

Legal Protection of Parties in Online Credit Agreement (Peer to Peer Lending) A Case Study of PT Vcard Technology Indonesia

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Abstract

The development of digital economy has led people to adapt to the use of services in information-technology-based loan or peer-to-peer lending. In early 2019, the V-loan case attracted attention of many people. The case has made debtors depressed, removed from their own houses, etc. Some debtors even were fired from works. In a case, the loan provider misused debtors' personal data in debtors' cell phones. The loan provider created WhatsApp groups containing all debtors' contacts, including the debtors. Then, they uploaded pornographic content. Their objective was to defame debtors. Parties involved in loan agreement should adhere rules and arrange for reasonable loan. To discuss this matter, it is necessary to review agreement based on the Law on Electronic Information and Transaction and the Regulation of Financial Services Authority number 77 of 2016. The study focused on legal protection of parties involving in P2P lending activities. The credit agreement of peer-to-peer lending is considered valid if it is based on Article 47 of the Government Regulation number 82 of 2016. Standard contract must be based on Article 20 of the Regulation of Financial Services Authority number 77 of 2016. Electronic signature is also required based on Article 41 of the Regulation. In addition, the application of information technology and electronic transactions must be carried out based on the principles of legal certainty, benefits, good faith, and the freedom of choice of technology based on Article 3 of Law Number 19 of 2016. Principles and objectives are fundamental elements of legal certainty. Therefore, organizer and the government must protect user of peer-to-peer lending.

Keywords: Financial Technology, P2P Loans, Legal Protection

Perlindungan Hukum Para Pihak dalam Perjanjian Kredit Online (P2P Lending) Studi Kasus PT Vcard Technology Indonesia

Abstrak

Perkembangan ekonomi digital menuntun masyarakat terhadap adaptasi penggunaan layanan dalam kegiatan pinjam meminjam uang berbasis teknologi informasi atau P2P lending. Kasus yang menyorot perhatian di awal tahun 2019 ialah kasus Vloan. Kasus ini

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membuat debiturnya tertekan, diusir dari rumah, bahkan sampai kehilangan pekerjaan dengan menyalahgunakan data pribadi yang ada pada ponsel debitur dengan cara membuat grup whatsapp berisi seluruh kontak pada ponsel debitur termasuk debitur itu sendiri kemudian melakukan penagihan yang tidak beretika dengan menyebarkan konten pornografi dan pencemaran nama baik. Para pihak seharusnya mengikuti aturan yang berlaku dan penyelenggara menghindari praktik penagihan yang tidak wajar. Untuk membahas hal tersebut perlu ditinjau perjanjian yang mengacu pada UU ITE dan POJK 77/2016 dan perlindungan hukum para pihak terhadap kegiatan P2P lending. Keabsahan perjanjian kredit P2P lending dinyatakan sah apabila memenuhi ketentuan yang diatur di dalam Pasal 47 PP 82/2016, kontrak baku yang disediakan oleh penyelenggara paling sedikit memuat ketentuan yang diatur di dalam Pasal 20 POJK 77/2016, dan tanda tangan elektronik juga wajib dipergunakan sesuai dengan ketentuan Pasal 41 POJK 77/2016. Selain itu, pemanfaatan teknologi informasi dan transaksi elektronik wajib dilaksanakan berdasarkan asas kepastian hukum, manfaat, itikad baik, dan asas kebebasan memilih teknologi/netral teknologi yang diatur di dalam Pasal 3 UU 19/2016, sebab asas dan tujuan merupakan kunci dari perbuatan hukum yang andal, khususnya dalam kegiatan P2P lending yang beroperasi menggunakan teknologi informasi dan komunikasi dan Perlindungan hukum pengguna tidak akan dapat dilindungi ketika tidak didukung oleh peran para pihak seperti penyelenggara, pengguna, dan pemerintah.

Kata Kunci: *Fintech, P2P Lending, Perlindungan Hukum*

A. Introduction

The use of information, media, and communication technology has changed both people behavior and human civilization in global scale. The development of information and communication technology has led people to be borderless. Significantly, it also causes social, economic, and cultural changes quickly. Information technology is now a double-edged sword because, in addition to contributing to the improvement of human welfare, progress, and civilization, it is also an effective means of law violations.

Currently, a new legal regime, known as cyber law or telematics law, has been born. Cyber law is a term related to the use of information and communication technology. Telematics law is an embodiment of the convergence of telecommunications, media, and informatics laws. Other terms that are also used are law of information technology, virtual world law, and –in the context of Indonesia- *mayantara* law. These terms were born bearing in mind the activities carried out through computer network systems and communication systems both locally and globally (the internet) by utilizing computer system-based information technology, which is an electronic system that can be seen virtually.

The internet brings the world economy into a new phase, which is more popular with the term digital economy.¹ The use of digital technology brings

¹ Richardus Eko Indrajit, *E-Commerce Kiat dan Strategi Bisnis di Dunia Maya*, Jakarta: PT. Elex Media Komputindo, 2001, p. 33.

impacts on several sectors. One of them is the business sector or industry, which eventually lead to online commerce or e-commerce. The impact of rapid development of technology and the internet does not only affect trade. It also affects financial industry, marked by the presence of digital financial innovation or commonly known as financial technology (fintech).²

According to The National Digital Research Center (NDRC), in Dublin, Ireland, fintech is “innovation in financial services”. It is an innovation in the financial sector that involves modern technology.³ Based on Article 1 of the Regulation of the Financial Services Authority Number 13/POJK.02/2018 on the Digital Financial Innovations in the Financial Services Sector, digital financial innovation or fintech is the activity of updating business processes, business models, and financial instruments that provide new added value in the financial services sector by involving the digital ecosystem. The concept of fintech adapts the development of technology combined with the financial sector of banking institutions. It is expected to facilitate a more practical, secure, and modern financial transaction process, including digital-based financial services that have now developed in Indonesia, namely payment channel systems, digital banking, online digital insurance, peer to peer lending (P2P lending), and crowd funding.³

