive Unconscionability. Procedural unconscionability can occur due to factors related to lack of understanding of one of the parties to the agreement, for example, the lack of opportunity to read and ask about the contents of the agreement. Meanwhile, the substantive unconscionability occurs if the agreement or parts of agreement are oppressive or overly harsh.

[13] Ibid, h. 4.

[14] Subekti R. dan Tjitrosudibio, R.,1996, *Kitab Undang-Undang Hukum Perdata*. Edisi Revisi, Pradnya Paramita, Jakarta.h.3

ISSN: 2307-3721, e ISSN: 2307-3713

This doctrine is contrary to the principle of assumption of risk, namely the principle that a person who has signed an agreement regarded willing to bear all the risks resulting from the agreement.[15]

One form of unconscionability in the agreement is the inclusion of a clause containing unfair surprise, the clause which had never expected to exist by normal people, while those who make the clause is consciously aware that the clause is not in accordance with the reasonable wishes of the other party. One example is the clause in the standard contract.[16]

There is ongoing debate on the legality of a standard agreement as a legal agreement, especially when associated with the principle of free will in making the contract or commonly known as the freedom of contract. Sluijter argued that standard contract is not an agreement because of the position of the entrepreneur, the bank is like a private legislators (*legio particutiere wet gever*). [17] In this case, the parties that determine all terms are banks, while debtors are totally invisible, and this is certainly not an agreement. While Pitio says that this standard contract is coercive agreement (*dwang contract*) that although legally-theoretically do not comply with the law, it is still accepted as a agreement due to the need in the community.[18]

This opinion was opposed by Statins and Asser Rutten who essentially argued that the standard contract did not violate the principle of freedom of contract and by signing of an agreement means that the parties are deemed to have understood, known and been willing to accept the consequences of the agreement.[19]

The Principles of Contracts in the Civil Code

According to Munir Fuady, some principles that should be considered in contract law as stipulated in the Civil Code are as follows:[20]

a. Regulatory principle means that the law is applicable provided that the parties in the agreement do not set differently. But if the parties set differently, then the applicable law is what governed solely by the parties, unless the law decides otherwise.

b. The principle of freedom of contract, that people are free to make or not make an agreement, free to determine the contents of agreement, its validity and the terms of the agreement, with a particular form or not, and to freely choose which laws will be used for the agreement. [21] It means that the parties in the agreement are given the freedom to create and manage their own content of the agreement, with provisions:

   1. Fulfilling the terms of a legal contract
   2. Not prohibited by law
   3. In accordance with the prevailing custom

[15] Y. Soga Simamora, 1997, *Pengujian dan Kontrol Terhadap Penggunaan Perjanjian Standar,* Jurnal Hukum Ekonomi, Edisi VII, Februari, h. 56

[16] Ibid, h. 55

[17] Shindarta, 2000, *Hukum Perlindungan Konsumsi Indonesia".* Grasindo, Jakarta, h. 120.

[18] Ibid, h. 121

[19] Ibid

[20] Munir Fuady, 1999, *Hukum Kontrak dari Sudut Pandangan Hukum Bisnis",* Citra Aditya, Bandung, h. 29

[21] Asser Rutten,1998, *Seri Dasar Hukum Ekonomi , Hukum Kontrak Di Indonesia*, Program Kerjasama Elips dan Fakultas Hukum Universitas Indonesia, Jakarta., h. 148

ISSN: 2307-3721, e ISSN: 2307-3713

4. The agreements are conducted in good faith

c. *Pacta sunt servanda* principle (the principle of binding force) means that an agreement is made legally binding and enforceable as a law for the parties who made it.

d. Consensual principle, meaning that an agreement is considered to occur since the agreement between the parties that make it, as long as all the terms of a valid agreement has been fulfilled. With the existence of such agreement, it gives birth to the rights and obligations of each party. This means that principally, the written requirement is not actually required in an agreement. However for convenience in terms of proof, it would be better if the agreement is set forth in a written form.

e. Obligatory principle means that the agreement has given rise to rights and obligations since the validity of the agreement terms are met, but in case of transfer of property rights, it needs a conveyance called Levering.

