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### **CONSUMER PROTECTION CONCEPT IN A FAIR CONSUMER FINANCING CONTRACT WITH MOTOR VEHICLE OBJECT IN INDONESIA**

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#### **Abstract**

The existence of financial institutions that offers various forms of financing facilities is essential to support the economic activities through the mobilization of financial resources. One of the financial institutions is a consumer finance institutions that used to fullfil the requirements to get goods by having the legal form of consumer financing contract.

The problems of the research: (1) How does the development of the concept of consumer financing contract with motor vehicles object that exist in today's society? (2) Why does consumer protection contained in the consumer financing contract with the object of motor vehicles not currently provide a sense of justice according to the law? (3) How does the ideal concept of legal protection of consumer in the consumer financing contract in a fair with motor vehicle object?. This type of research is a normative law by using normative juridical/law, conceptual, legal history, philosophical, and comparative law. The results of the research showed that the development of consumer financing contract in Indonesia was started from the development of leasing contract. In practice, consumer protection in the consumer financing contract has not provided justice according to the law, especially for the consumer. It was caused by an existing clause in the contract such as the maturity clause, the payment of fines, accelerated payments, the obligation to pay all at once, insurance, authorization which can not be revoked, and the termination of the contract with the release of Article 1266 and Article 1267 of the Civil Code. The injustice can possibly occur due to the existence of the financing position that is stronger than the consumers who require goods. Ideal concept to the development of consumer protection in the consumer financing contract should refer to the precepts of legal principles in the contract. This is to ensure that consumers understand their obligations, and thus a later dispute will not arise. The research recommends that the consumer financing contract is a standard contract containing clauses impropotional between the rights and the obligations of the parties, then the government, through the financial services authority institution needs to monitor the contract clauses.

## Keywords

Consumer, Consumer Protection, Consumer Financing Contract.

### A. INTRODUCTION

Consumer financing contract is a form of standard contracts that exist in society based on the principle of freedom of contract. Freedom of contract as the soul of the contract, expected to lead on contract that is fair and balanced for all parties. In fact, standard contracts was unbalanced and unfair to the parties, in which the weak parties's Bargaining Position was only accept all terms of the contract with forced (Taken for granted), because if they tried to bargain with other alternatives, they will lose what they needed. For weak parties there are two alternative options to accept or reject (take it or leave it).<sup>1</sup>

That problem is certainly a challenge for the jurist to provide the best solution for the realization of a mutual contract of the parties (win-win solution contract), on the one hand provide legal certainty and on the other hand gives justice.<sup>2</sup> Although it is impossible to integrate legal certainty and justice, but through the instrument of contracts can accommodate differences in interests in a balanced manner, the dilemma of contradictions apparent between legal certainty and justice will be eliminated, it will even be a necessity realization of a mutual contract of the parties.

The importance of contract arrangement in the practice is to ensure the interests of the rights and obligations exchanges take place in a balanced manner to the parties, so it could be established that a fair and mutually beneficial. Not the other way, to the detriment of either party or even ultimately to the detriment of the parties make an contract.

Consumer protection is an integral part of a sound business activity. There is a balancing between consumer protection law and finance companies in that kind of business activities. The absence of protection that balanced causing the consumer is in a weak position (Soussi et al., 2022).

Legal protection by the state to consumers who have a weak bargaining position was very important. Legal protection of the rights of consumers in consumer financing contract can not be given by a legal aspect, but by a system of legal tools capable of providing simultaneous and comprehensive protection against all standard contracts (Spathopoulou, 2022).

In the subject matter, such as the cancellation of the contract, can not be negotiable, it is necessary to put forward their requirements in raw contract / standard. Based on preliminary research found the fact that the reality in the consumer financing contract, the rights of consumer finance companies is more prominent than the rights of consumers, because in general terms or clauses

<sup>1</sup> <http://ocw.usu.ac.id/course/download/2100000221hukum.../slide10.pdf>, accessed on November 21<sup>st</sup> 2016.

<sup>2</sup> Djasadin Saragih, *Peran Interpretasi dalam Sosialisasi Hukum; Khususnya Hukum Perdata di dalam BW*, Yuridika No. 8 of III, February – March 1988, page 39.

for consumers are the only obligations. It can be seen from the clause maturing in contract on some consumer finance company that is like, the contract document company Adira Dinamika Multi Finance Tbk in Article 7, Mandiri Tunas Finance to in Article 12 and Federal International Finance Article 6 stating that: " if the second party (consumers) can not pay the installments as specified in the contract, then the first party (a finance company) reserves the right to terminate the contract unilaterally and withdraw goods from the second party (the consumer) and the money installments that already paid by the second party (the consumer) to the first party (the company) is considered as rent ". It means that between the rights and obligations of finance companies and consumers are not balanced. Finance companies have more rights than consumers, while consumers have an obligation greater than finance companies.

Another example of the problems that arise in the consumer financing contract is about a clause on cancellation of the contract without going through a judge (in the case of goods as the object of the contract were not listed in the registration of fiduciary) which is a requirement on the rights of the finance company to cancel unilaterally the contract and withdraw objects treaty if consumers negligent or experiencing delays in payment (*wanprestasi*), without going through a judge's order that this is actually contrary to the provisions of Article 1266 and 1267 on Civil Code which essentially states that the cancellation of the contract must be sought from the trial judge.

Another issue in the consumer financing contract is about the clause can be prosecuted and should be with a lump sum payment that is a requirement of the finance company that make onerous for the consumers. This requirement applies if the consumer is in *wanprestasi*, so they are required to immediately pay the entire remainder of the payment at once. Meanwhile, if a consumer pays an orderly manner and has paid more than fifty percent (> 50%) the amount of the overall price of the object of the contract, or consumers live pay several installments again in order to obtain repayment, so based on the authority of the finance company, the object of the contract can be drawn without taking into account previous payments already made by consumers. Money installments already paid by the consumers is considered as a substitute for loss on consumption of goods.

