Civil Liability for Default of Electronic Contracts in Fintech Lending Agreements

Megawati Barthos(✉)

Borobudur University, Jakarta, Indonesia
angkasamega70@gmail.com

Abstract. Fintech Lending in Indonesian regulations, known as Information Technology-Based Co-Financing Services is experiencing rapid development due to the use of information technology in the funding system. These developments do not necessarily have a positive impact but also a negative one, such as causing losses to the funder due to the risk of default by the fund recipient. Based on this, a problem formulation was found: civil liability for electronic contract defaults in fintech lending. This writing uses a normative juridical method with a statutory approach. The study's results using the above method show that the borrower is responsible based on the principle of absolute responsibility (strict liability).

Keywords: Fintech Lending · Liability · Default · Electronic Contracts

1 Introduction

Financial Technology or Indonesian Financial Technology is defined by The National Digital Research Center (NDRC) as "Innovation in financial services" or "innovation in financial services," which is innovative financial services that get a touch of modern technology [1]. Technological development results from human thought always wanting to create an innovation. Then its application aims to make it easier for humans to carry out activities. The internet is a result of very rapid development and progress in the field of technology; the internet seems to create a world without boundaries where the internet can connect people in all parts of the world to interact [2].

The financial sector is one of the business sectors that has experienced significant changes, known as financial technology or financial technology. The development of financial technology needs to be regulated by law to develop the industry itself and protect the public as users. One of the developments in fintech is fintech lending or peer-to-peer lending, which in Indonesian is referred to as Information Technology-Based Joint Funding Services under the legal umbrella of POJK 10/POJK.05/2022.

Financial technology (peer-to-peer lending) is here to answer the problem of public financial access to conventional financial institutions. Previously, dealing with conventional financial institutions (banks) was complicated and took a long time. Therefore, financial technology (peer-to-peer lending) offers convenience and speed in public finance transactions, especially borrowing funds.

© The Author(s) 2023
A. Endah Kusumaningrum et al. (Eds.): ICLEH 2022, ASSEHR 723, pp. 74–81, 2023.
https://doi.org/10.2991/978-2-38476-024-4_10

However, in addition to the convenience and effectiveness offered by fintech lending are several funding risks by the lenders. Where the recipient of the funds defaults on the agreement given. This is evidenced by the risk of default in fintech lending. The risk of default occurs because the fund recipient experiences a delay in payment to the funder and/or does not make the payment as agreed. Based on the description above, this study will discuss how civil liability for electronic contracts in fintech lending agreements is made.

2 Research Method

The type of research used is normative legal research, often called doctrinal legal research. According to Peter Mahmud Marzuki, any research related to the law (legal research) is always normative [3]. The approach used is the statutory approach, which is carried out by reviewing various laws and regulations relating to the issues raised. In addition, the research examines primary, secondary, and tertiary legal materials collected using library research. Furthermore, it is analyzed using a descriptive-analytical approach which is a way of analyzing by describing the object under study.

3 Findings and Discussion

Funding through information technology in Indonesia is based on the Financial Services Authority Regulation or POJK Number 10/POJK.05/2022 concerning Information Technology-Based Co-Financing Services. This new regulation as an improvement and revoking the previous regulation, namely POJK 77/POJK.01/2016 concerning Information Technology-Based Lending and Borrowing Services. Technology-Based Mutual Funding Services or often called fintech lending is classified as an electronic system operator, wherein the operation of the electronic system there are arrangements regarding the responsibilities and obligations of the electronic system operator, which in this case is the fintech lending service provider. The regulation regarding the electronic system operator is contained in Article 15 paragraph (1) of the ITE Law, namely as follows:

1. Every Electronic System Operator must operate an Electronic System reliably and safely and be responsible for the proper operation of the Electronic System.
2. The Electronic System Operator is responsible for the Electronic System Operation.
3. The provisions as referred to in paragraph (2) shall not apply if it can be proven that the occurrence of coercive circumstances, errors, and/or negligence on the part of the Electronic System user can be proven.

To the article, if it is related to the implementation of fintech lending, the fintech lending as the provider of the electronic system must fulfill the responsibilities and obligations determined by the law.

In order to fulfill their obligations and responsibilities as electronic system operator, fintech lending use a contractual mechanism in the form of an electronic contract. The fintech lending applies this contractual mechanism for anyone who wants to make funding on fintech lending so that every user who wants to do funding and receive funds at a

fintech lending will first be faced with an electronic contract that the fintech lending has provided to be able to continue using fintech lending, so that all service users who will use fintech lending considered to have read, understood and agreed with the electronic contract.