Furthermore, according to Asser-Rutten, of the five principles, the most important one is the principle of freedom of contract, and the principle is not written with abundant of wordings in the legislation but the whole of civil law in Indonesia is based on the principle of freedom of contract.[22]

DISCUSSION

Standard Contract of Credit Has Met the Principle of Freedom of Contract Terms.

Generally an agreement must go through a process of negotiation between the parties who make an agreement. But lately the growing trend shows that many agreements in the business transactions that occur without negotiations, but by the way in which the other party has set a standard contract or the complete terms and then presented it to the other party to be approved.

There are times when an agreement contains clauses that could incriminate one of the parties and resulted in losses to the party. In connection with that, the law of contract recognizes a doctrine called the unconscionable doctrine that makes such agreements become void and null. Usually this unconscionable doctrine refers to the biased bargaining position because there is no choice for the injured party, but to accept a clause in the contract that is very unfair, so the benefit is not fair to the other party.

There are several reasons to use the principle of this injustice that can make an agreement becomes null and void or can be canceled, namely :

a. Non-fulfillment element of the agreement of will (Article 1320 of the Civil Code).

b. Agreements or contracts that violate the public order (Article 1337 of the Civil Code)

c. Agreements or contracts that violate decency (Article 1337 of the Civil Code).

This unconscionable doctrine is divided into two, namely Procedural Unconsionability and substantive Unconscionability. Procedural unconscionability can occur due to factors related to lack of understanding of one of the parties to the agreement, for example, the lack of opportunity to read and ask about the contents of the agreement. Meanwhile, the substantive

[22] Ibid

ISSN: 2307-3721, e ISSN: 2307-3713

unconscionability occurs if the agreement or parts of agreement are oppressive or overly harsh.

This doctrine is contrary to the principle of assumption of risk, namely the principle that a person who has signed an agreement regarded willing to bear all the risks resulting from the agreement.[23] Therefore, if a person is in a very weak bargaining position and the agreement contains a clause that is not fair, then the injured party is given the authority to demand the agreement to be void or canceled based on the doctrine of this unconscionable doctrine.

One form of unconscionability in the agreement is the inclusion of a clause containing unfair surprise, the clause which had never expected to exist by normal people, while those who make the clause is consciously aware that the clause is not in accordance with the reasonable wishes of the other party. One example is the clause in the standard contract.[24]

The agreement, later known as the standard agreement or standard contract has actually been known since the days of Ancient Greece. [25] One of them was with the pricing of goods in the practice of buying and selling that were determined unilaterally by the seller regardless of the quality of the goods sold. But along with the times, the standard contract is no longer only about the price, but is more concerned to detailed and specific things. This is understandable given the problems that arise are also increasingly complex, as well as because of the high level of human civilization.

The use of standard contract in credit facilities in the banking sector in Indonesia is basically aims to provide convenience to the parties making a transaction, because it is not possible when the bank should negotiate on the substance of the agreement with each person who will be debtor. Besides a lot of exertion and thoughts, it will also take a long time to proceed; it will even become its own difficulties in the administration and in the implementation of the agreement. In the standard contract, it has clearly defined the rights and obligations of each party.