The above legal facts must be based on the data of complaints made by consumers to the National Consumer Protection Agency which reached 34.5%. More specifically the problem of consumer complaints in the consumer financing contract, in essence, a matter of rescheduling of installment payment requests by consumers, accumulated interest due to late installments which burden consumers, consumer installment stalled due to efforts stalled, penalties / interest charged arbitrarily by the business agent can not be accepted by consumers, request for action to business agent on businessmen's policy that cause disadvantage for consumers, consumers are not given the National Consumer Protection Agency (their rights) even though it has settled all their obligations (repayment vehicle),

withdrawal of the vehicle by a Debt Collector.

In general, the problem of consumer financing contract arises in case of withdrawal of objects contract. Withdrawal by law would require a relatively long time, because it should be through the judge's order. To avoid this risk, in the practice the financing companies take shortcuts way by pulling the vehicle directly. Withdrawal of goods from the consumers often use security forces. Even that action of financing companies included in the clause of the contract, it can not be said to provide protection for the companies.

Government control of raw contract / standard is the shortest path that can be taken, while waiting for this contract arrangement with the legislation and jurisprudence. This government oversight through administrative rules that can be preventive. Whole raw contract before used treated against the society, should be registered in the authorized agency (in this case the Financial Services authority). Thus, society can know the terms of the contract in the early and can circumvent them if such a condition were found incompatible with the interests.

The problems in the consumer financing contract described above, shows that the progress and development of the automotive industry with a breakthrough marketing system of consumer financing to support the advancement of economic development, has not been fully supported by reforms in the fields of law, particularly in the field of consumer protection.

Consumer protection in consumer financing contract is a legal formulation that need to be built. Indeed, the purpose of the formulation of a legal order is to create an atmosphere of order, fairness, usefulness and peace and at the end of these laws are implemented and adhered to.

Reviewing the development of such contracts need the intervention of the state, by setting certain requirements regarding the contents of the contract as outlined in the legislation.

Weak consumer's position in the consumer financing contract requires the role of the state that required in accordance with the principles of the State to protect, such as monitoring the activities of the company to protect the consumer society of imbalanced power.

Based on the background, problems in this study was formulated : (1) How does the development of the concept of consumer financing contract with the object of motor vehicles that exist in today's society? (2) Why does consumer protection contained in the consumer financing contract with motor vehicles object not currently provide a sense of justice according to the law? (3) How does the ideal concept of legal protection of consumer in the consumer financing contract in a fair with motor vehicle object?.

## **B. RESEARCH METHODS**

Efforts to achieve the objectives of this study, the research method used is descriptive analysis and prescriptive methods, is descriptive because it is a deductive process that is carried out to make a description of an object of

observation. namely to obtain a comprehensive and systematic general picture as well as to describe the existing conditions or facts, namely regarding consumer protection in a fair consumer financing agreement. The general description is analyzed based on the legislation and the opinions of experts which aims to seek and get answers to the main problems that will be discussed further. It is prescriptive because it is directed at predicting the law in the future to find the ideal concept of a just consumer financing agreement.

Every legal research always has a philosophical basis, namely truth, justice, honesty, objectivity, and order. Legal research is a process of thinking and acting logically, methodically, and systematically regarding juridical phenomena, legal events or empirical facts that occur to be reconstructed in order to reveal truths that are beneficial for life.

In accordance with the field of study of Legal Studies, the approach used in this research is a normative juridical approach. Normative legal research is research on legal principles, especially positive legal rules derived from library materials, legal systematics, vertical and horizontal legal synchronization of legislation, legal history and legal comparisons. The juridical law approach is carried out by identifying and conceptualizing law as norms, rules, regulations, laws that apply at a certain time and place as a product of a certain sovereign state power. In this case the provisions of normative law regarding consumer protection.

In particular, this study examines consumer protection legislation and is associated with the development of consumer financing agreements. In addition, in order to realize research that produces answers that are quite valid, researchers also conduct research using a statutory approach (*statute approach*), *conceptual approach* (conceptual approach), *historical approach* (historical approach), *philosophical approach* (philosophical approach), and *comparative approach* (comparative approach).

The statutory approach, conceptual approach, historical approach, and philosophical approach used in this research are embodied in the framework of tracking the history of consumer protection legislation. Through this approach, it can be understood the philosophy of the rule of law and the changes and developments in the philosophy that underlies various laws and regulations in the field of consumer protection so that it can be used as a basis for solving legal problems related to consumer protection in consumer financing agreements in Indonesia.

Comparative legal approach (*comparative legal approach*) intended to obtain legal facts that emphasize and look for differences and similarities that exist in various agreement documents, especially those relating to consumer protection in consumer financing agreements in Indonesia with arrangements in several companies. The comparative legal approach in this study was conducted to compare the existing legal arrangements in several consumer financing agreement documents from finance companies.

### **C. DISSCUSSION**

## **1. Developments of Consumer Financing Contract in Indonesia**

Consumer financing contract that grow and develop in the society encourage people to participate and enjoy the products that they needed. But on the other hand, most people are unable to purchase the products in cash because they are still classified as low-income communities.

Since the announcement of the Package Policy December 20<sup>th</sup>, 1988 (Pakdes 20<sup>th</sup>, 1988), start to introduced a new legal order in Indonesia, one of which is an institution of Consumer Financing. It creates the legal consequences of a legal relationship that occurs between the institution of consumer financing to consumers called consumer financing contract. Utilization of the existing consumer financing contract in this Financing Institutions is people can fulfill their needs easily.

This situation encourages the development of consumer financing contract contained in the consumer finance company by implementing a flexible financing system in accordance with the needs and skill levels of consumers. The emergence of consumer financing legal institutions that are regulated by the government is the savior for low-income consumers to obtain needed goods.

In view of the factors as mentioned above, in practice it began to look for a funding system that has terms and conditions that is more businesslike and not much different from the regular credit system, but reach out to the wide society as consumers. Then start to develop a system called consumer financing, which included a financing contract consumers that are very flexible.