The development of the digital economy enables people to develop innovations in lending and borrowing activities, characterized by the existence of information technology-based lending and borrowing or the P2P lending services. It is considered to have contributed to the development and the national economy. P2P lending services are very helpful in increasing public access to good online financial service products with various parties without the need to know each other. The main advantages of the P2P lending services include the availability of agreement documents in an online electronic form for the needs of the parties, the availability of legal counsel to facilitate online transactions and online risk assessment of the parties, sending billing information (collection) online, providing status information loans to parties online, and provision of escrow accounts and virtual accounts in the banking system to the parties. Therefore, the entire implementation of fund payments takes place in the banking system and the P2P lending services are expected to meet cash needs quickly, easily, and efficiently, as well as to increase power competitiveness.

Furthermore, based on Article 5 of the Law Number 21 of 2011 on the Financial Services Authority, the Financial Services Authority (OJK –*Otoritas Jasa Keuangan*) is obliged to organize an integrated regulatory and supervision system for all

² Ernama Santi, dkk., “Pengawasan Otoritas Jasa Keuangan Terhadap Financial technology (POJK No. 77/POJK.01/2016)”, *Jurnal Ilmu Hukum*, Vol. 6, No. 3, 2017, p. 1.

³ *Ibid.*, p. 2.

³ Immanuel Adhitya Wulanata Chrismantianto, “Analisis SWOT Implementasi Teknologi Finansial Terhadap Kualitas Layanan Perbankan di Indonesia”, *Jurnal Ilmu Hukum*, Vol. 20, No. 1, 2017, p. 134.

activities in the financial services sector. Based on Article 6 (c) of the Law, the OJK carries out the task to regulate and to supervise financial service activities in the Insurance sector, Pension Funds, Financing Institutions, and Other Financial Services Institutions. To be precise, the provisions are regulated in Article 2 Paragraph 1 of the Regulation of the Financial Services Authority Number 77 of 2016 on the Information Technology Based Money Lending and Borrowing Services. The regulation declares organizers of P2P lending activities as 'other financial service institutions'.

Electronic contract is inseparable part of fintech activities, including P2P lending.⁴ Based on Article 1 Point 17 of the Law Number 19 Year 2016 on the Electronic Information and Transactions, electronic contract is agreement of parties made through electronic systems. The P2P lending conducts its activities through an electronic system by using the internet network. Based on Article 1 point 4 of the Regulation of the Financial Services Authority Number 77 of 2016, an electronic system is a series of electronic devices and procedures that function to prepare, collect, process, analyze, store, display, announce, send, and/or disseminate electronic information in the field of financial services. Based the regulation, fintech should be under the supervision and regulation of the OJK, and follow the applicable legal provisions.

Considering the importance, the Government of Indonesia has issued regulations to govern fintech. They consist of the Law Number 21 of 2011, the Law Number 11 of 2008 on Electronic Information and Transactions as amended to the Law Number 19 of 2016 on Information and Electronic Transactions, the Government Regulations Number 82 of 2012 on the Implementation of Electronic Systems and Transactions, the Regulation of the Financial Services Authority Number 1/POJK.07/2013, and the Regulation of the Financial Services Authority Number 1/POJK.07/2014.

The development of the P2P lending activities is inseparable from their legal issues that mostly P2P lending providers violate applicable legal provisions. The case that drew attention in early 2019 is the Vloan case. According to CNN Indonesia, Vloan is a fintech in the P2P lending under the PT Vcard Technology Indonesia that is not registered in the OJK.⁵ Unusual and unethical billing practices made debtors depressed, removed from their own houses, etc. Some debtors even were fired from works. In a case, the loan provider misused debtors' personal data in debtors' cell phones. The loan provider created WhatsApp groups containing all debtors' contacts, including the debtors. Then, they uploaded pornographic content. Their objective was to defame debtors. As a fintech organizer, Vloan has an obligation to comply applicable legal provisions and avoid unreasonable billing

⁴ *Ibid.*

⁵ CNN Indonesia, "Empat Pengaih Utang Fintech Ilegal Ditangkap Polisi", <https://www.cnnindonesia.com/ekonomi/20190108172912-78-359352/empat-penagih-utang-fintech-ilegal-ditangkap-polisi>, accessed on June 26, 2019.

practices. Unfortunately, many people use P2P lending services because their ease. Therefore, it is necessary to review agreement based on the Law on Electronic Information and Transaction and the Regulation of Financial Services Authority number 77 of 2016.

B. Case Analysis of PT. Vcard Technology Indonesia

This study begins with a case that started in 2019 regarding the misuse of a contract in an electronic document that led to a criminal act. PT. VCard Technology Indonesia or called Vloan is a company engaged in the P2P lending business.⁶ To be able to use the facilities offered, users only need to download the application and register themselves by creating a User ID by completing personal data. The organizer used the personal data to determine user authentication. Only by providing a User ID and Password containing personal data and with a standard contract set forth in an electronic document, the credit process can be completed within seconds.

In the billing process, the desk collector of the PT Vloan misuses the users' personal data. One of the examples is to create a WhatsApp group containing contacts of a user who made late payment. Then, the desk collector announced that the user has a debt. In other words, the creditor deliberately embarrassed the debtor in front of family members, friends, and office colleagues. If the debtor does not also pay the debt with the interest, the desk collector became even more unreasonable by spreading pornographic content into the WhatsApp group. It was done as a threat to the debtor so that the debtor often faced problems with friends and family. There is even a case where a debtor was even fired by his office and expelled from his home. PT Vloan has many applications named, among others, Supercash, Rupiah Cash, Super Funds, Loans Plus, Super Dompnet, and Super Loans that are not registered in the OJK.