Freedom of contract is a reflection of the development of the understanding of the free market pioneered by Adam Smith in which he proposed the theory of classical economics, has been based on the teachings of natural law. The same basic thinking of Jeremy Bentham is known as utilitarianism. So Utilitarianism and the classical theory of laissez faire are considered complementary and equally revive individualistic liberal thoughts.[26]

In the concept of Laissez-Faire, individuals must be given the freedom to set their steps, with all their thoughts and strengths, to achieve prosperity as optimally as possible. If an individual successfully achieve prosperity, community which is a collection of individuals will be prosperous too. In achieving economic prosperity, the individuals should have the freedom and the king and his officials should not intervene.[27]

In the freedom of contract, the law provides for widely open freedom to the public to have an agreement about anything, as long as it does not conflict with laws and regulations, decency

[23] Y. Soga Simamora, 1997, *Pengujian dan Kontrol Terhadap Penggunaan Perjanjian Standar,* Jurnal Hukum Ekonomi, Edisi VII, Februari, h. 56

[24] Ibid, h. 55

[25] Shidarta, Op.cit. h. 199.

[26] P.S. Atiyah 1981, *Promisses, Morals, And Law,* Clarendon Press Oxford, New York, h.21

[27] Dewi Tenty Septi Artiany, 2006, *Tinjauan Hukum Atas Kalausula Baku dalam Perjanjian Kerjasama Pengusaha Stasiun Pengisisan Bahan Bakar Minyak untuk Umum (SPBU) Dihubungkan dengan asas kebebasan berkontrak*, UI, Jakarta h. 24

ISSN: 2307-3721, e ISSN: 2307-3713

and public order. [28] So it can be said that the situation of freedom of contract is not freely make agreements without regard to the law, decency and common interests, but rather responsible freedom of contract and it is constrained by the laws of decency and common interests. Therefore, even though the parties have the freedom to contract, but the agreement should not contain elements that are contrary to the law, decency and common interests. In this case Nili Cohen in his Pre-Contractual Duties argued as follows: *"No legal system would legitimize use of violence, fraud or other unlawful means in negotiating process;.....A contract concluded by violence or fraud is not a product of the free will of the contracting parties".*[29]

According to the contract law in Indonesia, the principles of freedom of contract include the following scopes:

a. The freedom to make or not to make an agreement.

b. Freedom to choose a party with whom he/she wants to make an agreement.

c. Freedom to decide or choose the cause of the agreement that will be made.

d. Freedom to determine the object of agreement.

e. The freedom to determine the form of an agreement.

f. The freedom to accept or deviate the statutory provision which is optional (*aanvulled,optional*).

Freedom of contract is the 'spirit' of a contract or agreement; it implicitly provides guidance that the contracting parties are assumed to have equal position. Furthermore, the parties will be in a state of need each other, and the agreement can be seen as a cooperation to achieve common goals that give happiness together, there is a mutual respect and have a shared responsibility to run an agreement that binds for each other. Thus, it is expected to appear fair and equal contract also for the parties.[30]

However, in practice it is often found that a standard contract model considered likely to be biased and unbalanced. Among those who have a strong bargaining position with the ones that have weak bargaining position, the parties who have a weaker bargaining position will have to accept all the contents of a contract taking it for granted, because when they try to bargain with other alternatives, it will likely accept the consequences of losing what is needed. For those of weaker bargaining position only have two alternatives, namely take it or leave it.[31]

Relating to the circumstances, Sutan Remy Sjahdeini suggests that if the agreement whereby there is a lack of equal positions of the parties, then it is called the two opponents of agreement, and not the two partners making an agreement. In the freedom of contract, justice can only be achieved if the parties have equal bargaining power.[32]

[28] Rahman Hasanudin, 1995, *Aspek-aspek Hukum Pemberian Kredit Perbankan di Indonesia*, PT. Citra Adiya Bakti, Bandung, h 148

[29] Nili Cohen dalam Jack Beatson an Daniel Friedman (editor), 1995, *Good Faith an Fault in Contract Lw*, Clarendon Press Oxford, New York, h.25

[30] Agus Yudha Hernoko,Op.cit ,h 2

[31] Ibid

[32] Ibid

ISSN: 2307-3721, e ISSN: 2307-3713

Tan Kamello says that "the pressure of one of the parties through the position of inequality of bargaining power can result in unequal performance of the agreement, and this violates the principle of *iustum pretium*"[33]

The relationship between banks and customers is regulated in the contract law that resulted in consequences, the parties, in this case the bank as a business entity and its clients, both individuals and business entities have rights and obligations. In order to know what rights and obligations held by the parties, it should be seen first what types of services used by the customer.

