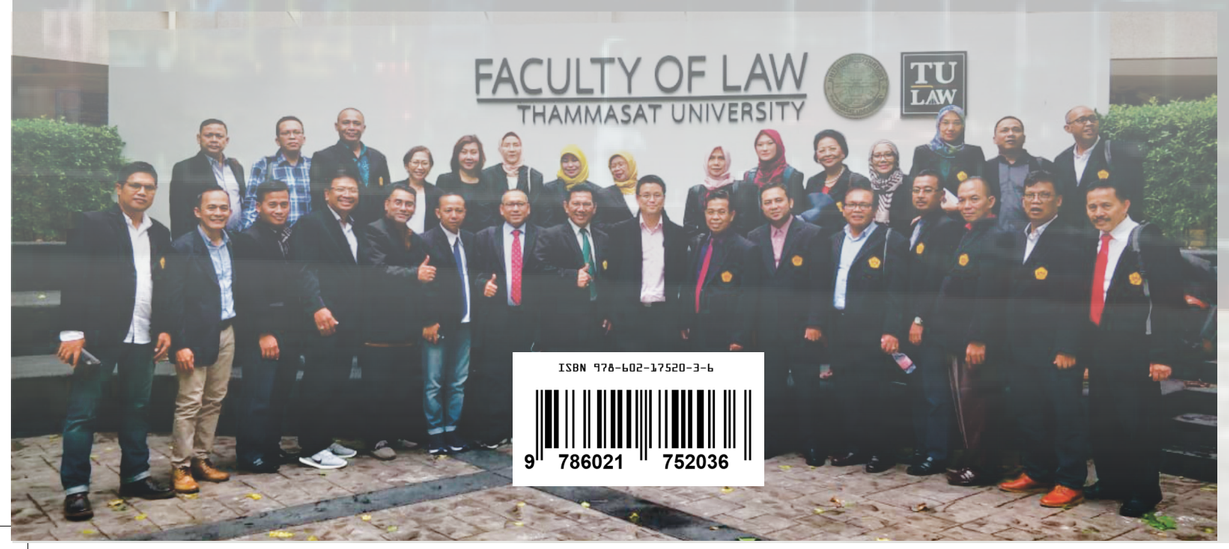
Proceeding Book

ASEAN Business Law and Policy and its Development
Comparative Study Between Indonesia & Thailand
THAMMASAT UNIVERSITY THAILAND
Bangkok, 12 July 2018



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Program Pasca Sarjana
Universitas Borobudur Jakarta

Buku Proceeding
ASEAN Business Law and Policy and its Development

Tema : Comparative Study Between Indonesia & Thailand

Perhimpunan Mahasiswa Program Doktor Ilmu Hukum
Universitas Borobudur, Jakarta

Editor:
Henning Glasser.
Prof. Dr. H. Faisal Santiago, SH, MM
Zulfikar, SH, M.Kn

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KATA SAMBUTAN
KETUA PROGRAM DOKTOR ILMU HUKUM
UNIVERSITAS BOROBUDUR JAKARTA-INDONESIA

Dengan perkembangan pasar bebas Asean dilakukan antara satu negara dengan negara lain dalam kawasan Asia Tenggara yang kemudian dikenal dengan nama Masyarakat Ekonomi ASEAN atau MEA, menuntut kita harus mengikuti perkembangan bisnis di kawasan Asia Tenggara.

Sejalan dengan adanya pasar bebas Asia Tenggara tersebut diatas, maka sebagai praktisi hokum dan mahasiswa Doktor Hukum dituntut untuk dapat memahahami aspek hukum bisnis di kawasan Asia Tenggara.

Dalam kesempatan ini Universitas Borobudur melalui Program Doktor Hukum mengambil kesempatan untuk melakukan sharing knowledge melalui kegiatan Seminar Ilmiah Intemasional, dimana terjadi kolaborasi dan sinergi keilmuan antara 2 (dua) Negara yaitu Indonesia dan Thailand khususnya para mahasiswa dalam rangka menambah pengetahuan mengenai hukum bisnis antara Indonesia dan Thailand menuju Masyarakat Ekonomi ASEAN atau MEA.

Adapun Seminar : "ASEAN Business Law and Policy and its Development"

(Comparative Study Between Indonesia & Thailand), diharapkan kegiatan ini khususnya bagi mahasiswa Doktor Hukum dapat memberi gambaran tentang aspek hukum bisnis diantara Negara Indonesia dan Thailand.

Lahimya pemikiran para pemateri dalam proceeding ini, patut mendapat apresiasi sebagai reflektif yang berkontribusi kepada semua pihak, terutama keilmuan yang serumpun.

Akhir kata kami ucapkan terima kasih untuk pihak yang membantu penyelenggaraan seminar ilmiah Intemasional ini, dalam hal ini : German-Southeast Asian of Excellence for Public Policy and Good Governance CPG-Thammasat University, Bangkok-Thailand, Panitia dan seluruh mahasiswa Program Doktor Hukum Universitas Borobudur, Jakarta-Indonesia.