One of the goals of the contractual mechanism in the form of an electronic contract implemented by fintech lending is to provide legal certainty to provide a sense of security and comfort for service users in conducting funding in fintech lending. The provider of fintech lending will bind the parties in an electronic contract so that the parties can continue to fund their fintech lending, the electronic contracts provided are standard and generally contain rules for use, rights and obligations of the parties, restrictions, and other guidelines related to funding in the fintech lending.

The high number of funding in fintech lending, as well as the occurrence without physical meetings between the parties, is a pressure for related parties to present and provide legal certainty in electronic funding in fintech lending. Electronic contracts are here to answer the problem of legal certainty in funding in fintech lending. The definition of an electronic contract based on article 1 number 17 of Law Number 19 of 2016 concerning Electronic Information and Funding states that an electronic contract is an agreement between parties made through an electronic system. Electronic contracts can take place without any physical meeting between the parties. In essence, electronic contracts have the same validity as conventional contracts. This is based on the legal terms of the agreement contained in Article 1320 of the Civil Code. If the electronic contract has fulfilled the conditions for the validity of the agreement, then the electronic contract can be legally valid and binding on the parties [4].

Electronic contract arrangements in the implementation of fintech lending are set out in Article 31 and Article 32 of POJK 10/POJK.05/2022. In the implementation of the Information Technology-Based Co-Funding Service agreement or known as LPBBTI, it consists of [5]:

1. Agreement between the organizer and the Fund Provider; and
2. Agreement between funder and fund recipient.

The agreement between the organizer and the funder is set out in a document or electronic contract at least containing the following elements:

1. agreement number;
2. the date of the agreement;
3. the identity of the parties in the form of the name of the Funder and the Identity Number of the Funder;
4. rights and obligations of the parties;
5. Funding amount;
6. Funding economic benefits;
7. The amount of the commission;
8. Period of time;
9. Fee details;
10. Provisions regarding fines, if any;
11. use of Personal Data;

12. Funding collection mechanism;
13. risk mitigation in the event of non-performing funding;
14. dispute resolution mechanism; and
15. the mechanism for settling rights and obligations if the Operator cannot continue its operational activities

While the agreement between the funder and the recipient of funds is stated in a document or electronic contract at least containing the following elements:

1. agreement number;
2. Agreement date;
3. the identity of the parties;
4. rights and obligations of the parties;
5. the amount of funding;
6. economic benefits Funding;
7. installment value;
8. time period;
9. the object of guarantee, if any;
10. related costs;
11. provisions regarding fines, if any;
12. use of Personal Data;
13. dispute resolution mechanism; and
14. the mechanism for the settlement of rights and obligations following the provisions of laws and regulations if the Operator cannot continue its operational activities.

The use of electronic contracts in fintech lending is an implementation of Article 3 of the ITE Law: "Utilization of information technology and electronic funding is carried out based on the principles of legal certainty, benefits, prudence, good faith and freedom to choose technology or technology neutral". With the electronic contract mechanism in fintech lending it becomes a juridical instrument (legal certainty). Legal certainty emphasizes that the law or regulation must be enforced as the law or regulation intends it. Everyone hopes to enforce the law in the event of a real event. How the law should apply and not deviate must be enforced regardless of the situation. Legal certainty becomes a protector of arbitrary actions, and people need legal certainty because legal certainty will make society more orderly. Legal certainty plays a very important role, so electronic funding that occurs in fintech lending requires a legal certainty that is poured into electronic contract documents, which in turn binds the parties involved in the funding, thus giving birth to a code of conduct guidelines for conducting electronic funding in Indonesia. Fintech lending and the funding process are expected to be more orderly to provide the expected benefits for the parties.

Fintech lending can be accessed anytime and anywhere to make funding or receive funds. In addition, fintech lending provides easy access to the distribution of funds made by the parties. So that recipients of funds can receive access to funding quickly without going through lengthy and complicated regulations. Some of these factors make fintech lending a more flexible and efficient means of funding so that it is in demand by the

public. However, from all the practicalities offered in fintech lending, it does not mean that the funding carried out does not have risks.

Funding through fintech lending also allows problems or disputes between funders and recipients of funds. Taking place without a physical meeting between the giver and the recipient of the funds, the funder does not know the financial profile of the beneficiary. So funding only relies on descriptions, photos, and documents provided by fintech lending. The following are the funding risks that may occur in a funding agreement through fintech lending [8]:

Default Risk. The risk of default is the condition of the recipient of the funds being late and/or unable to return the funding money from the funder. Fraud is a condition where the recipient of the funds is not the real identity owner, so there is a possibility that no payment will be made at all. Recipients of funds may be victims of identity theft or individuals who falsify salary information and debt obligations that could affect their ability to pay.