1. Aspects of Agreement in Money Lending and Borrowing Activity

Loan agreement, as well as agreements of sale, lease, and exchange, is a type of named agreements. It is an agreement with special name and is regulated in legislation. Generally, money loan agreement occurs because of economic factors. Debtor lends some money to defend interests and improve standard of living.

Article 1754 mentions that loan agreement is when one party gives to the other party a certain amount of goods, which are spent due to usage, on condition that the latter party will return the same amount of the same type and condition. Harahap explains that loans for used goods and money are "real-contract". These

⁶ Fitri Novia Heriani, "Berkaca dari Kasus Vloan, Masyarakat Diminta Waspada Lakukan Pinjaman Online", <https://www.hukumonline.com/berita/baca/t5c389ac751125/berkaca-dari-kasus-vloan--masyarakat-diminta-waspada-lakukan-pinjaman-online>, accessed on September 1, 2019.

loan agreements only bind after debtor receiving goods or money.⁷ Some main legal principles of agreements based on the Civil Code include the following.⁸

a. Principle of Freedom of Contract (*Contractvrijheid*)

This principle is an essential principle of law contract. This principle is also called the principle of “consensualism” autonomy, which determines the “existence” of an agreement.⁹ The principle of consensualism contained in Article 1320 of the Civil Code implies the “will” of the parties to participate in one another and the willingness to bind themselves to one another. The principle of consensualism has a close relationship with the principle of freedom of contract and the principle of binding force contained in Article 1338 of the Civil Code, which states that all agreements legally valid as a law for those who make them. The word “all” (originally ‘*semua*’ in Bahasa Indonesia) implies all agreements, either the names are known or unknown by law. The coverage of “all” contains the principle of autonomous party. Article 1338 of the Civil Code is correlated to Article 1319 of the Civil Code which states that all agreements, whether they have a specific name or are unknown by a certain name, are subject to general rules contained in this chapter and the previous chapter.

The principle of freedom of contract is related to the contents of the agreement, namely the freedom to determine “what” and with “whom” the agreement is conducted. An agreement that is conducted based on Article 1320 of the Civil Code has a binding power. The principle of freedom of contract is one of the most important principles in the Law of Agreement.¹⁰ Freedom is the embodiment of free will, the transmission of human rights. Based on the National Law of Agreement, the principle of freedom of contract must be based on freedom, which is responsible and able to maintain balance, namely “personality development” to achieve prosperity and happiness of life and soul that are harmonious, equal, and balanced with the interests of people.¹¹

b. Principle of Consensualism

The principle of consensualism is closely related to the principle of freedom of contract. The principle of consensualism is contained in Article 1320 and Article 1338 of the Civil Code. The principle of consensualism in Article 1320 of the Civil Code implies the “will” of the parties to mutually participate and bind themselves to one another. The principle of consensualism in Article 1338 of the Civil Code, contained in the term “all”. “All” implies covering all agreements, either the name is known or unknown.¹²

⁷ Yahya Harahap, *Segi-Segi Hukum Perjanjian*, Bandung: Alumni, 1982, p. 108.

⁸ Munir Fuady, *Hukum Kontrak dari Sudut Pandang Bisnis*, Bandung: PT. Citra Aditya Bakti, 2007, p. 50.

⁹ Mariam Darus Badruzalman, *Hukum Perdata Tentang Persetujuan-Persetujuan Tertentu*, Bandung: Sumur, 1985, p. 78.

¹⁰ Dhanang Widijawan, *Dasar-Dasar Hukum Kontrak Bisnis*, Bandung: CV. Keni Media, 2018, p. 79.

¹¹ *Ibid.*

¹² *Ibid.*

c. Principle of *Pacta Sun Servanda*

The principle of *pacta sun servanda* is regulated by Article 1338 of the Civil Code. All agreements are valid for those who make them. An agreement cannot be withdrawn other than by another agreement involving the parties involved or for reasons stated by law. An agreement must be carried out in good faith.

d. Principle of Legal Certainty

Agreement as a legal figure must contain legal certainty. Legal certainty is revealed from the binding power of the agreement, namely as a law for parties involved in the agreement.

2. Electronic Contracts

The term electronic contract in English is also known as e-contract or online contract. An electronic contract is defined as a contract that exists in cyberspace and is shown by the support of electronic means and not in paper-written form.¹³ Based on Article 1 Point 17 of the Law Number 19 of 2016, electronic contract is an agreement of parties made through electronic systems. According to Gunawan, an electronic contract is a standard contract that is designed, created, stipulated, duplicated, and disseminated digitally through the internet site (website) unilaterally by contract makers (in this case, business actor), to be digitally closed also by contract closing (in this case, consumers). Makarim uses the term online contract for electronic contracts (e-contract) and defines it as an engagement or legal relationship conducted electronically by integrating networking of computer-based information systems with communication system based on telecommunication networks and services, which is further facilitated by the existence of a global internet computer network.¹⁴

3. Validity of Online Credit Agreement based on the Civil Code and the Regulation of Financial Services Authority Number 77/POJK. 01/2016

According to Kelsen's legal certainty theory, certainty is a matter (condition) that is certain, a provision or stipulation. A law must be absolutely certain and fair. It must be a code of conduct and be fair because it must support an order that is considered reasonable. Because it is fair and carried out with certainty, a law can carry out its functions. According to Kelsen, law is a norm system. Norm is a statement that emphasizes the "should" or *das sollen* aspects, by including some rules about what should be done. Norms are deliberative human products and actions. Laws that contain general rules are guidelines for individuals to behave in a society, both in relationships with fellow individuals and with communities. These rules become a limit for a society in burdening or taking action against individuals.

