

BANK'S LEGAL ACTIONS ON LENDING ISSUE AGAINST THE ANNULMENT OF DEBTOR'S MARRIAGE

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Abstract

The primary function of Indonesia bank as the collector and distributor of people fund in the form of saving and credit account makes them become a financial agent that bridges surplus unit with deficit unit. Generally, credit is classified into two kinds; commercial and consumer credit. It will be affected due to abrogation of debtor settlement. Although the agreement of credit is not immediately nulled, it needs such a legal action as the solution. Three alternative legal action that bank may consider are: asking for credit settlement at one time, making novation, or letting it out as long as the credit installments are regularly paid. Therefore, this study is a juridical-normative research using both statute and conceptual approaches.

Keywords

legal action by bank, abrogation of settlement, implementation of credit

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Introduction

The primary function of bank refers to the collector and distributor of people fund as mentioned in Article 3 of Act No. 7 year 1992 amended by Act No.10 year 1998 about the Amendment of Act No. 7 year 1992 about Bank (further called UU Perbankan/ Bank Law). Bank collects people fund in the form of debet account and distributes the fund in the form of credit/loand and/or the other forms in order to improve the standard living of many people. Hence, bank becomes such a financial intermediary that bridges surplus unit with deficit unit.

It is consistent to Mathias Dewatripont and Jean Tirole (1993:13), "a bank is a financial intermediary that participates in the payment system and finances entities in financial deficit (typically the public sector, non financial firms, and some households) using the funds of entities in financial surplus (typically households)." Their argument stresses on the function of bank as an intermediary agent in a payment system that uses surplus unit's fund to be distributed to those in need. Furthermore, Shelagh Heffernan (1996:18), argued two reasons why bank is considered as an intermediary agent: "First, the presence of informations costs undermines the ability of a potential lender to find the most appropriate borrower, in the absence of intermediation. Second, borrowers and lenders have different liquidity preferences." In this case, creditors need to spend extra money to get detail information to find the most competent debtors besides their different preference of liquidity.

As an intermediary agent, bank should be able to keep people trust by implementing the principle of prudential banking and distribute people fund to certain productive sectors, not only consumptive needs. It corresponds to Article 29 subsection (2) and (3) of Bank Law mentioning that bank obligates to do business under the principle of prudence. Following Hikmahanto Juwana (2002:4) argued, "banking industry is a kind of industry that touch upon trust (i.e., fiduciary) of people with money to save. People trust for banking industry is everything. "People trust is very fundamental for bank. Therefore, bank may collect the fund for operational needs."(Abdullah, 2012:156).

In its development, it has another function besides collector and distributor of fund. It provides information and insight, provide guarantee and liquidity (Insukindro, 1995:26). Providing information and distributing people fund refer to bank capability as creditors that conduct credit analysis to see the debtors' needs. The credit/loan should be appropriate to the needs, not over-limit as it may risk both bank and customer. Providing guarantee refers to bank function as a fiduciary agent which takes people trust as its key element. It guarantees to keep people fund safe, use the fund properly in accordance to the needs of business activity, and repay the fund on which the due date comes.

Dealing with the distribution of credit, two categories of debtor that commonly asking for credit/loan to bank in order to meet their needs. They are individual and corporation. Individual debtor commonly needs credit/loan in the form of either

commercial loan (for their business) or consumer loan (to encounter their consumptive needs) such as housing loan, car loan. For corporations, they take loan for investment or stock in their business.

In the implementation of credit, the alteration on individual debtor status including their marriage status (e.g., the marriage is over or annulled) or on which the debtors and/or their spouse have passed away. Of course, such alteration of debtor's marriage status may affect the continuance of loan, whether bank may keep providing credit/loan or temporarily stop the load based on particular conditions or even immediately stop at one time and thus the debtor needs to do settlement on their loan.

With the legal issue, the starting point and limitation of this study involves what legal action that banks may take against debtors on which they have marriage cancellation. It focuses on individual customers as it deals with debtors' marriage status, while the debtors have signed the credit agreement and bank has provided the loan, and thus, it reveals rights and obligations on both parties.

Research Method

This study is a normative-legal research that analyzes particular legal action that bank may consider against debtors due to the annulment of debtor marriage. It used both statute and conceptual approaches. It took both primary and secondary resources. The former included several lexes such as Burgerlijk Wetboek (BW), Bank Law, Marriage Law, etc., while the later involved doctrines, textbooks, journals, and other relevant sources. The collected data is then analyzed in qualitative manner using deductive method.

Result and Discussion

1. Providing Loan (Lending)

The activities that bank may conduct are classified into three categories, as follow.

- a. Bank as an agent that collects people fund in the form of saving, deposito, and giro.
- b. Bank as an agent that distributes people fund in the form of credit/loan, or as "loan provider"
- c. Bank as an agent that supports sales transaction and payment (Sinungan, 1990:3).