The development contract according to the researchers must be followed by the establishment of the rule of law. Establishment of the rule of law in a society means that the society is changing rapidly, the law not only serves to maintain order but also should help the society change process. Law as a means of development according to Mochtar Kusumaatmadja, legal purpose is not only the creation of stability but also the performance of a justice.<sup>3</sup> To achieve order in this society, it needs legal certainty. Without certainty and order in society, the parties may not want to bind theirself in a contract.

Legal certainty in the legal concept of development itself is a characteristic that can not be separated from the law, especially for the norms of written law, so that these laws can provide guarantees for the parties involved in the contract and can be held accountable for the fulfillment of contracts, especially the contract of consumer financing, therefore the parties feel protected, especially for consumers.

Concept of development law becomes relevant in view of the problems that faced by the legal certainty consumer financing contract in Indonesia. Consumer financing contract is legislation for the parties. It is not only as a legal instrument that must be obeyed by the parties involved in the contract, but also should be seen as an instrument that should be able to restrict the behavior of the parties, in

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<sup>3</sup> Mochtar Kusumaatmadja, *Konsep-Konsep Hukum Dalam Pembangunan*, Publisher Alumni Bandung, 2002, Page 3.

order to achieve what the purpose of contract. So that the rights and obligations of the parties can bring a sense of justice.

## **2. Consumer Financing Contract Based on Law**

Every contract that used the title of financing contract like a consumer financing contract, consumer finance contract with the submission of fiduciary property, apparently has not given justice to the parties, in the sense that some provisions favorable financing company.

Injustice is based on matters relating to maturity or abort clause, clause lump sum payment and the instantaneous, acceleration clause payment by the consumer, the late payment penalty clause, the insurance clause, clause authority with the right of substitution or absolute power can not be revoked, a release clause of Article 1266 and 1267 of the Civil Code (termination without the judge's order), the consumer financing contract should be consistent with the purpose of law as the theory of legal development Mochtar Kusumaatmadja and legal purposes as the basic idea is the creation of law Gustav Radbruch that is fairness, expediency and legal certainty.

Clauses mentioned above, in relation to the provision of Article 18 Section (1) Act No. 8 of 1999 on Consumer Protection that emphasizes business agent in offering goods and / or services that are held for trading are prohibited from creating or include the standard clause in every document and / or contract if:

- a. declare the transfer of the responsibility of business operators;
- b. stated that business agent are entitled to reject the handover to the goods bought by consumers;
- c. stated that business agent are entitled to reject the handover to the money paid for the goods and / or services purchased by consumers;
- d. express authorization from consumers to business agent, either directly or indirectly to any unilateral action relating to goods purchased by consumers in installments;
- e. arranging concerning proof of loss of use of goods or utilization of services purchased by consumers;
- f. entitles business agent to reduce the benefits of the services or reduce the wealth of consumers who become the object of buying and selling services;
- g. stating the submission of consumers to the regulations in the form of new rules, additional, secondary and / or advanced conversion create unilaterally by business agent in the period of consumer used services purchased by them;
- h. stating that the consumers give authorizes the business agent to encumbrance of mortgage, lien or security interest of the consumer goods purchased by installment.

The provisions of the above actually gives examples of other forms of transfer of responsibilities performed by business agent. There is the different thing between the standard clause and the exoneration clause. When look at the provisions of Article 18 Section (1) Act No. 8 of 1999 on Consumer Protection, can

be obtained temporary answer that the both terms are different. It means, the standard clause is a clause which created unilaterally by business agent, but it should not lead to the exoneration clause.<sup>4</sup> Meanwhile in Article 18 Section (2) Act No. 8 of 1999 on Consumer Protection, explained that business agents are prohibited to include the standard clauses that location or shape is hardly visible or can not be read clearly, or the disclosure of which is difficult to understand.

The Article 18 Section (3) Act No. 8 of 1999 on Consumer Protection declare null and void any standard clause that has been set by the business agent on documents or contracts that contain provisions that are prohibited in Article 18 Section (1) as well as standard contract or standard clause which comply with the provisions referred to in Article 18 Section (2). This is a reaffirmation of the nature of freedom of contract referred to in Article 1320 of the Civil Code jo. Article 1337 of the Civil Code. This means that contracts which contain provisions concerning the standard clause prohibited in Article 18 Section (1) or which has the format as prohibited in Article 18 Section (2) has never been considered and binding on the parties, business agent and consumers who carry out trade transactions of goods and / or services.

By operation of law on nullification of the clause as mentioned in Article 18 Section (3), Article 18 Section (4) Act No. 8 of 1999 on Consumer Protection further require the business agent to adjust the standard clauses that contrary to Act No. 8 of 1999 on Consumer Protection

Business agent also can be liable to imprisonment or a fine (Article 62 Section (1). Moreover, it can also imposed additional penalties as mentioned in Article 63 Act No. 8 of 1999 on Consumer Protection, such as:

1. deprivation of certain goods;
2. The announcement of the verdict;
3. The payment of compensation;
4. the stoppage of certain activities that contributed to the loss of customers;
5. obligation withdrawal of goods from circulation; or,
6. revocation of business license.

Inclusion of a ban on the use of standard clauses as stated in Article 18 Act No. 8 of 1999 on Consumer Protection mentioned above, this is a step forward for the development of law, especially in the Consumer Protection Law. The existence of such provisions be lifted consumer image, with the hope of standing between consumers and producers / business agent be balanced.

Law of Consumer Protection want to create a balancing between consumer and business agent. The setting is the inclusion of standard clauses is not an identification with the interests of consumers and harm the interests of business agent. Accordance with the principles of balance in consumer protection law, wants to be protected the interests of all parties, including the government's interest in national development, must have a balanced portion.

The application of standard clauses conducted by parties with stronger

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<sup>4</sup> Shidarta, *Hukum Perlindungan Konsumen Indonesia*, Grasindo, Jakarta, 2000, Page 123.



position will harm others with a weaker position, usually a model contract like this known as the abuse of state.<sup>5</sup> Positioning the business agent in a stronger position than the position of the consumer, it is not always true. Because in any case the consumer's position even stronger position than business agent, and even that consumers who designed the standard clause.