¹³ Sylvia Christina Aswin, "Keabsahan Kontrak dalam Transaksi Komersial Elektronik", *Thesis for Master's Degree in Diponegoro University's Post-Graduate Program*, 2006, p. 66.

¹⁴ *Ibid.*

The existence of these rules and the implementation of these rules lead to legal certainty.¹⁵

Normative legal certainty is when certain regulations are made and promulgated because they regulate clearly and logically. Clearly is in the sense of not causing doubt (multi-interpretation) and logical. Clearly requires that a regulation becomes a norm system with other norms so that they do not clash or cause norm conflicts. Legal certainty refers to the implementation of clear, constant, consistent, and consequent laws that cannot be influenced by subjective circumstances. Certainty and justice are not just moral demands, but factually characterize the law.

4. The Validity of the Electronic Contract based on the Civil Code

Contract of law (Dutch: *overeenscomstrecht*, Indonesian: *hukum kontrak*), according to Friedman, is a legal instrument that only regulates certain aspects of market and agreements. Friedman does not further explain certain aspects of market and agreements in his statement. Aspects of the market must refer to various business activities that exist and develop in a market. The market may cover various types of contracts carried out by business actors, who enter into an agreement to buy and sell, lease, buy leases, leasing, and others.¹⁶

The term 'contract' has been adapted into Indonesian language. The term has been used in the Indonesian translation of the Civil Code, especially in Chapter II of Book III of the Civil Code, concerning the agreements that were resulted from contract or agreement. Referring to the understanding of agreement in a broad sense, contract has narrower meaning because it refers to a written agreement or agreement that generally applies in business field.¹⁷

The Civil Code regulates certain contracts referred to as named contracts or *nominaates*, which refer to contracts or agreements regulated in the Civil Code. For instance, they are agreements of sale, exchange, leasing, borrowing, grants, safekeeping of goods, etc. Unnamed agreement (*inominaat*) is agreement that is not regulated in the Civil Code such as franchise agreements, leasing, licenses, etc. Based on Article 1234 of the Civil Code, an engagement is intended to give, to do, or not to do something. An agreement or a contract in the making must meet the following elements.¹⁸

a. Essential Element

Essential element of a contract is a very important element and must be fulfilled to determine that a contract have existed or been born. This is intended to provide clarity of what are covered and who are agreed in a contract based on type of activity to be agreed. In this study, it covers P2P lending activities and parties,

¹⁵ Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, Jakarta: Kencana, 2008, p. 158.

¹⁶ Salim H.S, *Hukum Kontrak Teori dan Teknik Penyusunan Kontrak*, Jakarta: Sinar Grafika, 2003, p. 3.

¹⁷ Iswi Hariyani, dkk., *Penyelesaian Sengketa Bisnis*, Jakarta: PT. Gramedia Pustaka Utama, 2018, p. 10.

¹⁸ Ricardo Simanjuntak, *Teknik Perancangan Kontrak Bisnis*, Jakarta: Kontan Publishing, 2018, p. 168.

namely creditors and debtors, amount of credit, repayment period, payment procedures, and dispute resolution.

b. Natural Element

The natural element of a contract is an element of an agreement that is generally inherent in law. However, the enforceability of the element can be set aside by the contracting parties through a strict agreement to waive their validity. In this case, when parties waive the terms of the cancellation of the agreement regulated in Articles 1266 and 1267, the cancellation must not be requested through a court. It is to be completed by the parties.

c. Accidental Element

The accidental element is an element that basically describes the openness of a contract in realizing the principle of freedom of contract for parties. The parties in this case can agree on matters that have been mutually agreed upon and put them into a contract, even though the agreed matters are not explicitly regulated in existing laws, as long as the forms of the agreement still meet the validity requirements of a contract based on Article 1320 of the Civil Code.¹⁹

In addition to the elements above, a contract is considered valid if it meets certain conditions. Article 1320 of the Civil Code regulates the conditions for a valid agreement as follows.

a. Agreement of Parties Binding Themselves

An agreement, which is a meeting between offer from one party (offeror) and acceptance by another party (offeree), is the basis of the arising of obligations and rights of the contracting parties.²⁰ An agreement is also a principle of consensualism since an agreement is declared valid if there is consensus among parties. Agreement is consensus of statement of will between parties, who mutually agree on each other's wishes without coercion, error, and fraud.²¹ Based on the first condition, electronic contracts made based on standard clauses certainly violate or do not comply with the provision. Article 1321 of the Civil Code states that acceptance of an offer cannot be made by force, or by fraudulent means, or as a result of an error. It is affirmed in Article 1449 of the Civil Code that it will result in an illegitimate agreement that giving the consequences of being able to cancel the agreement that has been formally agreed upon. Based on these provisions, the elements can be explained as follows.

i. Error

Error can occur to people or to goods that are the objective of the parties to the agreement. For example, of person error is that a private television director has a contract with someone he thinks is a famous artist but it turns out that

¹⁹ *Ibid.*, p. 169.

²⁰ *Ibid.*, p. 212.

²¹ Riduan Syahrani, *Seluk Beluk dan Asas-Asas Hukum Perdata*, Bandung: PT. Alumni, 2010, p. 205.

the person is not the artist in question, just happens to have same name. An example of goods error is that someone buys a painting of a famous painter but it turns out to be just an imitation.²²

ii. Coercion

Based on Article 1323 of the Civil Code, coercion is a threat of deeds that causes extreme fear for a person who thinks well, aimed at himself, his wealth, and his family. In the case of electronic contracts, especially in making standard clauses, the element of coercion is fulfilled because user has no other choices but to agree to the terms and conditions of using the electronic system.

iii. Fraud

Based on Article 1328 of the Civil Code, fraud is a reason to cancel an agreement, if the fraud used by one party. It is evident that the other party will not enter into the agreement without any deception. Deception cannot only be guessed, it must be proven.