Customers who agreed to put their money in the bank, indirectly, the clients has been willing and agree with the requirements set by the bank. Customer trust is the important key to the success of the bank in promoting their business. When people no longer trust banks, because it is not safe to keep money in the bank, there should be a way to give a sense of security to the community that there is a guarantee that their money would be safe in the bank.

Legal protection is a way to provide security to the people in saving their money in the bank. To provide legal protection for depositors, according to the Indonesian banking system, it can be done in two ways, namely:

1. Implicit Deposit Protection, the protection provided by:
   a. Legislation in the field of banking;
   b. Protection produced by effective supervision and oversight, conducted by Bank of Indonesia;
   c. Efforts to maintain business continuity of the bank as an institution in particular and the protection of the banking system in general;
   d. Maintaining the health of banks;
   e. Doing business in accordance with the precautionary principle;
   f. The way of the provision of credit which does not harm the interests of the bank and the customer;
   g. Providing information on customer risk.
2. Explicit Deposit Protection, the protection gained through the establishment of institutions that guarantee the public deposits.[34]

In the Banking Law there is no provision which specifically governs the protection of customer deposits. The Banking Law only mentions about bank supervision conducted by Bank of Indonesia, it is affirmed in Article 29 paragraph (1) of the Banking Law. However, Article 37 of the Banking Law and the government had anticipated the loss of public confidence that will result in increasingly poor condition of Indonesian banks, namely by stating:

1. Each bank shall guarantee that public funds are kept in the bank concerned.
2. To guarantee the public deposits in banks as referred to in paragraph (1), it is established the Deposit Insurance Agency.

[33] Tan Kamello, *Karakter Hukum Perdata dalam Fungsi Perbankan Melaui Hubungan Antara Bank dengan Nasabah*, Pidato Pengukuhan Jabatan Guru Besar Tetap dalam Bidang Ilmu Hukum Perdata pada Fakultas Hukum Universitas Sumatra Utara, Tahun 2006, h 11

[34] Ibid.

ISSN: 2307-3721, e ISSN: 2307-3713

3. The Deposit Insurance Agency referred to in subsection (2) is an Indonesian legal entity.
4. The provisions concerning the guarantee of public funds and the Deposit Insurance Agency, shall be further regulated by Government Regulation.

Furthermore, the explanation of this article states that the establishment of the Deposit Insurance Agency is necessary in order to protect the interests of customers and simultaneously increase public trust in the bank. In organizing the deposit guarantee public funds to banks, The Deposit Insurance Agency can use:[35]

1. Mutual fund scheme;
2. Insurance scheme, or;
3. Other schemes approved by Bank of Indonesia.

Problems arise when in practice banks utilize it to press the debtors to make burdensome clauses, or so-called *clausa eksenoras*, so that there is an imbalance of bargaining power between them. On the one hand, banks are in a strong position because they serve as the parties who have the funds. On the other hand, the debtors are weaker, because they serve as the "compelled parties" to sign the loan agreement due to the huge demands for credit. Whereas in the law of contract, a equal position for the parties is something that principle and a form of the principle of freedom of contract. From the description of the debtors, it becomes necessary to be protected by the positive law of Indonesia

By type, standard contract can be divided into four types, namely:

1. Unilateral standard contract, i.e. standard contract that is specified by powerful position parties in the agreement. These powerful parties usually are creditors.
2. Reciprocal standard contract, is the standard contract whose content is determined by both parties, such as standard contract made by the employer and the workers in the standard collective labor agreement.
3. Standard contract that is determined by the government is a standard agreement whose contents determined by the government to certain legal acts, such as agreements pertaining to the land rights.
4. Standard contract specified in the notary public or lawyer, is the standard contract whose concepts have been prepared from the beginning to meet the demand of members of the public who ask for their assistance.[36]

What is meant by the standard contract in this study is a unilateral standard contracts and the standard contracts made by notary public. This is because in banking practice, legally there are two types of standard contract always used by the banks in providing credit, namely:[37]

1. Credit agreement with privately made deed, namely lending agreement of which clauses have been made by the bank, and then presented to the debtor. The signing of the agreement made by themselves, without the presence of notary public.