In providing loan to customers, the fund is from bank stock and saved money collected by bank in the form of giro, deposito, and saving account. For customers' saving accounts, bank should allocate expenses for cost of fund in the form of giro service, interests of deposito and saving, operational cost including employee salary, rental expense for building, etc. Therefore, banks need to immediately "spin" the collected

fund by providing credit/loan and other activities as their strategy to pay all those expenses and take profit margin to avoid any "idle" fund which may make them pay the bill without earning.

The term 'credit' derives from Greek credere that means trust (truth or faith) (Abdullah, 2012:162). Hence, if someone has facility of credit, it means that bank trust him/her in completing his/her obligation based on the agreement they have made. In Bank Law, the definition of 'credit' is mentioned in Article 1 subsection (11) that "Credit is supplying money or bill or the other which can be equalized with that based on particular credit agreement between bank and other parties, and it has the debtor pay their bill along with its interest in particular period of time."

In providing credit/loan, banks should consider any possible risk they may take, and thus they implement prudential banking principle in order to protect people fund. The provision of Article 8 of Bank law mentions that, before providing any credit/loan. Banks should conduct an accurate appraisal, given that the financial source for credit is not only from bank it self but also people money. Therefore, banks should implement prudential principle through accurate and deep analysis, effective distribution, auditing and monitoring, valid agreement, strong assurance, and regular documentation of credit. All those activities are aimed to make credit fairly distributed and on-time repaid (i.e., the loan along with the interest) based on the agreement they have made. Hence, some elements that need to be considered in providing credits are as follow.

- a. Trust. Each credit is based on bank's faith that the credit can be fully repaid by debtor as the agreement.
- b. Time. The period of time between credit distribution by bank and loan settlement by debtor.
- c. Risk. Each credit/loan contains risks during the predetermined period of time between credit distribution and the settlement. The longer the period of time, the higher the risk of credit.
- d. Performance. Each distribution of credit may create performance or contra-performance (Rahman, 1995:25).

As intermediary function of bank goes by, the purpose of bank for economy development and national stability that lead to public welfare will be reached. Therefore, providing load/credit to people is in line with the function only if it brings good influence for all parties including the increasing welfare for public, the increasing amount of taxes collected, the development of national economy both macro and micro. Following Thamrin Abdullah dan Francis Tantri, the primary aim of providing credit is to seek for profit, to support customers' business and government in terms of tax income, to create job vacancy, to increase the number of goods and services, to do saving, and to increase state's foreign exchange (Abdullah, 2012:166-167).

In national economy, there are various kinds of business that support economy system in order to go on track. Therefore, banks should create kinds of credit that correspond to such needs. In general, there are two kinds of credit, as follow (Abdullah, 2012:169-172).

1. In terms of utility, it consists of: a.Credit of investment, for financing particular projects, new factories or business expansion in the form of machine procurement and other equipments for investment and b. Credit of business capital, for financing business needs, supplying raw materials, and paying for some costs related to production in order to increase productions for more profit.
2. In terms of credit purposes, it consists of: a.Productive credit, for business or production of goods and services, and for business intensification, both for business capital and investment; and b.Consumptive credit, to meet personal consumption needs such as housing, vehicles, household, etc.

Definition of Bank Credit Agreement

Hartkamp (2011:33) defined the term 'agreement' as a juridical act, established by the corresponding and mutually interdependent expressions of intent of two or more parties, directed at the creation of juridical effects for the benefit of one of the parties and to the account of the other party, or for the benefit and to the account of both parties. On the other hand, **Subekti** defined agreement as an incident through which two parties promised to one another to implement particular thing (Subekti, 1992:1).

The formal regulation of agreement is mentioned in Article 1313 Burgerlijk Wetboek (BW) that "agreement is an act through which one or more parties engage themselves to another party." Therefore, agreement is seen as a legal act through which two or more parties get engaged to one another for particular purposes. Basically, bank credit agreement is similar to another agreement in common, especially its terms and conditions. What makes it different is the object of agreement, which refers to money lending along with its interests.

In Bank Law, it does not recognize the term 'credit agreement'. The concept of bank credit agreement is generally based on Article 1754 BW and Article 1 subsection (11) of Bank Law. This act mentions that "the agreement of lending is through which one party provides particular items that may finish off due to utility to another party under certain terms and conditions and the debtor should pay them back equally with the same types and condition." Furthermore, Article 1 subsection (11) of Bank Law mentions that "Credit is an act of providing either fresh money or such a bill based on particular loan agreement between bank and another party, and it requires the debtors to pay their loan in predetermined period of time along with the interest."