b. Skill of Contracting Parties

Article 1329 of the Civil Code confirms that each person is declared competent to contract, except when the law states that he is not capable. Based on Article 1330 of the Civil Code, parties that are not capable of making agreements are as follows.²³

i. Immature Individual

Article 330 of the Civil Code has explicitly determined that those who are not yet mature are those who have not reached the age of twenty-one years and have not married yet before. If a marriage has been dissolved before the age is even twenty-one years, then the status of the party does not return to the status of immature individual.

ii. Forgiven Individual

Article 1330 of the Civil Code stipulates that an individual who is an adult but in a state of mentally retarded, brain disorder, or visual impairment, then, based on Article 433 of the Civil Code, the person must be put under forgiveness. Therefore, the individual is declared incapable of carrying out legal actions or make a contract, even though sometimes the individual can act normally or can use his mind well.

iii. Married Woman

The Circular of the Supreme Court Number 3 of 1961 stipulates the elimination of the effectiveness of Article 108 and Article 110 of the Civil Code. This emphasizes that there is no difference between women and men in carrying out legal actions or entering into contracts.

²² Subekti, *Hukum Perjanjian*, Jakarta: Intermasa, 1987, p. 135.

²³ Ricardo Simanjuntak, *op. cit.*, p. 266.

c. Certain Thing

Certain thing in this case requires that the content of achievement as the object of the agreement must be clear and at least determined its type. This is regulated in Article 1333 and Article 1334 of the Civil Code as requirements that must be fulfilled (essential elements) in making a valid contract. The article stipulates that a contract must be contained as the main content of an item with at least a specified type. This is considered very important to be able to measure how the parties carry out their respective achievements on matters that have been agreed upon.²⁴

d. Halal cause

The cause can be interpreted as an objective basis on which a contract is formed. According to Subekti, cause is the content or purpose of an agreement. Based on Article 1335 of the Civil Code, an agreement without a cause, or that has been made for a false or prohibited reason, has no legal force. Furthermore, Article 1337 of the Civil Code explains that a cause is prohibited if the cause is prohibited by law or if the cause is contrary to decency or public order.

Essentially, electronic contracts are regulated in Law Number 19 of 2016. Online credit agreement, or information technology-based lending and borrowing money service, is organization of financial services to bring creditor and debtor in loan agreement through an electronic system using the internet network (without face to face). The agreement is documented in the form of electronic contract (e-contract). The presence of electronic contract is a result of advances of information and communication technology that requires legal certainty. Conventional contract that use paper have now shifted to paperless electronic contract system. Today's information technology has at least two implications. These implications affect economic and legal sectors. In the economic sector, the presence of the internet tends to bring a more transparent, effective, and efficient climate. On the other hand, the presence of the internet in the legal sector raises a number of fundamental issues. One of the legal issues is related to the validity of contract. Until now, conventional contract law rules have not been able to reach electronic means.²⁵

Electronic contract is an embodiment of the principle of freedom of contract while still considering aspects of reliability, security, and responsibility in the operation of electronic systems. Responsibility in the operation of electronic systems is based on the principle of the use of information technology and electronic transactions, which include the principles of legal certainty, benefits, prudence, good faith, and freedom of choice of technology.²⁶

²⁴ *Ibid.*, p. 268.

²⁵ Cita Yustisia, *Buku Pintar Bisnis Online dan Transaksi Elektronik*, Jakarta: Gramedia Pustaka Utama, 2013, p. 103.

²⁶ *Ibid.*, p. 98.

Based on Article 50 of the Government Regulation Number 82 of 2012, an agreement in an electronic contract is that the offer of a transaction sent by sender has been received and approved by recipient. The agreement as referred can be done by (1) an act of acceptance, which states an agreement; or (ii) act of receiving and/or using objects by users of electronic systems. Furthermore, in Article 51 of the regulation states that, in organizing electronic transactions, parties are obliged to guarantee provision of correct data and information and the availability of facilities and services as well as the settlement of complaints.

Electronic contract is closely related to standard agreement and exoneration clause. The standard agreement is translated from the Dutch term *woorwaarden*. In various states, there is no uniformity regarding the terms used for standard agreement. German literature uses the terms *allgemeine geschäfts bedingun*, *standaardvertag*, and *staandardkonditionen*.²⁷ Badruzalman translates them into fixed agreement. Standard means that procedure, size, reference, and legal language are standardized. It means that legal language is determined in terms of size, procedures, and criteria, so that it has a fixed meaning.

Business actors, in this case P2P lending activities organizers, utilize standard agreements in the form of efficiency in spending costs, manpower, and time by preparing standard contracts that must be approved by users if they want to use P2P lending, where standard contracts always emphasize the user and protect the interests of the organizer. If a P2P lending service user agrees to the standard contract, then the user can only accept the consequences of the content rather than the contract. Opportunities to make contract changes are very small and difficult.²⁸

Exoneration clause is a clause included in an agreement with one party avoiding to fulfill their obligations by paying full or limited compensation, which occurs because of broken promises or unlawful acts. The clause of exoneration can occur at the wish of one party as outlined in the agreement individually or in general, which has been prepared and reproduced in a form so that it is called a standard agreement.

5. The Validity of Online Credit Agreement based on the Regulation of in terms of the Financial Services Authority Number 77/POJK.01/2016 on Information Technology Lending and Borrowing Services

The era of globalization now cannot be separated from technological advances, especially information and communication technology. Advances in technology have resulted in economic development in business sector, especially in financial. The development of digital world has provided various services that make it easy for people. One of them is the presence of information technology-based loan

²⁷ Dhanang Widijawan, *op.cit.*, p. 99.

²⁸ Mariam Darus Badruzalman, *Hukum Perdata Tentang Persetujuan-Persetujuan Tertentu*, Bandung: Sumur, 1985, p. 100.

services.²⁹ Various ways were created to make it easier for people to get financial ease.