Some of these factors are the causes of conflicts between the parties in funding fintech lending. The conflict can then develop into a dispute when the injured party feels dissatisfied or concerned, directly to the party who is considered the cause of the loss or another party.

The contract creates an engagement for the parties, so following article 1338 of the Civil Code, paragraph one, or what is known as the Pacta Sunt Servanda where a contract will bind the parties as a law. Then the parties are obliged to carry out the contents of the contract properly. Electronic contracts in fintech lending also apply the principle pacta sunt servanda where the parties must obey and carry out the contents of the contract like the law. In the electronic contract in fintech lending, the service provider will contain several conditions that must be obeyed by fintech lending namely the giver and recipient of funds, this is useful for maintaining the quality and standard of services provided by fintech lending, as well as minimizing the occurrence of other things detrimental to the parties.

In every funding, there is always a risk that the funding will be disrupted or cannot be carried out properly as expected, causing a conflict that can become a dispute.

Disputes that often occur between parties in fintech lending are defaults, where one party does not fulfill its achievements or obligations as previously agreed by the parties.

There are four types of default, namely:

1. Not doing what is agreed to be done
2. Doing what was agreed but not as agreed
3. Doing what was agreed but late
4. Doing something that the agreement must not do

In civil law, if one of the parties does not fulfill its performance as stipulated and agreed in the contract and has been given a subpoena but is ignored by the party who does not fulfill its performance, it has defaulted. In the case of fintech lending, there are often defaults caused by the funder being late in paying the funding money and not even paying the funding shrimp to the funder.

The action caused by the recipient of funds in funding in fintech lending causes losses to the funder in a contract, the funder has the right to demand legal protection for

his rights that the recipient of the funds does not fulfil, and the funder can file a lawsuit to the court to force the party who defaults namely the recipient of funds to carry out their obligations as agreed in the contract, the party who defaults on himself can also be sentenced to compensate in the form of compensation in the form permitted by law (Articles 1236, 1239, and 1243 of the Civil Code).

Legal responsibility for a default is based on the contractual relationship between the parties. Contractual relationships arise as a result of agreements or laws. Every legal act always requires the presence of legal responsibility. As is the case with a contract where the parties have agreed on their obligations to be carried out, in other words, the obligations of the parties that have been regulated in an agreement are a cause that gives birth to responsibility, this is a responsibility for the bound party. In a contract, because it is based on the principle of Pacta sunt servanda, the agreement made is valid as a law.

According to Kelsen, a concept closely related to legal obligations is legal liability. According to him, a person has legal responsibility for certain actions or in other words someone bears legal responsibility; then he is also responsible for a sanction if his actions are contrary to the rule of law. [11].

Civil liability must have a basis, namely things that require someone to be responsible. According to civil law, there are two basic principles of liability: error and risk. Someone is required to be responsible or the birth of an obligation to be responsible because that person is guilty, either in error or negligence. Furthermore, in civil law, it is also possible for a person to be responsible not for committing a mistake but for arising from the risk of his legal position so that it obliges him to be responsible. [12] The principle of responsibility in civil law is distinguished as follows:

1. Liability Based On Fault
   The principle of liability based on fault is a very general in criminal and civil law. This principle is firmly held in the Civil Code articles 1365, 1366, 1367. This principle states that a person can only be held legally responsible if there is an element of wrongdoing. Article 1365 of the Civil Code, known as the article on PMH, must fulfill four main elements, namely:
2. Presumption of Liability
   Based on this element of responsibility, presumption is always responsible until it can prove that he is innocent. On the principle of responsibility for errors, the burden of proof is on the party who feels aggrieved. In contrast, on the principle of presumption, it is always a responsibility for the burden of proof to be borne by the party who caused the loss.
3. Presumption of non-liability
   The presumption is the opposite of the rebuttable presumption of liability principles.
4. Strict Liability
   The principle of absolute liability is often identified with the principle of absolute liability. However, some experts distinguish the two terms above. There are opinions that say strict liability is the principle of responsibility that stipulates no fault as a determining factor. However, there are exceptions where it is possible to be released from liability, for example in a force majeure situation. On the other hand, absolute liability is the principle of responsibility without fault and exception. In addition, there is a somewhat similar view, which attributes the difference between the two to

the presence or absence of a causal relationship between the responsible subject and his guilt.