Following Subekti, in any kinds of credit organized, what is essentially going is a loan agreement and it is set under Article 1754-1769 BW (Naja, 2005:261). However, Mariam Darus Badrulzaman argued that credit agreement had specific characteristics that differed from another one (Naja, 2005:263). Furthermore, Sutan Remy Sjahdeini (1993:14) defined that credit agreement was an agreement between bank (i.e., creditor) and customer (i.e., debtor) through which the bank provided either particular amount of fresh money or some kinds of that to the customer who should pay it back in predetermined period of time along with particular interest, retaine, or profit sharing. In short, bank credit agreement is a written agreement between bank as creditor who provides fresh moneh or some kinds of that and its customer as debtor who obligates to pay his/her bill in particular period of time along with its interests, retained, or profit sharing.

Dealing with the termination of bank credit agreement, as mentioned in Article 1381 BW, it is due to direct credit settlement, depositing credit settlement, novation, compensation, debt acquittal, and annulment or null and void. This termination requires the debtor to immediately settle the debt along with its interest, retaine, or profit sharing according to the predetermined agreement.

The Legitimation of Marriage and the Annulment of Marriage

Marriage is a physical and spiritual engagement between a man and a woman as a spouse that aims to become a happy family ever after under the norms of one and only God, as mentioned in Article 1 of Act No. 1 year 1974 about Marriage (further called Law of Marriage). In marriage, each of the spouses may assist and complete each other to develop their personality, assist and reach mutually spiritual and material welfare (Rofik, 2000:268). Following Paul Scholten, marriage is a legal relationship between a man and a woman to live together forever, and be legitimated by government (Soetomo, 1986:13). It is officially legitimate if it completes both administrative and religious elements (Isnaeni, 2016:75). It is different from BW's perspective that sees marriage as things that deal with civil-based relationship.

Article 2 of Marriage Law mentions that marriage is considered legitimate if it is based on the norms of their religions and beliefs. Each marriage is registered based on the applied law. Both administrative and religious elements in the process of marriage should be further classified into formal and material conditions. Formal conditions deal with the procedures of having marriage (both before and during the process). Material conditions deal with personal existence of the bride and groom. These two conditions are accumulative, and thus, it should be entirely accomplished.

Those conditions are as follow. Formal: a. Notifying the officials of marriage registrar, b. The registrar publishes and registers the marriage; and Implementing a process of marriage (i.e., marriage contract) and signing the certificate of marriage.

Materiil: a.Both bride and groom agree to get married; b.Both bride and groom are in appropriate ages; c.Both bride and groom do not engage to another marriage, but there is permission from the court for the groom;d. The bride has a waiting period; e. Both bride and groom are not in cognation, related by marriage, or nested relationship; and f. It does not violate any religious and applied norms.

Marriage that has already accomplished those two conditions (i.e., formal and material conditions) is considered legitimate and brings such a legal consequence for the spouse in terms of rights and obligation, the tenure rights of mutual assets, as well as the rights and obligations to children born in that marriage. Otherwise, if a marriage may not accomplish those conditions, it should be annulled by the court. The provision of marriage annulment is set under Article 22 of Marriage Law that marriage can be annulled if both parties cannot accomplish the conditions of organizing the process of marriage. Following Isnaeni, annulment is essentially subsided, and thus the marriage is no longer exists (Isnaeni, 2016:141).

Marriage Law does not specifically define the term marriage annulment as mentioned in Governmental Regulation No. 9 year 1975 which is the implementing regulation of Marriage Law. Those two rules only enact a provision that marriage can be annulled by court. Following Bakri A. Rahman and Ahmad Sukardja (1981:36), an existing marriage can be annulled if the married parties do not accomplish the condition to organize a marriage, and the annulment of a marriage can only be decided by court. It is consistent to Riduan Syahrani, that marriage can be annulled if one or both parties in that marriage (i.e., spouse) is found not accomplishing the conditions of organizing marriage (Syahrani, 1986:36). Basically, the annulment of marriage should be filed to court in a legal area in which the marriage is held or in the spouse residence to seek for solution, and then the judge will make decision related to the annulment of the marriage.

In accordance to the definition of marriage annulment, it argues that marriage can be annulled if: a. It has been held; b. It does not accomplish the conditions; and c. The annulment is decided by court.

Given that the annulment of marriage brings a quite complex legal consequence, especially for those related to the spouse whose marriage is annulled, some reasons to be filed for annulling a marriage have been set in detail. In Marriage Law, the annulment of marriage can be filed due to the following reasons:

- a. The marriage is held in front of the authorized marriage registrar
- b. The marriage is held by non-legitimate guardian of marriage.
- c. It is held without two witnesses.
- d. It is held under pressure that violates the norms.
- e. There is such misinterpretation about the identity of the bride or groom during the process of marriage.

- f. The pertinent parties cannot accomplish the conditions to organize a marriage.