Observing a few examples of the clause, for the parties that create an contract (the company) is very reasonable to include such clauses in the contract. It is not that a goods business when "profitable and safe", so the inclusion of clauses is a form of distribution rights and obligations that were exchanged proportionally among parties.

There is no restriction for one of the parties in the contract (eg, finance companies) to protect its interests from being harmed, and for the other party (the consumer), It is proper that the clause is more lead to the protection of the finance companies as funders (the creditor) while not harming each other. Such situation should be understood as the initial stage of implementation of the contract, the greatest risk lies in finance companies that have been accomplished in advance (the company has paid cash), so it is proper that the finance company expects comparable performance will be carried by consumers. A tribute to the performance of these consumers then be marked with the inclusion of clauses contract. Understanding workflow or business process completely out of the financing contract, then the mutual relations can be assessed proportionally.

The existence of consumer financing contract in the legal system, that in the field of civil law is the realm of the law governing private interests in society in order to avoid conflicts of interest between the parties. This thing will help identify the rules and principles that should be considered in accordance with the laws of such relationships. Understanding the legal character of the contract is also important to be associated with the state authority to regulate trade activities in the field of economy.

In fact consumer financing contract is the raw contract, so the parties are no longer free to set its own mutual rights and their obligations to each other. Requirements and provisions set by the parties that politically or economically has more powerful position. The content of justice and the benefit is based on the determined at the time when the contract was made. By the time, the meaning of justice can be changed. Understanding fair has a double meaning, which differ little from one another once or vague. These situation need to be understood and addressed if the character of the fair will be applied, for example in the consumer financing contract that is fair, which is attached to the position of the parties.

Similarly with the issue of justice, a new injustices arise if the items were not enough for everyone who wants it and then fair or not a situation is always associated with the limitations. Prosperity does not ensure justice when wealth was not divided balanced.<sup>6</sup>

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<sup>5</sup> Mariam Darus Badruzaman, *Aneka Hukum Bisnis*, Alumni, Bandung, 1994, Page 50.

<sup>6</sup> K. Bertens, *Pengantar Etika Bisnis*, Kanisius, Yogyakarta, 2000, Page 85.

In the sense of justice contained three essential elements: justice focused on others, justice must be enforced, and justice demands equality. Issues of justice or injustice only arise in the context of inter-human. This justice must be enforced or implemented, and this binding, which would evoke the obligations related to the rights that must be fulfilled. The last, justice demands equality, related to the obligations or rights, justice can involve individual obligation to the society (public), public liability against individuals (distributive) and obligations between individuals (cumulative).<sup>7</sup>

That phenomenon was evident from the history of the development of business activities in Indonesia. Increased sense of injustice is manifested by dissatisfaction with provisions that already agreed in the contract, among others with the various of accusations and demands to change the terms of the contract.

In this context, distributive justice and commutative justice can be judged to be important in consumer financing contract in Indonesia, although it is difficult to establish what kind of justice should be judged. Some will argue that distributive justice is very important, because the kind of justice is a matter of balance in the contract. On the other hand, from an ethical perspective cumulative justice is very important, because it involves a transaction in the contract.

Meaning that can be drawn from the above description is that the threat to the content of justice and the rule of law generally comes from circumstances that are causing imbalances. Even the use of the model of contract has provisions to improve transparency standards still need to be negotiated to suit the circumstances. One reason for this situation is the will of business agent to gain greater power in negotiating to face the conditions of consumers. In this context, business agent is faced on how to formulate the situation risks and benefits offered in the contract.

### **3. Ideal Concepts for Consumer Protection Law in a Fair Consumer's Financing Contract With Motor Vehicles Object in Indonesia**

Law in view of the economy has the task to organize and empower business agent to conduct their business by meeting legal requirements have been determined, maintain fair competition and provide consumer protection. For this reason the concept of consumer protection is applied.

Consumer financing contract in a fair, such as the provision of fines specified in the treaty clauses PT Adira Dinamika Multi Finance decisive late payment penalties installment for joint financing facility motorcycle 0.5% / per day or 15% / month and 0.2% / per day or 6% / month for joint financing facility of automobiles. Such interest would be unfair and contrary to the principle of goods faith because the Bank's interest at the moment is 13% / year. It is thus demonstrated that the finance companies as funders are not acting in goods faith because it uses its strong position to dictate the terms of the contract for the benefit

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<sup>7</sup> John Finnis, *Natural Law and Nature Right*, Oxford, Clarendon Press, 1980, page 161-163. As quoted in K Berten *Ibid*, Page 87.

of theirself.

If we assume that consumers have to pay a fine per day, is clearly contrary to the goods faith in implementing the contract as stated in Article 1338 Section (3) of the Civil Code. Consumer financing contract is an engagement which is born of the contract, and therefore the parties are not only bound by the words of the contract, but also by the goods faith.

Definition of goods faith itself is that both parties must apply that deserves to another, without guile, without artifice, without subterfuge and without disturbing others. Do not see its own interests but also the interests of other parties.

The principle of goods faith has grown so that all contracts should be based on goods faith. An contract that is not based on goods faith, can be ruled out even though the parties have agreed. Therefore, the provisions contained in the clause of consumer financing contract should be based on the principles of goods faith as desired of Article 1338 Section (3) of the Civil Code.

P L Wery<sup>8</sup> argued that goods faith has the function to restrict and *abolish* (*beperkende en derogerende werking van de goede trouw*) a requirement in a contract or a provision of law regarding the contract can be ruled out, if it is compared to the situation at the time the contract was made then the situation has changed, so the implementation of the treaty or statute are considered unfair again.

Judging from Article 1320 of the Civil Code in particular on Section 1 about contract and Article 1 338 Section 1 of the Civil Code (*pacta sunt servanda*) that associated with the function of limiting and negate the seemingly contradictory, but if it is applied and adhered to the provisions of the legislation or contract that there would be create injustice then such provisions can be criss or eliminated.