Bangkok, Thailand 12 Juli 2018

PROGRAM DOKTOR HUKUM
UNIVERSITAS BOROBUDUR
JAKARTA - INDONESIA

Ketua,

Prof. Dr. H. Faisal Santiago, SH, MM

EDITORIAL

Assalamualaikum Warahmatullah Wabarakatuh, Shallom, Om Swastiatu, Namo Budhaya, Salam sejawat

Puji syukur kita panjatkan kepada Tuhan Yang Maha Esa, atas rahmat dan hidayah-NYA, atas terselenggaranya seminar Intemasional yang merupakan hasil kerjasama antara Program Doktor Ilmu Hukum Universitas Borobudur dengan : German-Southeast Asian of Excellence for Public Policy and Good Governance CPG-Thammasat University, Bangkok-Thailand, dalam kesempatan ini mengambil topic : "ASEAN Business Law and Policy and its Development" (Comparative Study Between Indonesia & Thailand), yang diselenggarakan pada hari Kamis, 12 Juli 2018 di Thammasat University, Thailand-Bangkok.

Atas nama penyelenggara Seminar Intemasional kami mengucapkan terima kasih atas partisipasi rekan-rekan sejawat mahasiswa Program Doktor Ilmu Hukum Universitas Borobudur sebagai pemateri maupun partisipan, juga kepada pihak German-Southeast Asian of Excellence for Public Policy and Good Governance CPG-Thammasat University, Bangkok-Thailand.

Terima kasih yang tak terhingga kami sampaikan kepada pihak Universitas Borobudur yang dalam hal ini diwakili oleh Prof. Dr. H. Faisal Santiago, SH.,MM,Ketua Program Doktor Ilmu Hukum Universitas Borobudur dengan bimbingan dan arahannya kami dapat menyelesaikan kegiatan Seminar Ilmiah Intemasional ini dengan baik.

Akhir kata taka da gading yang tak retak, kami menyadari keterbatasan dalam banyak hal maka izinkanlah kami menyampaikan maaf sebesar-besamya, dengan harapan thema kegiatan ilmiah ini mencapai tujuan dalam rangka mensukseskan Masyarakat Ekonomi Asean (MEA).

Terima kasih,

Bangkok-Thailand 12 Juli 2018

Zulfikar, SH.,M.Kn.

FOREWORD

We are grateful that German-Southeast Asian Center of Excellence for Public and Good Governance (CPG), Thammasat University, Bangkok-Thailand in collaboration with the Doctoral of Law Programs, Borobudur University ,Jakarta-Indonesia (Program Doktoral Hukum, Universitas Borobudur, Jakarta-Indonesia), has successfully organized an international seminar on "ASEAN Business Law and Policy, and its Development (Comparative Study between Indonesia and Thailand)".

Regarding to the development of the Asean free market carried out between one other country in the Southeast Asian region, especially Thailand which later became known as the ASEAN Economic Community, demanded that we must follow business developments in the ASEAN region.

The legal system of Indonesia and Thailand are equally influenced by Continental European legal systems (civil law), however the level of detail and the administrative procedures are has similarity and difference. This seminar is expected to able to help anyone to understand the similarities and differences regard to the settlement of dispute business law (trade law).

Our hope, Through this seminar, is able to positively contribute to the both countries, given the economic relations both in the form of foreign Direct Investment and International Trade between the two countries are strong, and the future also trends this business relationship will increase, either occurred in Indonesia and/or in Thailand.

Bangkok, 12 July 2018

Project Manager for Public and Good Governance CPG

Henning Glasser

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THE LEGAL PROTECTION OF POLICY HOLDERS POST- BUSINESS LICENSES REVOCATION OF LIFE INSURANCE COMPANY BY FINANCIAL SERVICES AUTHORITY (OJK)

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Abstract

Currently, the fastest growing insurance company in Indonesia is a life insurance company. However, there are still many problems that occur in life insurance companies so that their business license is revoked by Financial Services Authority (OJK). In the revocation of such business license, the policy holder often suffers losses because he / she does not get his / her right to share the assets of the life insurance company in accordance with the provisions. Therefore, this article will discuss about the procedure of revocation of business license of life insurance company and legal protection to the policy holder after the revocation of the business license. The research method used normative juridical. Revocation of business license of life insurance companies by OJK can be done through 2 ways: preceded by administrative sanction in the form of restrictions on business activities and without preceding the imposition of administrative sanctions. Revocation of such business license must be announced to the public through the official OJK website and / or print media nationwide, and since the revocation of the business license, the life insurance company is obliged to cease its business activities. In relation to legal protection against policy holders, it is still in the form of guarantee fund which can be issued as the last guarantee if life insurance company has revoked its business license and conduct liquidation management, because the law regulating the policy guarantee program has not yet been established. In addition, legal protection is manifested in the form of an application for bankruptcy filing to a commercial court by OJK against a life insurance company whose business license has been revoked, due to the fact the insolvency of the life insurance company, the right of the policy holder over the distribution of property has a higher position than the right of other parties.

Keywords: legal protection, policy holders, live insurance company, financial services authority.