Inability to meet financial needs has become a problem in daily life. Therefore, innovation is needed to fulfill financial needs by providing technology to the system of borrowing and lending money in this era. Many people still understand that lending and borrowing money, or credit, comes from financial institutions such as commercial banks, central banks, and people's credit banks. Many people still do not understand the existence of other financial service institutions such as cooperatives, pawnshops, leasing companies, insurance, etc. It cannot be denied that until now bank has greatly contributed to the economic progress of the community at large. Over time, with a high level of need, there is now an alternative of lending and borrowing money based on information technology, the P2P lending. This payment method has cut the credit system of bank that is complicated. The presence of this system has made it easier for people to solve existing financial problems.³⁰

Basically, the validity of the credit agreement between creditor and debtor is regulated in Article 20 of the Regulation of Financial Services Authority Number 77 of 2016 as follows.

“(1) Loan agreements between lenders and loan recipients are contained in electronic documents.

(2) The electronic documents referred to in paragraph (1) must contain at least:

- a. agreement number;*
- b. date of agreement;*
- c. identity of the parties;*
- d. provisions regarding the rights and obligations of the parties;*
- e. loan amount;*
- f. loan interest rates;*
- g. installment value;*
- h. time period;*
- i. collateral object (if any);*
- j. details of related costs;*
- k. provisions regarding fines (if any);*
- l. dispute resolution mechanism;*

(3) The Operator is required to provide access to information to the loan recipient on the loan position received.

(4) Access to information as referred to in paragraph (3) does not include information related to the identity of the lender.”

²⁹ Ratna H., dkk., “Hubungan Hukum Para Pihak dalam Peer to Peer Lending”, *Jurnal Hukum*, Vol 25, No. 2, 2018, p. 321.

³⁰ *Ibid.*

6. Legal Protection of the Parties in P2P Lending Activities

Generally, in developed countries, the main cause of the establishment of consumer protection law is to accommodate one of the negative consequences of industrialization that is developing rapidly and showing high complexity, which causes many victims due to using or consuming industrial products.³¹ The service sector is also similar. All consequences caused by service providers, in this case PT Vloan, rises the need to protect consumers/users.

P2P lending activities are information technology-based activities that use electronic systems, or commonly referred to as platforms. The services are provided by companies engaged in the field of fintech. In this study, the focus is P2P lending provided by PT Vloan). Initially, it aims to support financial needs of people in the form of lending and borrowing money based on information technology or online where users and providers are entitled to legal protection. The government is obliged to guarantee legal certainty in the implementation of P2P lending. Therefore, the legal protection of special P2P lending activities is regulated in Chapter IV of the Regulation of Financial Services Authority Number 77 of 2016 and 1 of 2013.

Essentially, the relationship between organizer with creditor and debtor is subject to the provisions of Article 29 of the Regulation of Financial Services Authority Number 77 of 2016 and Article 2 of the Regulation of Financial Services Authority Number 1 of 2013. The two articles state that organizer is obliged to apply basic principles of legal protection, namely transparency, fair treatment, reliability, confidentiality, and security of data, and simple, quick, and affordable user dispute resolution. Organizer is obliged not to provide information that is difficult to access, know, or see or to provide information that is inaccurate, unclear, inaccurate, and misleading.

7. Theory of Legal Protection by Philipus M. Hadjon

Hadjon believes that legal protection is the protection of dignity and self-esteem, as well as recognition of human rights of legal subjects based on legal provisions of arbitrariness.³² According to Hadjon, there are two legal protections, namely preventive legal protection and repressive legal protection.³³

a. Preventive Legal Protection

Preventive legal protection is a form of legal protection where the people are given opportunity to submit objections or opinions before a government decision coming into a definitive form. Thus, the preventive legal protection aims to prevent. Preventive legal protection in P2P lending activities is regulated in the Regulation of

³¹ Janus Sidabalok, *Hukum Perlindungan Konsumen di Indonesia*, Bandung: PT. Citra Aditya Bakti, 2014, p. 23.

³² Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat Indonesia*, Surabaya: PT. Bina Ilmu, 87, p. 1.

³³ *Ibid*, p. 4.

Financial Services Authority Number 77 of 2016 and the Regulation of Financial Services Authority Number 1 of 2013 as follows.

i. Risk Mitigation

Based on Article 21 of the Regulation of Financial Services Authority Number 77 of 2016, organizer and user must carry out risk mitigation. The definition of risk mitigation is regulated in the explanation of Article 21 of the Regulation of Financial Services Authority Number 77 of 2016 that risk mitigation covers all risks contained in information technology-based lending and borrowing (P2P lending) services, including operational risk and credit risk. Furthermore, Article 24 of the Regulation of Financial Services Authority Number 77 of 2016 regulates the obligations of organizer to use an escrow account and provides a virtual account within the framework of P2P lending services. In the case of this study, PT Vloan did not comply to the Article 24 on the obligation to use escrow accounts and virtual accounts as a medium/intermediary. PT Vloan, instead, raised funds to their account, which was clearly in violation of and contradictory to the Article 24 and used the payment gateway service to send loan money.³⁴

ii. Data Confidentiality

Based on Article 26 of the Regulation of Financial Services Authority Number 77 of 2016, organizer is obliged to maintain confidentiality, integrity, and availability of personal data, transaction data, and financial data that they manage. The maintenance of data must be consistent since the data is obtained until the data is destroyed. They must ensure the availability of processes, verification, and validation that supports non-availability in accessing, processing, and execute personal data, transaction data, and financial data. Instead of borrowing data verification, PT Vloan uses ID cards and borrowers' self-photos to be distributed, and even abused. In addition, PT Vloan accesses almost all data in the borrower's device. This certainly violates and conflicts with the right to privacy.

iii. Prohibition

Based on Article 43 of the Regulation of Financial Services Authority Number 77 of 2016, in carrying out business activities, organizer is prohibited from:

- a. conducting business activities other than those of the organizer's business activities stipulated in the regulation;*
- b. acting as a lender or loan recipient;*
- c. providing guarantees in all its forms for the fulfillment of the obligations of other parties;*
- d. issuing debt securities;*

³⁴ CNN Indonesia, "Empat Pengaih Utang Fintech Ilegal Ditangkap Polisi", <https://www.cnnindonesia.com/ekonomi/20190108172912-78-359352/empat-penagih-utang-fintech-ilegal-ditangkap-polisi>, accessed on June 26, 2019.