The principle of responsibility that applies to funding in fintech lending event of a default is absolute responsibility (strict liability). This is due to the unbalanced position between the giver and the recipient of funds, where the lender is in a weak position because the lender must provide funding with a certain amount of money first. The weak position of the financier results in the full responsibility being in the hands of the beneficiary. The recipient of the fund is fully responsible for all funding money in funding in fintech lending, in line with article 21 paragraph (2) letter a of the ITE Law, which reads: "if it is done alone, all legal consequences in the implementation of electronic funding are the responsibility of the transacting parties." So, regarding funding in fintech lending, the party that must be responsible is the party that has defaulted. Liability can be carried out in various forms such as compensation according to the amount of loss suffered by the buyer. If a seller in a fintech lending who has committed an act of default then ignores his responsibility to make compensation, then the buyer can take legal action as stipulated in articles 38 and 39 of the ITE Law concerning dispute resolution. In fact, the buyer can also report to the authorities (criminal line) if the action is an act of fraud.

The legal consequences for sellers in marketplace who commit acts of default are in the form of penalties or sanctions, as has been regulated in book III of the Civil Code, namely:

1. The debtor must pay the loss suffered by the creditor (Article 1243 of the Civil Code), which applies to all engagements.
2. Creditors can request the cancellation of the contract through the court (Article 1266 of the Civil Code).
3. The creditor can request the fulfillment of the contract or the fulfillment of the contract accompanied by compensation and cancellation of the agreement with compensation (Article 1267 of the Civil Code).

In addition to bearing some of the legal consequences that have been mentioned, it can be concluded that five possibilities will be prosecuted against debtors who have defaulted as stated in Article 1267 of the Civil Code, namely:

1. Fulfill or carry out the agreement
2. Fulfilling the agreement accompanied by the obligation to pay compensation
3. Pay compensation
4. Cancel the agreement and
5. Cancelling the agreement with compensation

4 Conclusion

The beneficiary's responsibility in the event of a default is based on the principle of absolute responsibility (strict liability). Therefore, the recipient of the funds is responsible for the mistakes made. Meanwhile, the recipient of the funds has the right to fulfill

the agreed achievements, get compensation for the losses suffered, and can cancel the agreement.

References

1. Ernama Budiharto dan Hendro S, Pengawasan Otoritas Jasa Keuangan Terhadap Financial Technology (Peraturan Otoritas Jasa Keuangan Nomor 77/POJK.01/2016), Dipenogoro Law Jurnal, Vol. 6 Nomor 3, 2017, p. 1–2.
2. Heejin Kim. Globalization and Regulatory Change: The interplay of laws and technologies in E-commerce in Southeast Asia. Computer Law & Security Review, Vol 35 No.5. Amsterdam: Elsevier, 2019, p. 3
3. Peter Mahmud Marzuki, Penelitian Hukum, Edisi Revisi, Jakarta: Kencana, 2014, p. 55–56
4. Kadek Ari Pebriarta. Keabsahan Konrak Elektronik Dengan Kecakapan Melakukan Perbuatan Hukum Oleh Para Pihak". Kerthasemaya,Volume 3 Nomor 3. Denpasar: Bagian Perdata Fakultas Hukum Universitas Udayana. 2015. p. 4
5. Article 30 Financial Services Authority Number 10/POJK.05/2022.
6. Article 31 Financial Services Authority Number 10/POJK.05/2022.
7. Article 32 Financial Services Authority Number 10/POJK.05/2022
8. Investree, Ketahui Risikonya untuk Mendanai Secara Cermat, accessed through https://investree.id/how-it-works/know-your-risk (1 Agustus 2022)
9. Rachmadi Usman. Pilihan Penyelesaian Sengketa Diluar Pengadilan. Bandung: PT. Citra Aditya Bakti. 2013, p. 114
10. Vincentius Laisina. Pembuatan Kontrak Bisnis dan Akibat Hukumnya Menurut KUH Perdata. Lex et Societatis. Vol 3 No.10. Manado: Universitas Sam Ratulangi. 2015, p. 114
11. Bachtiar. Kekuasaan & Pertanggungjawaban Presiden Dalam Konstruksi Politik Hukum Konstitusi Negara Republik Indonesia. Jurnal Yudisial. Vol 11 No.2. Jakarta: Komisi Yudisial, 2018, p. 212
12. Janus Sidabalok. Hukum Perlindungan Konsumen di Indonesia. Bandung: PT. Citra Aditya Bakti, 2014, p. 90
13. Frans Noverwin Saragih. 2013. Tanggung Jawab Pelaku Usaha Wanprestasi dalam Transaksi E-Commerce. Kerthasemaya: Jurnal Ilmu Hukum. Volume 1 Nomor 2. Denpasar: Bagian Perdata Fakultas Hukum Universitas Udayana, 2013, p. 4

Open Access This chapter is licensed under the terms of the Creative Commons Attribution-NonCommercial 4.0 International License (http://creativecommons.org/licenses/by-nc/4.0/), which permits any noncommercial use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if changes were made.

The images or other third party material in this chapter are included in the chapter's Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the chapter's Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.