I. Introduction

A. Background

The main goal of long-term development as set out in the National Guidelines (GBHN) is the creation of a strong foundation for the Indonesian nation to grow and develop on its own power towards a just and prosperous society based on Pancasila and the 1945 Constitution.

Economic development at this time requires the support of investments in a very large amount of which implementation should be based on their own ability. Therefore, it takes a maximum effort to mobilize investment funds, especially those sourced from public funds.

Insurance companies are one of the most important financial institutions because they can increase the mobilization of public funds for development financing. In addition, development can not be separated from the various risks that can disrupt the results of development that has been achieved. Therefore, it requires the presence of a strong insurance company in order to bear the risk that will result in losses.

The need for the services of an insurance company is also one of the financial means in the life of the household economy, both in the face of financial risks arising as a result of natural risk of death, as well as in the face of various risks of property owned. The need for the presence of insurance companies is also felt by the business world, because on the one hand there are various risks that can disrupt the smoothness of business activities, on

the other hand the business world often can not avoid a system that forced him to use the services of insurance companies (Law Number 40 Year of 1992 on Insurance Business).

Currently, the fastest growing insurance company in Indonesia is a life insurance company. According to the assessment conducted by the Financial Services Authority (OJK), life insurance companies have the potential to grow positively along with the increase of people's welfare. This can be seen from the Central Bureau of Statistics (BPS) data which shows that the life insurance industry revenues in the year of 2017 experienced growth of 21.7%, four times higher than the economic growth rate of Indonesia of 5.19%. Total revenue of the life insurance industry recorded growth of 21.7%, from Rp. 208.92 trillion in 2016 to Rp. 254.22 trillion in the fourth quarter of 2017, and total premium income grew 17.2% from Rp167.04 trillion in 2016 to Rp195.72 trillion in the fourth quarter of 2017 (https://www.wartaekonomi.co.id/read173959/pendapatan-industri-asuransi-jiwa-melesat-217-di-2017.html).

The rapid growth of the life insurance industry is caused by several factors, including the development of Gross Domestic Product (GDP), population composition and demography, especially in the size of income per capita, the level of dependency ratio, and the level of community education (Rahim, 2013: 15-18). That is, if several factors are in good condition, then the growth of the life insurance industry will also increase.

But in practice, there are still some life insurance companies that can not meet the financial health requirements of insurance companies, such as the level of solvency, technical reserves, investment adequacy, equity, and guarantee funds (Article 2 paragraph 2 of OJK Regulation Number 71/POJK.05/2016 on Financial Health of Insurance Companies and Reinsurance Companies), so that business license is revoked by OJK. When the business license is revoked, problems arise for policy holders because they are not getting paid claims for premiums paid over the years to life insurance companies. Due to the fact the value of the company's assets is lower than its liability, so that the settlement of claim payment is not completely covered. Some cases that occurred such as revocation of business license of PT. Asuransi Jiwa Nusantara, PT. Asuransi Jiwa Bumi Asih Jaya and PT. Bakrie Life Insurance that has caused loss to thousands of policy holders because the life insurance company can not pay some or all rights of the policy holder.

Based on the problem, the author will discuss about the procedure of revocation of business license of life insurance company by OJK and legal protection to policy holder after the revocation of business license.

II. Discussion

A. Life Insurance Agreement

Life insurance is one of the most widely used types of insurance by Indonesians because life insurance has two purposes, namely as a guarantee of future income if the insured as the 'backbone of the family' dies and as a means of saving for future income (Sembiring, 2014: 83). To better understand life insurance, then the following will be described some opinions of legal experts on the definition of life insurance.

According to HMN Purwosutjipto, life insurance is:

The reciprocal agreement between the cover (the taker) of the insurer with the insurer, in which the cover of the insurance binds itself to pay the premium money, while the insurer binds himself to pay the money which the amount has been set upon the closing of the coverage to the connoisseur and based on the life and death of a designated person (Purwosutjipto, 2003: 9-10).

Meanwhile, according to A. Abbas Salim, life insurance is:

Life insurance is an insurance that aims to bear people against unexpected financial losses caused by death too fast or too long life. Here is illustrated that, in life insurance risks faced is the risk of death and one's life is too long. This, of course, will bring many aspects, if the risks that exist in a person is not insured to life insurance companies (Salim, 2003: 25).

In addition, the laws and regulations also provide the definition of life insurance as set forth in Article 1 sub-article 1 letter b of Law Number 40 Year of 2014 on Insurance which reads:

Life insurance is an agreement between two parties, namely the insurance company and the policy holder, which becomes the basis for the receipt of premiums by the insurance company in return for providing payments based on the death of the insured or payment based on the life of the insured with the benefits of the amount has been established and / or based on the results of fund management.

Based on the definition, in the life insurance agreement there are several parties, namely insurance companies, policy olders, the insured and the audience. The insurance company as the insurer is the party who assumes the risk and is obliged to pay the insurance benefit, the policy holder is the party who diverts the risk so that he is obliged to pay the premium to the insurance company and he is entitled to the policy, the insured is someone whose soul is insured, and the connoisseur is the party entitled to receive insurance benefits.