[35] Ibid. hal. 66

[36] Badan Pembinaan Hukum Nasional, Departemen Kehakiman, "*Naskah Akademis Tentang Kontrak di Bidang Perdagangan*", h. 14

[37] Budi Untung, "*Kredit Perbankan di Indonesia*", Andi Yogyakarta, Yogyakarta, 2000

ISSN: 2307-3721, e ISSN: 2307-3713

2. Credit agreements with authentic document, namely agreements on bank lending by the debtor made by notarial deed. Still, those clauses included in the notarial deed, are referring to the credit agreement, made by the bank. One of the banks that have used this type of agreement is the BRI.

Based on the above provisions, it appears that the relationship between the bank and the customer is governed by law of contract. The agreement publishes an engagement, between two people who make it. And in accordance with the law of contract as described earlier in this chapter that if there is an agreement between two parties such agreement is binding on the parties. This principle is known in the law of contract with the principle of the freedom of contract. This principle is inferred from Article 1338 paragraph (1) of the Civil Code which suggests that all agreements are made legally valid as a law for those who make it. Meanwhile the validity of the agreement terms can be seen in Article 10 of the Civil Code, known as the principle of agreement or consensus.[38]

The relationship between the bank and its customers in practice, commonly, the bank has made its own form. The form has listed all the requirements to be determined by the bank. This is what legal experts called a standard contract, it means that the contents of the agreement have been made and outlined in a form. [39] When it is seen from this point of view, it is clear for the customers that there are only two options namely whether to agree or not to agree to the terms and conditions that have been made by the bank. Therefore, it arises to various opinions, that the standard agreement is inconsistent with Article 1320 in conjunction with Article 1338 (1) of the Civil Code, as well as against the decency. But in practice this agreement is growing because of circumstances rendered this necessary, and it must be accepted as a reality.[40]

CONCLUSION

Credit agreements made in the form of a standard contract does not conflict with the applicable provisions of the contract law; it means that a standard contract has been referred to the terms of an agreement specified in Article 1320 of the Civil Code. The terms are a deal, competent law, any particular things and the legitimate rationale. Thus the standard contract is not contrary to the principle of freedom of contract.

In the implementation of standard contract still gives and does not diminish the legal protection of the debtor in the bank credit agreement. Debtor protection refers to the terms and conditions:

1. Article 1320 of the Civil Code on the validity of the terms of the agreement, including the clause from 1323 to 1325, Article 1338 and Article 1339 of the Civil Code.
2. Law No. 10 Year 1998 on Banking, divided into preventive and repressive protection. Preventive protection contained in Article 8, Section II, Article 12 and Article 29. While the repressive protection contained in Article 49, Article 50, Article 51 and Article 52 of the Banking Law.
3. Law No. 8 of 1999 on Consumer Protection, can use the provisions of Article 2, point c Article 7, Article 15, Article 18, Article 62 and Article 63 of the Law on Consumer Protection

[38] R. Subekti, *Op.cit*, h. 13.
[39] Ibid
[40] Ibid, h. 33.

ISSN: 2307-3721, e ISSN: 2307-3713

REFERENCES

[1] Agus, Y. H., (2010). *Hukum perjanjian asas proposionalitas dalam kontrak komersial*, Jakarta: Kencana Prenada Media Group.

[2] Ahmad, M. D. S. P., (2008). *Hukum perikatan penjelasan makna pasal 1233-1456BW, PT*. Jakarta: Raja Grafindo Persada.