Efforts to optimize the application of the responsibility of business agent in the above, the government needs oversight. Supervision is intended to make sure whether a policy or rules that created have been implemented well.

Government as the holder of a very large role in the development of national economy both through the application of regulations, especially those related to the responsibilities of business agent in order to consumers' interests are protected so that the government is not just leave it to the market mechanism related to both of these. It is solely intended to achieve a balance between the interests of business agent and consumers in achieving common prosperity.

When connected to consumer financing contract is there any breach of contract from the consumer because late payment of installments so can happen terms of verval clause, thus the goods withdrawn by finance company. In the practice, consumers are given the opportunity by the finance company to take back the goods object of the contract within the period in accordance with the contract to pay the entire arrears of unpaid installments plus fines and others. The opportunity to take back like this called "right of redemption".

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<sup>8</sup> Ali Imron, *Perubahan Keadaan dan Fungsi Itikat Baik dalam Pelaksanaan Perjanjian*, Bayu Media Publishing, Malang, 2008, Page 251.

Problems will arise when consumers can not pay at once all the arrears within the time specified in the contract. That problem concerns of the status of the installment money that has already paid by the consumer to the finance company.

If the consumer financing contract regarded as a lease, so all the money of installments has equal status with rents or payments for enjoying the goods.

Based on the establishment, it is reasonable if money of installment deemed forfeited or lost although in reality the object of the contract have been repaid almost paid off or stay several installments. Then mentioned that when consumers are negligent in paying the installments as stated in Article 6 Section 5 after maturity (PT Mandiri Tunas Finance), then the consumer is obliged to pay a fine for each day of delay as specified in Article 2 of this contract.

Breach of contract has been done by consumer and based on Article 12 of the consumer financing contract in PT. Mandiri Tunas Finance which states that if during the period of time after the maturity of consumers have not repaid yet the installments, the consumer financing contract has become an end in itself by releasing Article 1266 and 1267 of the Civil Code. Consumers should immediately return the vehicle in goods condition to the company, while the money has been received by the finance company from the consumer is considered as compensation payment for the use of goods. Therefore can not be required / requested back by the consumer, either partly or wholly. Based on these matters, finance company declared void or at least do not have the force of law again "Letter of Consumer Financing Contract" that has been created and punish consumers to deliver the goods as an object to the finance company with the terms if consumers negligent handed, then the consumer must be obliged to pay up the money in fines to the finance company each day.

According to researchers, if consumers are in breach of contract which means do not pay the installments as agreed, finance companies should not solely cancel the contract by releasing provisions of Article 1266 and Article 1267 of the Civil Code when the goods as the object of the contract is not registered in the registration of fiduciary as set out in the Act No. 42 of 1999 on Fiduciary as the rules of a specific regulation (Lex Specialist). Because the contract like this should be subject to the provisions contained in the Civil Code as the general regulation (Lex Generalis).

As a barometer, researchers will be pointed out the Ruling of Supreme Court Reg. No: 935 K/Pdt/1985 on September 30<sup>th</sup> 1986 that the legal considerations of the decision states essentially are: ... In the light of justice and morals are not worth if the form and content of the contract eliminate the rights of buyers (consumers) on the goods object of the contract, only caused delays or difficulties installment payments, without considering the number of installments paid.

Consumer financing contract is more about buy and sell because money of installments have been paid be taken into account and even consumers pay the remaining installments, then the contract remain the owner of the object. That

matter is contrary to the sense of justice of consumers who have to pay the installments several times, but due to negligence in paying the installments, the vehicle pulled out of the consumer and installment money that has been paid is lost.

Problems like this are very interesting when studied and associated with the theory or doctrine of consumer financing institutions, which is considered as a lease.

1. In the event of breach of contract, namely the omission of the installment payment obligations, then the contract is declared void by itself without trial (terms of the contract based on habit)
2. Vehicle as the object of the contract can be drawn
3. The money that has been paid in installments considered as rent or compensation for the use or as a replacement of the object of the contract. Therefore the money can not be taken or reclaimed by consumers.
4. Transfer or alienation vehicle as an object of the contract before repayment is to be a ban on the doctrine of consumer financing institutions, this is due to its characteristics or main nature of the institution of consumer financing that there is a transition delay right up until the time of redemption or the last installment fulfilled
5. Based on Article 1338 of the Civil Code, the contract created by the parties is legally binding as law for those who create it.

The above description can be analyzed:

1. Although there was negligence that resulted in the cancellation of the contract without the contract process and the transitional object, but the goods are not withdrawn but ordered to the customer to pay the remaining installments.
2. The money that has been paid previously with withdrawal the object of contract that considered by the finance company as rent and reimbursement for enjoying the object of the contract is not fair when consumers only late in paying the installments then their goods withdrawn and the money that has been paid is lost.

Relating to the justice, consumer financing companies that exist today if examined from justice there are weaknesses that is imbalance position of the parties (finance company and consumer) in the contract. Such imbalance among other things in clause (contents of the contract) as follows: clause maturity, the obligation to pay immediately, the acceleration of the payment by the consumer, late payment penalties, insurance, empowered with the right of substitution or absolute power that can not be revoked, the release Article 1266 and 1267 of the Civil Code (termination without the judge's decision).

The requirement for consumers to pay at once and instantly across the arrears within the time specified in the contract, show that the consumer's position is weaker than finance company, because consumers have to meet the amount of unpaid arrears. This is contrary to justice which requires impartiality or similarities in determining the content of the contract. The requirement to pay at once and in

a time to pay the arrears that unpaid, it is known that the consumer financing are more inclined to side with the finance company.

Regarding the consumer's right to reclaim goods which have been withdrawn by the finance company because the consumer can not pay the installments on time. This provision also shows the position of the imbalance between the consumer and finance company. It is also not in accordance with justice which calls for a balanced rights and obligations in the contract.

Other imbalances is about late payment penalties. It gives more profitable for finance company, because finance companies have a strong economic position, whereas the consumer, would be very mind of its economic aspects. Finance companies that have a strong position is also incompatible with justice which requires equality in the contract.