According to Article 255 of the Code of Commercial Law (KUHD), the policy is a life insurance agreement made in writing. The policy contains the day and date of the insurance, the name of the policy holder, the name of the insured, the start and end of the policy, the amount of insurance money and the insurance premium (Muhammad, 2015: 196-198).

B. Procedures to Obtain Business License of Life Insurance Company

Life insurance company is an insurance company that carries out risk mitigation services that provide payments to policy holders, insured, or other parties who are entitled in the event of death or survivors, or other payments to policy holders, insured, or other parties eligible at the time specified in the agreement, the amount of which has been determined and / or based on the results of fund management (Article 1 paragraph 6 of Law Number 40 Year of 2014 on Insurance).

Life insurance companies must be in the form of legal entities, such as limited liability companies, cooperatives, and joint ventures (Article 6 paragraph 1 of Law Number 40 Year of 2014 on Insurance).

and may only be owned by:

a. Indonesian citizens and / or Indonesian legal entities directly or indirectly owned by Indonesian citizens; or
b. an Indonesian citizen and / or an Indonesian legal entity as referred to in letter a together with a foreign national or foreign legal entity that must be an Insurance Company having a similar business or a holding company which one of its subsidiaries is engaged in a similar Insurance (Article 7 paragraph 1 of Law Number 40 Year of 2014 on Insurance).

Every life insurance company that will conduct its business activities must obtain a business license from OJK, by way of the Board of Directors as the applicant applying for a business license to OJK. Within a maximum period of 30 working days from the date of receipt of the complete application, the OJK shall grant approval or rejection of the application

If it refuses, the OJK shall notify the applicant in writing along with the reason. If approved, the OJK shall determine the decision on granting the business license to the applicant (Article 9 of Law Number 40 Year of 2014 on Insurance). A life insurance company that has obtained a business license must conduct business activities not later than 3 months from the date of business license stipulated by OJK and must convey the implementation of such business activities to OJK (Article 27 of OJK Regulation Number 67 / POJK.05 / 2016 on Business Licensing and Institutional Insurance Companies, Sharia Insurance Companies, Reinsurance Companies, and Sharia Reinsurance Companies).

C. Procedure of Revocation of Business License of Life Insurance Company

Regarding the task of supervising the financial services activities in the insurance sector, OJK has the authority to impose administrative sanctions to life insurance companies that violate the provisions in Law Number 40 Year of 2014 on the Insurance and its implementation regulation. One of the forms of administrative sanction is

revocation of business license.

The revocation of business license shall be conducted by OJK if the life insurance company can not resolve the violation which is the cause of the issuance of administrative sanction in the form of business activity restriction for all business activities up to the maximum period of 3 months since the stipulation of the administrative sanction. In addition, OJK may revoke the business license without prior to the imposition of other administrative sanctions, in the case of:

a. the financial condition of life insurance companies deteriorated drastically;
b. share holders of life insurance companies are not cooperative;
c. directors, board of commissioners, or equivalent to a life insurance company has no way of dealing with issues that endanger the interests of the policy holder;
d. stipulated in the provisions of laws and regulations in the field of insurance; and / or
e. other conditions which in the opinion of OJK may harm the interests of policy holders (Article 6 paragraph 2 of OJK Regulation Number 17 / POJK.05 / 2017 on Procedures for Imposing Administrative Sanctions in Insurance and Wealth Insurance Company Insurance, Sharia Insurance Company, Reinsurance Company, and Sharia Reinsurance Company).

The revocation of business permit is announced by OJK to the public through OJK official website and / or print media on a national scale. Since the revocation of such business license, life insurance companies are obliged to discontinue their business activities (Article 43 paragraph 1 of Law Number 40 Year of 2014 on the Insurance).

Furthermore, the Board of Directors shall prepare and submit the closing balance to OJK no later than 15 days after revocation of business license (Article 3 paragraph 1 of OJK Regulation Number 28/POJK.05/2015 on the Dissolution, Liquidation and Insolvency of Insurance Companies, Sharia Insurance Companies, Reinsurance Companies, and Sharia Reinsurance Companies). The life insurance company is also required to hold a General Meeting of Share holders (AGM) to decide the dissolution and form a liquidation team within 30 days from the revocation of the business license (Article 4 paragraph 1 of OJK Regulation Number 28/POJK.05/2015 on the Dissolution, Liquidation and Insolvency of Insurance Companies, Sharia Insurance Companies, Reinsurance Companies, and Sharia Reinsurance Companies).

In the framework of dissolution, the liquidation team shall register and notify the dissolution to the competent authority, and publish it in the State Gazette of the Republic of Indonesia and 2 daily newspapers which have a wide circulation. The action shall be held no later than 30 days from the date of the dissolution decision by the GMS. Notices and announcements contain several matters, namely: its dissolution and legal basis, the name and address of the Liquidation team, the procedure for filing the bill, and the period of filing the bill (Article 5 of OJK Regulation Number 28/POJK.05/2015 on the Dissolution, Liquidation and Insolvency of Insurance Companies, Sharia Insurance Companies, Reinsurance Companies, and Sharia Reinsurance Companies).