[3] Asser, R. (1998). *Seri Dasar Hukum Ekonomi, hukum kontrak di Indonesia*. Jakarta: Fakultas Hukum Universitas Indonesia.

[4] Badan, Pembinaan Hukum Nasional, Departemen Kehakiman, "*Naskah Akademis Tentang Kontrak di Bidang Perdagangan*", h. 14

[5] Budi, U. (2000). *Kredit Perbankan di Indonesia.* Yogyakarta: Andi Yogyakarta.

[6] Darji, D. D. S. (1996). *Pokok-pokok Filsafat Hukum Apa dan Bagaimana Filsafat Hukum Indonesia* (Edisi Revisi). Jakarta: Gramedia Pustaka Utama.

[7] Ignasius, R. W., (1997). *Hukum sekitar perjanjian kredit*, Badan Penerbit: Universitas Diponegoro.

[8] Mari, Y. H., (1985). *Segi-segi* Hukum Perjanjian. Jakarta: Intermasa.

[9] Mariam, D. B., (1994). *Aneka* Hukum Bisnis. Bandung: Alumni.

[10] Muhammad, D. (2000). *Hukum perbankan di Indonesia*. Bandung: Citra Aditya Bhakti.

[11] Munir, F. (1999). *Hukum kontrak dari sudut pandangan hukum bisnis.* Bandung: Citra Aditya.

[12] Nili, C. D. J. B., & Daniel, F. (Eds.), (1995). *Good faith and fault in contract law*. New York: Clarendon Press Oxford.

[13] Atiyah, P. S. (1981). *Promisses, morals, and law*. New York: Clarendon Press Oxford.

[14] Subekti, R. (1975). *Hukum perjanjian*, Jakarta: Intermasa.

[15] Rahman, H. (1995). *Aspek-aspek hukum pemberian kredit perbankan di Indonesia*. Bandung: Citra Adiya Bakti.

[16] Shindarta. (2000). *Hukum perlindungan konsumsi Indonesia.* Jakarta: Grasindo.

[17] Subekti, R. D. T., R. (n.d). *Kitab undang-undang hukum perdata*. (Edisi Revisi). Jakarta: Pradnya Paramita.

[18] Sutan, R. S. (2009). *Berkontrak dan perlindungan yang seimbang bagi para pihak dalam Perjanjian Kredit Bank di Indonesia*. Jakarta: Pustaka Umum Graffiti.

[19] Sutan, R. S., (2009). *Kebebasan berkontrak dan perlindungan yang seimbang bagi para pihak dalam Perjanjian Kredit Bank di Indonesia.* Jakarta: Pustaka Utama Graffiti.

[20] Wirjono, P. (1960). *Asas-asas Hukum perjanjian*. Bandung: Sumber.

ISSN: 2307-3721, e ISSN: 2307-3713

[21] Dewi, T. S. A. (2006). *Tinjauan Hukum Atas Kalausula Baku dalam Perjanjian Kerjasama Pengusaha Stasiun Pengisisan Bahan Bakar Minyak untuk Umum (SPBU) Dihubungkan dengan asas kebebasan berkontrak*. Retrieved from http://lib.ui.ac.id/file?file=pdf/abstrak-89122.pdf.

[22] Mufidi, M. F. Disertasi, (nd). *Perjanjian alih teknologi dalam bisnis frenchise sebagai sarana pengenbangan hukum ekonomi*. Indonesia: Unisba Hukum.

[23] Simamora, Y. S. (1997). Pengujian dan kontrol terhadap penggunaan perjanjian standar. *Jurnal Hukum Ekonomi* (Edisi VII).

[24] Civil Law Code, Law Number 10 on Banking (1998).

[25] Civil Law Code, Law No. 8 on Consumer Protection (1999).

ISSN: 2307-3721, e ISSN: 2307-3713