- e. *providing recommendations to users;*
- f. *publishing information that is fictitious and/or misleading;*
- g. *making service offerings to users and/or the public through private communication facilities without the user's consent; and*
- h. *imposing any fees on users for filing complaints.*

In fact, PT Vloan has acted as a lender through its application, given recommendations to users to use other applications (the applications are owned by PT Vloan itself) to cover interest, penalties or even provisions, and charges payment gateway fees so that the amount of money borrowed by user is not the same as they promise because of the discounted payment gateway services.

b. Repressive Legal Protection

Repressive legal protection is a form of legal protection aims to resolve disputes.³⁵ It means legal protection after a dispute that aims to restore the rights of the injured party. In order to be able to carry out repressive legal protection for the benefit of the public, especially users of P2P lending services, there are some alternatives as follows.

i. Non-Litigation

As discussed earlier, the standard agreement provided by organizer, in this case PT Vloan, is regulated in Article 20 of the Regulation of Financial Services Authority Number 77 of 2016. At least, it contains the dispute resolution mechanism known as the choice of law. In addition, the OJK has released the Regulation of Financial Services Authority Number 1 of 2014 dealing with disputes in the field of financial services. The regulation covers the following mechanisms.

a) Mediation

Mediation is an effort to settle a non-litigation dispute based on mutual agreement of the parties through a mediator (mediator) who is neutral and does not make decisions but actively facilitates dialogue between parties in an atmosphere of openness and honesty to reach consensus. An impartial mediator works actively with the disputing parties to help them find common ground to reach a peace agreement. The mediation element consists of voluntary dispute resolution, based on the agreement of the parties, there is a neutral mediator, the mediator actively participates in the negotiation, the mediator has no right to make a decision or peace agreement, the peace agreement is made by the parties in consensus.³⁶

³⁵ Philipus M. Hadjon, *op.cit.*, p. 5.

³⁶ Iswi Hariani, et al., *op.cit.*, p. 85.

b) Adjudication

Adjudication is an alternative method of resolving disputes outside the court which has not been widely applied in Indonesia. The emergence of adjudication, especially in the financial services industry, was triggered by the OJK's plan to protect the interests of consumers, in this case P2P lending service users, when facing business disputes with business actors (financial service institutions). The adjudication of users of P2P lending services is expected to protect the possibility of arbitrary actions by business actors who have a far stronger position.³⁷

c) Arbitration

Arbitration is an alternative dispute resolution similar to a court because the procedure of the event is like a court hearing. Therefore, it is also called quasi-judicial or semi-court. The arbiter acts like a court judge who has the authority to actively examine a case, lead a trial, and even form a decision. In addition, arbitration awards are final and binding, in contrast to court decisions that have legal remedies. However, the arbitration process and the court both adopted the method of mediation before proceeding to the subject matter.³⁸

In general, the principle of alternative dispute resolution institutions in the Regulation of Financial Services Authority Number 1 of 2014 adheres to the principle of accessibility where consumers easily access dispute resolution services and covers the all area of Indonesia. It also contains the principle of independence that requires alternative dispute resolution institution to have supervisory organs to ensure that the agency meets the requirements to undergo its function and does not depend on certain financial service institutions. In addition, the regulation also covers the principle of justice that alternative dispute resolution institutions should take decisions with a variety of considerations. The considerations are, among others, that (1) the mediator actually acting as a facilitator in order to bring together the interests of the parties to the dispute to obtain a settlement agreement; (2) adjudicators and arbitrators are prohibited from taking decisions based on information that is not known to the parties; and (3) adjudicators and arbitrators must provide written reasons in each decision.

In fact, PT Vloan does not use alternative dispute resolution based on the regulation. Instead, they used methods that are not appropriate through its desk collectors. Therefore, it is clear that PT Vloan has violated the provisions stipulated in the dispute settlement mechanism regulated in the credit agreement between the lender and the loan recipient as stipulated in the Regulation of Financial Services Authority Number 1 of 2013 on Consumer Protection in the Financial

³⁷ *Ibid.*, p. 121.

³⁸ *Ibid.*, p. 133.

Services Sector and the Regulation of Financial Services Authority Number 1 of 2014 on Alternative Institutions for Dispute Resolution.

ii. Litigation

In a business activity that bring the interests of many parties together, the potential for disputes and disputes cannot be avoided. Litigation is the settlement of disputes between parties, including in P2P lending, which are conducted before a court based on the Indonesian civil procedural law process.³⁹ Article 38 of Law Number 19 of 2016 makes it clear that anyone can file a lawsuit against those who operate electronic systems and/or use information technology that causes harm. Further, Article 39 of the Law Number 19 of 2016 explains that civil lawsuits are carried out in accordance with statutory regulations.