However, if within 30 days of the revocation of the business license, the GMS can not be held or the GMS may be held, but it is unsuccessful to decide the dissolution and fail to establish a liquidation team, OJK may carry out the following actions:

a. decide dissolution and form a liquidation team;
b. register and notify the dissolution to the competent authority, and publish it in the State Gazette of the Republic of Indonesia and 2 daily newspapers which have a wide circulation;
c. order the liquidation team to carry out liquidation in accordance with the provisions of Law no. 40 Year of 2014 on the Insurance and its implementation regulation; and
d. order the liquidation team to report the results of liquidation to OJK (Article 6 paragraph 1 of OJK Regulation Number 28/POJK.05/2015 on the Dissolution, Liquidation and Insolvency of Insurance Companies, Sharia Insurance Companies, Reinsurance Companies, and Sharia Reinsurance Companies).

D. Legal Protection Against Policy Holder After Revocation of Business License.

Legal protection of policyholders is generally regulated in Chapter XI Act Law Number 40 Year of 2014 on Insurance, while legal protection against policy holder after revocation of business license of life insurance company specially arranged in some article, among others Article 53 paragraph (1) stating that life insurance company must become participant of policy guarantee program. The policy guarantee program is intended to guarantee the return of some or all rights of the policy holder from the life insurance company whose business license is revoked and liquidated. In addition, the existence of the policy guarantee program is intended to increase public confidence in the insurance industry in general so it is expected to increase public interest to use insurance services. However, until now there has been no law regulating the policy guarantee program, even though it has been mandated in Article 53 paragraph 4 that the law must be established since Law Number 40 of 2014 on Insurance is enacted.

Therefore, the protection of the policy holder is still in the form of guarantee fund as regulated in Article 20 of Law Number 40 Year of 2014 on Insurance. Guarantee Fund is a wealth of life insurance company which is the last guarantee in order to protect the interest of policy holder, in case the life insurance company is liquidated (Article 1 sub-article 18 of Law Number 40 Year of 2014 on Insurance, Pasal 1 angka 18). The guarantee fund shall be adjusted in amount with the development of the business of the life insurance company, subject to no less than that required at the beginning of establishment, ie at least 20% of the minimum equity of Rp. 100 billion rupiahs (Article 36 juncto Article 33 of OJK Regulation Number 71/POJK.05/2016 on Financial Health Insurance Company and Reinsurance Company).

Guarantee Funds may not be mortgaged or burdened with any rights and may only be transferred or withdrawn after OJK approval. So if the life insurance company has revoked its business license, then conducts the liquidation, the guarantee fund may be issued as the last guarantee in order to protect the policy holder's interest.

Furthermore, if the policy holder has not fulfilled his / her rights, then the policy holder may submit a complaint to OJK, especially to the Insurance Supervisory Section. After that the Insurance Supervisory Section will supervise whether the life insurance company revoked its business license and has returned its debt to the policy holder. OJK has no obligation to reimburse the rights of the policy holders because the settlement of the debt claims payment is entirely the responsibility of the life insurance company whose business license is revoked.

In addition to supervision, OJK may apply for the insolvency of the life insurance company to the commercial court. Submission of a bankruptcy application may be filed with or without a request from the policyholder as a creditor. In applying for bankruptcy, OJK must consider several matters, namely:

a. the fulfillment of the requirements is declared bankrupt as stipulated in the law concerning bankruptcy;
b. fulfillment of the application requirements as referred to in Article 52 paragraph 3;
c. the Company's financial capacity to repay debt or liabilities;
d. the Company's supervisory status;
e. imposition of administrative sanctions against the Company; and
f. a certain condition.

Under these terms, OJK is not solely based on the fulfillment of the requirements of two or more creditors and does not pay at least one debts that have been matured and can be collected, but also consider other matters, especially the condition of life insurance companies.

Bankruptcy filing by OJK against a life insurance company that has been revoked business license provides legal protection for policyholders. This is explained in Article 49 paragraph 2 of Law Number 40 of 2014 on Insurance stating that if there is a conflict of interest between the interests of share holders and the interests of the policy holder, then the liquidation team shall prioritize the interests of policy holders.

Furthermore Article 52 paragraph (1) states that:

"In the case of an Insurance Company, a Sharia Insurance Company, a reinsurance company or a reinsurance company sharia is bankrupted or liquidated, the right of the Policy holder, the Insured, or the Participant for the distribution of his / her property has a higher position than the other party's rights."

In that article, it is clearly stated that the right of the policy holder is higher than the right of the other party to the distribution of property if the life insurance company is liquidated or bankrupted.

In addition, the legal protection of policyholders is regulated in Article 52 paragraph 2 stating that:

"In the event that the Insurance Company or reinsurance company is bankrupted or liquidated, the Insurance Fund must be used in advance to fulfill the obligations to the Policy holder, the Insured, or any other party entitled to the insurance benefit."

The insurance fund referred to in that article is a pool of funds derived from premiums established to fulfill obligations arising from a policy issued or from an insurance claim. With the existence of several articles, the Law Number 40 Year of 2014 on Insurance has provided legal protection to policy holder after revocation of business license of life insurance company.