The next problem is the authority with the right of substitution or the power of absolute that can not be revoked, in an contract as contained in each document contracts that exist today, it also shows the weakness of the content of the contract. It indicates that there is still justice to be aimed not substantive justice, but procedural justice.

The provisions of Article 1338 of the Civil Code which is disputed by the finance company, which is valid contract is the law for the parties. The legal contract should not be contrary to justice, moral principle and merit. Contract in such cases must be implemented in goods faith (Article 1338 Section 3 of the Civil Code).

The above description, it can be seen that even in the consumer financing contract has been "Clause Delays Transfer of Rights", however, when the consumer has to pay the installment, the goods can not be revoked by the finance company because such goods as the property of the consumer. Payments that has not been paid by consumers declared as a debt to be paid. The above rights when assessed according to moral principles and the principle of goods faith is appropriate to give justice, it can be the legal protection of the consumer. It can also be said that consumer financing contract is a contract of buy and sale, because the money has been paid can not be considered as rent.

Based on the results of research on consumer financing contract that none of the contracts include the right for consumers to reclaim the goods which have been withdrawn by finance company because the consumer can not pay the installments on time. That there is a clause / terms retrieval of finance company. This is when linked with the purposes of the law everywhere in the world is to uphold justice. Law exists in the national culture, but justice stands above all cultures. In other words, all countries recognize justice as a universal virtue, while resting on the enforcement of the national law.

Recognition of the state as a single institution with the legitimacy to achieve justice through the law can not be separated from the philosophy of that creation. The philosopher Socrates argued that the state was formed because humans are social creatures who have the instinct to live collectively (living together). The state

has the ability to perform its function to ensure the safety of its citizens, including to get the justice, because it has the power to ward off all other groups attempt to dominate other human groups (which create injustice). Without being in a collectivity, people will be very vulnerable to threats and will become victims of human injustice or other groups are much stronger.

Regulating the complex human relationships necessary rules (laws) that must be obeyed by citizens. All interests must obtain the appropriate channel (channeling), so that all citizens can enjoy the happiness. The state should regulate (state functions as a regulator as defined by W Friedmann) that human relations are in balance so that all interests are met equitably.

Furthermore when justice in relation to the rule of law is one of the element in the legal purpose to maintain a balance between the elements of fairness and certainty. Legal certainty must always be in balance to justice. Similarly, elements of justice must always be in balance with certainty. In outline, with regard to the purposes of the law will be rooted in ethical theory which create to the concept of justice which is strongly influenced by Aristoteles, juridical theory dogmatic / legal positivism which create to the rule of law and utility theory bring out the benefit that influenced by Jeremy Betham.<sup>9</sup>

Regarding the legal certainty in Indonesia that characterized by justice of Pancasila, so the legal certainty does not mean merely legal certainty according to law, but the legal certainty in a justice (there is a balance between legal certainty and justice).

In particular based on justice, some of the weaknesses that exist in the consumer financing contract are justice requires the principle of impartiality (impartiality or equality of consumer and finance company) in the contract, while there are imbalance between the parties (consumers and finance company) in the consumer financing contract that exist today. That imbalance is the requirement to pay instantly in terms of consumers to delays / arrears the payment.

Consumer financing contract is necessary to realize in justice and legal certainty, both for the interest of consumers and business agents, so that in relation to the clauses contained in the contract should provide legal certainty for the parties, thus justice that are intended to be realized.

Certainty of law itself would be obtained if in creating the contract of the parties, especially the finance company before approving the application for consumer credit, finance companies need to do a credit analysis first.

The purpose of this credit analysis is to provide assurance to the finance company that the credit being applied it is decent and trustworthy. On the basis of the results of the credit analysis, finance companies give consideration carefully whether the consumer petition deserves to be granted. It is necessary to get attention seriously because considering the possibility of credit risk is difficult repaid and tend to jammed.

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<sup>9</sup> Ahmad Ali, *Menguak Tabir Hukum (suatu kajian filosofis dan sosiologis)*, Publisher Chandra Pratama, 1996, Page 72-85.

Norms of goods faith in the consumer financing contract needs to be understood by the parties. It means that although there is contract that the finance company can take back the vehicle as the object of the contract from the hands of consumers when the money installment is not paid or the price is not paid, but taking such goods must be carried in a consumer's place with the consent / permission from the consumer first. Because the vehicle has written on behalf of consumers in the Vehicle Registration Number and Proof of Vehicle Ownership.

Based on the contract in the case of late payment (no installments) the goods can be withdrawn, it based on the authorization by the consumer granted to the finance companies and or their representatives (substitution). The recall of the goods subject to the approval or consent of consumers and conducted at the residence of the consumer because the Vehicle Registration Number and Proof of Vehicle Ownership already on their behalf. If these provisions are not ignored by the finance company, then the finance company can be said to have committed an unlawful act as set out in Article 1365 of the Civil Code and may be subject to Article 335 of the Criminal Code of objectionable act.

The Results of research on consumer financing contract is all the contracts that become the object of research to include a clause on maturity. This clause in connection with contracts that include clauses maturity due to the inability of consumers to carry payment of installments on time as agreed, should pay attention to the causes of the delay and finance company can not immediately cancel the contract and declare the right to withdraw the goods which become the object of the contract. But because of the cancellation of the contract must be requested to the court, this is in accordance with the provisions contained in Article 1266 of the Civil Code.

Clause or abort condition is considered to be a requirement that is not fair and its presence beneficial to the finance company and not on the consumer that would conflict with the purpose of justice in the Pancasila, where justice of Pancasila calls for balance and impartiality in the contract. It is a requirement that does not give a view of the same bargaining power for the parties. Terms of "abort" is a requirement that does not give justice.

The recall goods without taking into account of the number of payments that have been made, give beneficial for finance company, as contained in the such contract which is become the object of research. Supposed to achieve justice for the parties to the contract should include a clause on the provision that if the goods are sold, the proceeds will be calculated by the number of installments already paid by the consumer to the finance company, so the goodwill of the parties to the contract can be realized.