Based on the description above, preventive legal protection should provide opportunities/options regarding defaults made by loan recipients. In the context of the legal engagement agreements made by PT Vloan with the loan recipient, it is a debt agreement where the achievement is fulfilled if the debtor, in this case the loan recipient, pays/repays the debt to the creditor based on the provisions stipulated in Article 1381 of the Civil Code. Conversely, if the debtor fails to carry out his achievements (default), then based on the provisions of Article 1267 of the Civil Code, the creditor is entitled to compensation in the form of costs, losses, and interest. However, PT Vloan instead chose to collect debts by embarrassing the debtors and misusing their personal data. They did not adhere to the repressive legal protection that they should choose the path determined by the regulation. The OJK in this case has prepared a special institution, namely an alternative dispute resolution agency as an intermediary to reach consensus but PT Vloan used other methods in dispute resolution.

8. Hans Kelsen's Legal Certainty Theory

Certainty is a condition that is certain, a stipulation or a provision. Law must be absolutely certain and fair. It must be a code of conduct and be fair because the code of conduct must support an order that is considered reasonable. Fair and certainty implementation enable law to carry out its functions. Legal certainty is a question that can only be answered normatively, not sociologically.⁴⁰

According to Kelsen's legal certainty theory, certainty is a matter (condition) that is certain, a provision or stipulation. A law must be absolutely certain and fair. It must be a code of conduct and be fair because it must support an order that is considered reasonable. Because it is fair and carried out with certainty, a law can carry out its functions. According to Kelsen, law is a norm system. Norm is a

³⁹ *Ibid.*, p. 27.

⁴⁰ Dominikus Rato, *Pengantar Filsafat Hukum Mencari, Menemukan, dan Memahami Hukum*, Yogyakarta: Laksbang Pressindo, 2010, p. 59.

statement that emphasizes the “should” or *das sollen* aspects, by including some rules about what should be done. Norms are deliberative human products and actions. Laws that contain general rules are guidelines for individuals to behave in a society, both in relationships with fellow individuals and with communities. These rules become a limit for a society in burdening or taking action against individuals. The existence of these rules and the implementation of these rules lead to legal certainty.⁴¹

Normative legal certainty is when certain regulations are made and promulgated because they regulate clearly and logically. Clearly is in the sense of not causing doubt (multi-interpretation) and logical. Clearly requires that a regulation becomes a norm system with other norms so that they do not clash or cause norm conflicts. Legal certainty refers to the implementation of clear, constant, consistent, and consequent laws that cannot be influenced by subjective circumstances. Certainty and justice are not just moral demands, but factually characterize the law.⁴²

Based on the above provisions, and analysis based on Kelsen's theory of legal certainty, a P2P lending credit agreement is valid only if it meets the requirements (norms) of the validity of the electronic contract as stipulated by Article 47 of the Government Regulation Number 82 of 2016. The standard contract provided by the organizer must contain at least the provisions regulated in Article 20 of the Regulation of the Financial Services Authority Number 77 of 2016. In addition, electronic signatures must also be used in accordance with the provisions of Article 41 of the Regulation of the Financial Services Authority Number 77 of 2016. Furthermore, the use of information technology and electronic transactions must be carried out based on the principle of legal certainty, benefits, good faith, and the principle of freedom of choice of technology, or neutral technology, set forth in Article 3 of Law Number 19 of 2016. It is because principles and objectives are the key of legal actions reliable, especially in P2P lending activities that operate using information and communication technology. PT Vloan has clearly violated the principles and the objectives of information technology and electronic transactions as explained previously. Therefore, PT Vloan should register itself in the OJK database and follow the regulations and requirements set out in the Regulation of the Financial Services Authority Number 77 of 2016.

C. Conclusion

This study concludes that a P2P lending credit agreement is valid only if it meets the requirements (norms) of the validity of the electronic contract as stipulated by Article 47 of the Government Regulation Number 82 of 2016. The standard

⁴¹ Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, Jakarta: Kencana, 2008, p. 158.

⁴² CST. Kansil, et al., *Kamus Istilah Hukum*, Jakarta: Jalan Permata Aksara, 2009, p. 35.

contract provided by the organizer must contains at least the provisions regulated in Article 20 of the Regulation of the Financial Services Authority Number 77 of 2016. In addition, electronic signatures must also be used in accordance with the provisions of Article 41 of the Regulation of the Financial Services Authority Number 77 of 2016. Furthermore, the use of information technology and electronic transactions must be carried out based on the principle of legal certainty, benefits, good faith, and the principle of freedom of choice of technology, or neutral technology, set forth in Article 3 of Law Number 19 of 2016. It is because principles and objectives are the key of legal actions reliable, especially in P2P lending activities that operate using information and communication technology.

In line with the Kelsen's theory of legal certainty, a rule is made and promulgated certainty because it regulates clearly and logically. Legal certainty refers to the implementation of clear, permanent, consistent, and consistent law. The implementation cannot be influenced by subjective circumstances. Regulations made by the OJK, which is the Regulation of the Financial Services Authority Number 77 of 2016, 13 of 2018, 1 of 2013, and 1 of 2014 clearly stipulates P2P lending service activities. However, PT Vloan blatantly violated these regulations.

User cannot be protected legally if organizer, user, and government do not support the protection. In terms of standard contract, organizers and users should be equally strong as legal subjects. On the other side, the government has the duty to supervise the regulations they make. For this reason, in line with the Hadjon's theory of legal protection, the agreement should protect dignity and recognize human rights of legal subjects based on legal provisions of arbitrariness. Preventive legal protection should provide opportunities/options regarding defaults made by loan recipients. In the context of the legal engagement agreements made by PT Vloan with the loan recipient, it is a debt agreement where the achievement is fulfilled if the debtor, in this case the loan recipient, pays/repays the debt to the creditor based on the provisions stipulated in Article 1381 of the Civil Code. Conversely, if the debtor fails to carry out his achievements (default), then based on the provisions of Article 1267 of the Civil Code, the creditor is entitled to compensation in the form of costs, losses, and interest. Based on repressive legal protection, they should choose the path based on the regulation. The OJK in this case has prepared a special institution, namely an alternative dispute resolution agency as an intermediary to reach consensus.

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