III. Closing

A. Conclusion

Revocation of business license of life insurance company by OJK can be done through 2 ways, that is preceded by administrative sanction in the form of restriction of business activity and without preceding the imposition of administrative sanction. Revocation of such business license must be announced to the public through the official OJK website and / or print media nationwide, and since the revocation of the business license, the life insurance company is obliged to cease its business activities. Furthermore, the Board of Directors shall prepare and submit the closing balance to OJK no later than 15 days after revocation of business license. The life insurance company is also required to convene the General Meeting of Share holders to decide the dissolution and form a liquidation team within 30 days from the revocation of the business license. In the framework of dissolution, the liquidation team shall register and notify the dissolution to the competent authority, and publish it in the State Gazette of the Republic of Indonesia and 2 daily newspapers which have a wide circulation.

Legal protection of policy holder after revocation of business license of life insurance company is regulated in Article 53 of Law Number 40 Year of 2014 on Insurance which states that the life insurance company must be a participant of the policy guarantee program. However, because until now there is no law regulating the policy guarantee program, the legal protection is still in the form of guarantee fund set forth in Article 20. So if the life insurance company has revoked its business license, then do the management of liquidation, the fund of such guarantee may be issued as a final guarantee in order to protect the interests of the policy holder. Legal protection is further manifested in the form of a bankruptcy filing application to the commercial court by OJK against a life insurance company whose business license has been revoked. Such filing may be filed with or without a request from the policy holder as a creditor. With the insolvency of the life insurance company, the right of the policy holder over the distribution of property has a higher position than the rights of the other party. This is regulated in Article 52 paragraph 1 of Law Number 40 Year of 2014 on Insurance.

B. Suggestions

1. The government should immediately enact a law regulating the policy guarantee program so policyholders will get better protection.
2. OJK should conduct better supervision on life insurance companies so that there will be no revocation of business license of life insurance company that can harm policyholder.

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THE PRINCIPLE OF CARE IN LENDING OF BANK CREDITS BASED ON LAW NUMBER 10 OF 1998 TO THE AMENDMENT OF LAW NUMBER 7 OF 1992 REGARDING BANKING

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Abstract

The provisions of Article 2 of Law no. 7 of 1992 concerning Banking that has been amended by Law no. 10 of 1998, where the application of prudential principles in lending to avoid the risk of non-performing loans. It is expected to increase the quality of assets and the improvement of bank management in managing non-performing loans. The issues discussed are how to apply prudential principles in the provision of credit by banks and what constraints faced by banks in applying prudential principles in lending. Where the precautionary principle is to be carried out consistently in accordance with Articles 8, 11, and 29 a. 3 of Banking Law, for example in the form of assessment / analysis to prospective borrowers, the making and application of Credit Manual, as well as the making and delivery of the report on the Legal Lending Limit to Bank of Indonesia. However, in its implementation, there are still some obstacles, including the debtor's uncertainty about the importance of administrative credit requirements and the lack of awareness of the debtor's customers in fulfilling their obligations in accordance with the agreement.

Keywords: Prudential principle in lending.

A. Introduction

Bank is a business entity that collects funds from the community in the form of savings, then channeled to the community in improving people's lives. Banks have a strategic role in achieving national development objectives, in order to improve the distribution of development and its results, economic growth and national stability (Undang-Undang No. 7 Tahun 1992 tentang Perbankan, Penjelasan Umum), especially in increasing economic growth, per capita income, employment and income distribution.

Lukman Mulyono, stated that banking services generally have two objectives:

1. As a provider of efficient mechanisms and means of payment for customers. For that, a lot of provision of cash, savings, and credit cards. This is the most important bank role in economic life. Without the provision of this efficient means of payment, goods can only be traded in a time-consuming barter.
2. By accepting savings from customers and lending them to those in need of funds, the bank is increasing the flow of funds for more productive investment and utilization. If this role goes well, then the economy of a country will increase (Mulyono, 2009: 32).

Didik J. Rachbini, also stated that:

"The banking sector has a very vital role, among others, as a regulator of the national economic artery. The smooth flow of money is needed to support economic activity. Thus, the sound and strong condition of the banking sector becomes the ultimate target of the policy in the banking sector. The role of the banking sector in development can also be seen in its function as a means of transmitting monetary policy "(Rachbini, 2011: 74).

Given the importance of the function of a banking, the public confidence in banking becomes a very important part to do. Banking business is a risky business. However, this business also promises big profits if managed well. Banking sector in the life of a country is a development agent, because the bank is a financial institution that has

a function as a financial intermediary institution that is as an institution that performs activities of collecting funds from the community in the form of savings and channeling back to the community in the form of credit or financing.

Article 3 of Law no. 7 of 1992 concerning Banking that has been amended by Law no. 10 Year 1998, mentioned that the business activity of the most important bank is to collect funds from the community in the form of deposits and channel funds deposited in the bank in the form of credit. Thus the banking institution is an institution that requires the trust of the community. This is because in conducting its business, the bank uses funds from third parties, ie depositors, to gain profit. Therefore, the bank must maintain the trust of third parties by being careful in carrying out its duties and functions (Soetrisno, 2012: 52).