That injustice was also associated with not accounting for the number of installments that have been paid, while the goods which become the object of the contract can be taken by the finance company. If it turns out that the goods has been sold by the customer to a third party, then the provisions above is true for protecting the finance company. If the goods was lost, finance company can ask



for compensation to the insurance company because there are obligation to insure the goods.

Insurance contract that created between the insurance company as an insurer and the consumer as the insured, finance company is a third party, or in other words not a party of the insurance contract. Even, for example a finance company that stop the insurance that is on the basis of authorization from the consumer, as it is allowed by Article 264 of the Commercial Code stating that "an insured not only can be covered at the expense of its own, but can also be covered at the expense of a third, either by a general or specific authorization, and outside the knowledge of the concerned though, and so it is with regard to the provisions of the applicable", but the finance company is still not a party of the insurance contract.

Article 1340 of the Civil Code provides that:

Contracts only apply between the parties that creating the contract. These contracts can not harm third parties; third parties can not get benefit from the contracts, in addition to those mentioned in Article 1317 of the Civil Code.

In the insurance contract of motor vehicle in which the finance company is a third party, then the case of insured risks (eg in case of theft or accident) finance companies are not entitled to request the insurance company (insurer) order the payment of compensation paid by the insurance company (insurer) to finance companies and not to consumers (insured). In essence, even though the vehicles were become the object of the contract it has closed its insurance, finance company still had not obtained the guarantee absolute that if something happens on the vehicle as the object of the contract, the finance company will receive compensation payments as repayment of consumer financing contracts. Avoid the difficulties posed by a consumer with bad faith, then the finance company tried wherever possible to be able to gain a strong position on the mastery over the payment of compensation.

There is a legal effort used by the finance company for some purpose. Legal effort that can be done by the finance company is using the opportunity provided by Article 1317 of the Civil Code. That Article provides the permissibility to hold promise for the behalf of third parties. Furthermore, it was also stipulated in article that someone who has foretell things like that, should not be pulled back if such third parties have expressed wish to use it. Practice clause contain such promise as stated in the insurance contract (insurance policy) with respect to insurance coverage against the vehicle which is the object of consumer financing contract given to the insured by a finance company whose name is mentioned in that clause.

According to Article 1317 of the Civil Code that is a promise for the behalf of third parties should qualify that:

- (A) with the pledge it is the intent of the parties who entered into an contract to issue its own rights for third parties and
- (B) attached to a gift and stipulator (requested set an appointment) to promitor (the promise) or on a promise of stipulator for himself.

If the intention is not there, so the third party is not acquired the right to demand of payment.

As stated above that there are essential conditions prescribed by Article 1317 of the Civil Code, if the third parties has stated that they want to use these promises, then the party who has made a promise can not draw such promises. Finance companies as a third party in the insurance clause. If the finance companies want to use the rights that granted in the insurance clause, they must express their wish to the insurance companies.

Oemar Seno Adji<sup>10</sup> argued that under Article 1317 of the Civil Code through the first terms, then if an contract granting of credit between the creditor (finance company) with the debtor (consumer) is held, and the insurance company told (betekend) about the existence of this contract, the insurance company is obliged to reckon with finance company the insurance money that should be paid to the insured / consumer. The existence of such notification has been written with the inclusion of an insurance clause in the insurance policy. The notice can be replaced with a note in the policy by the insurance company stating that their appointments for (the benefit of) a third party that has been notified and known. The existence of this formulation in the policy, it means that finance companies have expressed their will to use verbal clause.

According to Researchers, the inclusion of verbal clause in the insurance policy may not be revoked unilaterally by the insurer (insurance company) without the consent of the insured parties (consumers). The inclusion of the insurance clause is the inclusion of a promise by the insurer (insurance company) at the request of the insured (customer) who must be obeyed and implemented by the insurer. Because the party of insured which essentially requires that promise (that compensation payments paid to the finance company), then the insured has the right to cancel that promise and not a insurance companies.

Inclusion of verbal clause in the insurance policy is the obligation of the consumer, as things of the contract in the credit contract with the consumer financing companies, which in the verbal clause was stated also that the contract between the finance company and the insured (customer), such was recorded and approved by insurer (insurance company), and then the insured (customer) is impossible to withdraw the clause, if consumers do not want to do it.

Verbal clause is a beding for the behalf of third parties. Third parties, with beding that in this case is the finance company mentioned in verbal clause, obtained the right to demand payment of compensation. The parties that must make a payment of compensation is an insurance company that based on the verbal clause must pay it to the finance company.

The purpose of verbal clause precisely to safeguard the interests of finance company. When the existence of the verbal clause the insurance company can not

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<sup>10</sup> Sutan Remy Sjahdeini,, *Kebebasan Berkontrak dan Perlindungan yang Seimbang Bagi Para Pihak dalam Perjanjian Kredit Bank di Indonesia*, Jakarta : Institut Bankir Indonesia, Pustaka Utama Grafiti, Jakarta, 2009, Page 319.

ignore the clause and then pay compensation not to the finance company, which is precisely the desired interests to be protected, but to consumer (insured), then there is no point in the verbal clause inclusion in the policy. Considering the purpose of verbal clause that recognized legal force by Article 1317 of the Civil Code, which is to protect the interests of finance company, so long as the payment of compensation by the insurance company for losses incurred, the finance company as the holder of verbal clause has legal relationships directly with the insurance company or the insurer. As far as the compensation payments, the finance company has the right to act as a plaintiff to the insurance company.

Adhering to the verbal clause is much more robust and secure financing for the finance company rather than adhering to the authorization by the consumer to bill and receive payment of compensation as explained above.

As a raw contract one of the other requirements specified in the consumer financing contract is accelerated repayment terms. This requirement is a requirement based upon the theory is actually a favorable terms for consumers. That acceleration of the payment is actually not profitable for finance companies, because revenue has been estimated to be derived from the interest on the cost that did not happen.