According to those all reasons, it found that a marriage could be annulled if it was legally defective on its process. However, the annulment of a marriage could not be annulled automatically, but should be filed to court for final decision.

Legal Consequences of Marriage Annulment

The annulment of a marriage happens on which it has been decided by court. With judge's decision, the marriage is seen as a thing that has never happened. When a marriage is annulled, it does not only affect the spouse in personal such as the children, assets in marriage, but also the third party that has ever made a legal relationship with the spouse.

Following Mukti Arto (2007:261), a legal condition starts since a fixed-legal decision has been made. It is consistent to Article 28 subsection (1) of Marriage Law that the annulment of a marriage begins since the court's decision with fixed-legal power has been made, and it applies since the marriage took place. However, if the court's decision commonly applies prospectively, it becomes retroactive in the annulment of marriage. In other word, the annulment of a marriage applies subsided since the marriage took place. Nevertheless, the annulment may not immediately nullify the legal relationships that ever happen in that marriage. It is mentioned in Article 28 subsection (2) of Marriage Law that the court's decision of marriage annulment is not subsided on:

- a. Children born in the annulled marriage..
- b. The spouse with good faith, but the mutual assets, if the annulment of marriage is due to beforehand marriage.
- c. Another third party as long as they have their rights through good faith, before the decision of marriage annulment with fixed-legal strength is made.

Toward the third party with good faith, the annulment of a marriage may not bring any legal consequence to them. any civil acts by the annulled spouse to the third parties before the annulment of their marriage remain legally applied, including those that deal with bank credit agreement. The ex-spouse still must accomplish all the content of agreement they made with the third party although it was made before the annulment of marriage. It aims to protect the third party with good faith and avoid them from any disadvantages. It is as mentioned in Article 98 BW that the annulment of a marriage may not disadvantage the third party, if they have good faith to the spouse.

Overall, a marriage can be annulled by Court if it is found legal defective on which the marriage takes place, either formal or material. However, the annulment that Court has decided will not bring any legal consequence to the children born in that marriage, as

well as the good-faith third party who made a legal agreement with the spouse before the decision of annulment was made.

Bank's Alternatives Solution against the Annulment of Debtor's Marriage

In banking practices, the annulment of debtor's marriage does not immediately nullify any credit agreement without any legal action as the solution. At least, there are three alternative solutions that bank may apply, as follow.

1. Credit Settlement All at Once

Credit settlement becomes the primary priority for bank. As a creditor, banks will not get any legal consequences due to their debtor's marriage annulment, as the process of credit (including credit engagement, assurance, and credit disbursement) is executed by considering any legal aspects and appropriate documents. As long as the debtor is able to pay his/her credit, bank will not see it as problems to concern on.

2. Novation

It deals with the alteration of collateral or debtor. It may refer to credit renewal in which a new credit agreement is made to replace the old one. Following R.Setiawan (1987:116), novation is a new agreement that removes and replaces the old one. There are three novations as follow.

- a. Objective Novation, through which the existing engagement is substituted by the new one.
- b. Passive-Subjective Novation, in which the debtor is substituted by the new one.
- c. Active-Subjective Novation, in which the creditor is substituted by the new one.

In banking practices, it needs to apply objective novation and/or passive-subjective novation to encounter the annulment of debtor's marriage, while active-subjective novation may not be applied as it deals with creditor substitution.

3. Letting it out as long as the installment of credit/loan is regularly paid.

In this context, if those previous alternatives may not be applied, and the installment is regularly paid, bank will let it out up to the credit settlement, given no direct relation between marriage annulment and the credit agreement.

Hence, the annulment of debtor's marriage may not affect any credit agreement between banks and their customers, and thus the bank will not see it as a big deal to be concerned on. However, the existence of credit agreement will not be nulled although the collateral agreement has fallen, since credit agreement is a primary agreement

which does not depend on the collateral agreement which is a kind of follow-up agreement. Therefore, the nullification of collateral agreement only shifts the position of bank from preferent creditor to concurrent creditor along with the other creditors. Nevertheless, if the debtor is unable to pay his/her obligation to the bank -which makes it bad credit- the bank will execute the collateral based on security rights that have been charged to the debtor's collateral.

Conclusion

During the process of providing credit (i.e., lending issue), any possible alteration may happen in the party of individual debtor's status due to the annulment of marriage by court, and it may bring consequences on the continuance of lending by bank. Three alternative legal actions that banks may apply as the solutions involve: first, asking for credit settlement all at once to the debtor; second, asking for novation on debtor's loan, either objective or passive-subjective novation; third, letting it out as long as the instalment of credit is regularly paid. However, in case that the credit turns into bad credit and the first and the second alternatives are unavailable to be applied, bank may execute the debtor's collateral based on particular security rights that both parties have agreed.

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