At this time many people who use banking services to facilitate in transactions, especially in financial matters, such as transfers, clearing, bank guarantee, and safe deposit box, in addition to providing credit facilities for prospective borrowers to develop their business. Investment loans can be used to finance investments, working capital loans can be used for working capital, either as a capital enhancer or as an initial working capital.

In the provision of credit facilities, banks must apply prudential principles to avoid the risk of non-performing loans. In accordance with the provisions of Article 2 of the Law on Banking, states that "Indonesian banking in conducting business activities based on economic democracy by using the principle of prudence" (Undang-Undang No. 7 Tahun 1992, Op.cit, Pasal 2). Where the principle of prudence is a very important principle and must be implemented by the bank in running its business activities, which aims to maintain the security, health, and stability of the banking system.

In accordance with the provisions of Article 4 paragraphs 1 and 2 of Law no. 24 Year of 1999 on Foreign Exchange Traffic and Exchange Rate System, explains that:

1. With regard to the application of prudential principles Bank of Indonesia sets out provisions on various types of foreign exchange transactions conducted by the Bank.
2. Implementation of the provisions referred to in paragraph 1 shall be stipulated in a Bank of Indonesia regulation (Undang-Undang No. 24 Tahun 1999 tentang Lalu Lintas Devisa dan Sistem Nilai Tukar).

The Banking Law does not explain in detail the precautionary principle, but there are several related articles which can be seen in the provisions of Articles 6, 7, 8, 10, 11, 13, 14, 29, 2, 3 and 4 and Article 30 to 36. Article 8 explains that:

1. In providing credit or financing based on Sharia Principles, Commercial Banks shall have confidence based on in-depth analysis or the willingness and ability and ability of debtors to settle their debts or to refund the financing in accordance with the contract.
2. Commercial Banks shall have and apply credit and financing guidelines based on Sharia Principles, in accordance with the provisions stipulated by Bank of Indonesia (Undang-Undang No. 7 tahun 1992, Op.cit, Pasal 8).

Recently, there have been many cases of prudential violations in the national banking system. Though this principle is already required in banking regulations where the bank in running its business should be based on the principle of prudence. This principle is very necessary especially in the case of credit disbursement because the source of credit funds disbursed is not from the bank itself but the funds coming from the community so that the application of prudential principles through accurate and in-depth analysis, proper distribution, supervision and good monitoring , legitimate and compliant agreements, strong binding guarantees and complete and orderly credit documentation.

B. Problems

Based on the matters that have been discussed the issues discussed are:

1. How is the application of prudential principles in the provision of credit at the bank?.
2. What constraints are faced by the bank in applying prudential principles in lending credits?.

C. Literature Review

1. Agreement

Article 1313 of the Civil Code states that the understanding of a treaty is an act in which one or more persons commit themselves to one or more persons (Kitab Undang-Undang Hukum Perdata, Pasal 1313).

From this it is clear that the agreement is a legal act between two parties or more that is mutual. However, in this provision the meaning of the agreement is incomplete, as it only mentions a one-sided agreement. On the other hand Setiawan explained that:

The agreement is also referred to as consent because the parties that promise it agree to do something. Engagements born out of agreement are desired by the parties that make the agreement. In contrast to the engagement that is born because the law is outside the will of the parties concerned. If two or more parties have agreed to enter into an agreement, the parties intend to bind themselves in a legal relationship and are bound by each other because of the promise they have made and of course they must keep true of what they have promised (Setiawan, 2004: 49).

In making an agreement there are several principles, namely:

1.The principle of Freedom of Contract, this principle is an extension of an open system with the freedom to treat anything, provided it does not contradict legislation, propriety, and public order. In accordance with the provisions of Article 1338 a. 1 The Civil Code which essentially explains the power of the treaty is equal to a law.

According to Subekti, that:

The principle of freedom of contract is by way of pressing on the words "all" in front of the word "agreement" referred to in Article 1338 a. 1 The Civil Code, as if making a statement we are allowed to make any agreement and it will bind us, as binding the law. The restriction on freedom is only what is called "public order and decency" (Setiawan, 2004: 49).

The principle of Freedom of Contract under Indonesian treaty law covers the following scope:

1. Freedom to make or not to make agreements.
2. Freedom to choose the party with whom he wishes to make the agreement.
3. Freedom to determine or choose causa of the agreement to be made.
4. Freedom to determine the object of the agreement.
5. Freedom to determine the form of an agreement.
6. Freedom to accept or discount the optional provisions of the Act (aanvullend, optional) (Sjandeini, 1993: 47.

2. The principle of Consensualism, meaning that an agreement is initially based on the agreement of both parties without any element of coercion, deception, error or forgetness. This principle is in accordance with the provisions of Article 1320 of the Civil Code regarding the validity of an engagement.

3. The principle of binding force, in this principle it is explained that each party bound in a treaty must respect and execute what they have contracted and shall not commit any act which is distorted or contradictory of the agreement already made.