It is not fair that consumers who pay more quickly or pay off more quickly, is still in overload interest equal to when they pays in installments. Consumers are right that carry no interest but burdened with fines which make sense because of the loss of profit that should be obtained by the finance company when the installments are paid as planned.

The calculation must be clearly stated in the contract and can not be accelerated payment after it was done, because the magnitude of the cuts will be determined unilaterally by only finance company. Seeing the reality of the results of these studies, it does not provide relief prepayments.

Researchers found in the legislation governing financial institutions in particular on consumer financing necessary to include the stipulation that consumers can request the judge's decision regarding the amount of the pieces were acquired due to the acceleration of payment, when consumers were treated unfairly by the finance company.

It is possible that someday the government will intervene in the contract, including a request that the contract be changed or even canceled if the contract does require the interests of consumers, as stipulated in the jurisprudence. On the other hand, the government is also obliged to protect the interests of business agent who work as partners to help improve economic development. So the use of these powers is subject to the requirements contained in the common of law legal system.

Furthermore, consumer financing contract is the result of an contract that is based on the will of the encounter and the principle of freedom of contract. The principle of freedom of contract is restricted by legislation and guidelines, among others on merit and the principle of good faith. The principle of good faith as a joint

law always pursues two objectives, that are to ensure certainty (order) and satisfy the demands of justice.<sup>11</sup> This is consistent with the purposes of the law by Gustav Radbruch.

To pursue these two objectives of legal certainty should be one of the principles in making a deal in which the government holds a role, that is as a regulator. The consumer financing contract full understanding of the application of the principle of legal certainty in contracts involving the government's role needs to be developed. Particularly the development in the context of the development of public interests which are associated with measures of merit according to the people's judgment and can vary according to the time and place, social relations, economic development and the evolutionary changes surrounding social outlook.

The occurrence of a condition which can not be predicted by consumers led to demands absolute legal certainty in the implementation of the contract in this time, where it is difficult or practically impossible to achieve all purpose of the contract. Consumer financing contract was negotiated in the futures and uncertainties conditions do not allow the parties to determine in advance of any content that must be considered in the contract. The limited view of the situation that will come from the rights and obligations of the parties in these situations often have an impact that some of the contracts remain open and incomplete. Realizing that the history of consumer financing contract in Indonesia showed the continuous efforts to balance the interests between business and consumers.

Balancing the interests of the parties in the contract due to events that can not be predicted at the time the contract was created necessary renegotiate their diverse goals and interests can be accommodated to reach the consumer financing business activity steady and still have benefit for both parties. The renewed talks aimed at restoring the balance by encouraging the parties provide the new charge against the treaty. Supporting its success, in this renewed talks based on the principles of justice (equity) and the principle of mutual benefit (mutual benefit) that originate in the equality of the parties. This equality is in an contract and not to the performance of the contract. Equality of the parties will make performance of the will of the parties at a point not far away from equilibrium.

Such an contract futures, consumer financing contract requires adaptation and renegotiated for various reasons. Context of consumer financing contract requires some sort of flexibility, so that the contractual relationship remains stable and achieve the expected results of activity in terms of the occurrence of a situation that can not be known at the time the contract was created. The principle of *pacta sunt servanda* which has been accepted in a modern legal system and upheld in the ruling of Supreme Court can not fully applicable in the consumer financing contract.

As a natural phenomenon that in this world nothing is eternal, as well as transfer of wealth that is balanced in an contract is not an eternal thing. The

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<sup>11</sup> Subekti, *Pembinaan Hukum Nasional, Himpunan Karangan, Pidato & Cerramah*, Publisher, Bandung, 1975, Page 33-34.

assumption that a contract made in the situation and condition that will not change is a fiction, so that the situation can not be predicted at the time of the conclusion of contract or circumstances that are beyond forecast or Force majeure can be used to justify a breach of contract (*wanprestasi*) from keeping its obligations in a contract.

The unpredictable situation is generally provide two different effects on the contract where the parties can establish that execution of the contract can not be continued or liability exemption only applied to one party.

The provisions concerning the unpredictable situation in contract of law in Indonesia is regulated as force majeure are accommodated in three chapters in Book III of the Civil Code, namely Articles 1244, 1245 and 1246. The events that can be viewed as force majeure or circumstances of this force will be limited to events that are unpredictable like an accident, illness or death.

Different from that set out in article of the Civil Code, force majeure defined in more detail. The definition of force majeure or reasons which can not be controlled by the parties is war, riots, storms, floods, fires, lightning, earthquakes, natural disasters and other causes where the parties do not have control and make the implementation of this contract does not may be implemented by both consumers and business agent.

Failure to perform the obligation of consumer financing contract is not regarded as a breach of contract if the failure was caused by force majeure or reasons beyond the control of the parties. Moving on from the formulation, it can be analyzed that the consumer financing contract includes provisions regarding the definition of force majeure.<sup>12</sup> Provision of force majeure is used to suspend the implementation of the obligation and not the termination of the contract, and with this provisions of force majeure in consumer financing contract may also be viewed as a form of overcoming such events through the negotiations back.

Understanding of force majeure or unpredictable situation meant not to terminate the contract, but aim to adjust the requirements of the contract to achieve balance disrupted due to circumstances. Force majeure as formulated is an event that fundamentally altered the balance of contracts resulting from the due execution of a contract that can not reach goal.

### **C. CONCLUSIONS**

- a. The development of consumer financing contract in Indonesia is the answer to financing existing institutional weaknesses and the weaknesses of the community's ability to meet the needs of life (economic facilities)
- b. Consumer financing contract as the answer to the economic needs of society turned out in the practice have not given a sense of justice
- c. Ideal concept of consumer protection in consumer financing contract should reflect the values that contained in Pancasila that is positioning the parties as the

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<sup>12</sup> Wirjono Prodjodikoro, *Hukum Perdata tentang Persetujuan-Persetujuan Tertentu*, Sumur Bandung, Bandung, 1991, Page 78.

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