4. The principle of equilibrium, this principle requires that both parties meet and execute the agreement. The creditor has the power to demand achievement and, if necessary, may demand repayment through the debtor's wealth, but the creditor bears the burden of carrying out the agreement in good faith. So the position of a strong lender is offset by its obligation to pay attention to good faith, so that the position of creditors and debtors is balanced.

5. The principle of legal certainty, in this principle of agreement is as a legal figure must contain legal certainty, this can be seen from the binding power of the agreement that is as a law for the parties.

6. The principle of good faith, this principle relates to the implementation of an agreement, in accordance with the provisions of Article 1338 a. 3 The Civil Code which states that the agreement should be carried out in good faith. Basically good faith can be distinguished in subjective and objective terms. Good faith in subjective terms, means honesty while good faith in objective terms, means the corresponding propriety in the execution of the agreement.

Article 1320 of the Indonesian Civil Code regulates the syarah validity of the engagement that exists: "agree those who commit themselves, are mature or competent, a certain matter and a halal thing" (KUHPerdata, Op.cit, Pasal 1320). Of the four conditions, the first two conditions are called subjective requirements because it involves the subject, while the next two conditions are called objective requirements because they involve objects or achievements. If an agreement does not meet the subjective requirements, the agreement may be terminated or can be canceled, whereas if the objective conditions are not met then the agreement is null and void and is considered never existed.

In entering into an agreement, the parties must either be mature or professionally qualified. The skill in question is that each person is capable of making engagements, if he by law does not declared incompetent. According to the provisions of Article 1330 of the Civil Code, persons who are not competent to make an agreement are those who are immature or under the ability.

A certain thing in making a covenant is the object of an agreement that the achievement already exists or at least can be determined. It is useful to establish the rights and obligations of both parties in the event of a dispute in the execution of the agreement. According to the provisions of Article 1332 of the Civil Code, that which can be the subject of a treaty are merely tradable goods. In addition, Article 1333 of the Civil Code explains that the object of the treaty amount may not be mentioned, as long as it can be calculated and determined. So the object of the agreement can also be determined by its kind.

Whereas a covenant without cause is lawful or prohibited by law does not have the power, Where the agreement without cause, if the intended purpose by the parties at the time of the treaty will not be reached while the false intent of the cause. Article 1337 of the Civil Code, for which is not lawful is contrary to the law, public order and morality. If a treaty contains elements of an illegal cause then the agreement is null and void, so there is no right to demand or fulfillment of the treaty because it was never considered as originally.

2. Credit Agreement

In general, people interpret credit equal to debt, because after a certain period they have to pay off. Article 1 number 11 of Law no. 10 of 1998 on Banking defines that:

"Credit is the provision of money or equivalent claims, based on a loan agreement or agreement between the bank and another party requiring the borrowing party to repay the debt after a certain period of time with interest" (Undang-Undang No. 10 Tahun 1998 Op.cit, Pasal 1 angka 11).

While in the Draft Law on Credit Banking, it is explained that:

"The credit agreement is a consent and / or agreement made jointly between the creditor and the debtor on a number of credits under the conditions already agreed upon, in which case the debtor is obliged to return the credits already received within a certain period of time with interest and fees agreed upon (http://www.hukumonline.com/berita/baca/hol2874/ruu-tentang-perkreditan-perbankan, diakses 15 September 2014).

Based on this understanding, it can be seen that the credit agreement is a loan-borrowing agreement between the bank and the prospective debtor, the credit agreement is classified as a replacement loan agreement. However, the credit agreement is a special agreement, because there are peculiarities where the creditor as the bank and the object of the agreement in the form of credit / money. Therefore, the rules applicable to the credit agreement are

the Civil Code and the Banking Act and its implementing regulations as a special rule.

In the Civil Code, it does not recognize the term credit agreement specifically, when viewed from the procedure of credit agreement implementation, the credit agreement can be included in the scope of the lending and borrowing agreement, in accordance with the provisions of Article 1754 of the Civil Code which states that the borrowing is an agreement with which one party (in this case the bank) gives the other party (in this case the debtor), a certain amount of consumable goods, on the condition that this latter party shall return the same amount of the same kind of goods in the same circumstances.

3. Elements of Credit Agreement

In the credit agreement there are several elements, namely the existence of legal subjects, namely the bank as creditor and debtor. Bank as creditor is a party that gives / distributed credit to the debtor, as the party receiving credit from the bank. The existence of a legal object in the credit agreement is the credit itself. And achievements that are obligations that must be met by the parties in the credit agreement. And the term is the validity period of credit agreement made by the parties.

The credit agreement must be made in writing and in the Indonesian language. In accordance with the provisions of Article 8 a.2 of the Banking Act, namely:

1. the identity of the creditor and debtor correctly, completely and clearly;
2. purpose of credit use;
3. the amount of money and certain types of currency;
4. term of agreement;
5. large and procedure of interest calculation;
6. credit guarantee;
7. the rights and obligations of the creditor and debtor;
8. terms of withdrawal of credit;
9. matters which give rise to material obligations for the debtor, and;
10. the debtor's statement that the debtor has understood and approved the contents of the credit agreement(http://www.hukumonline.com/berita/baca/hol2874/ruu-tentang-perkreditan-perbankan, diakses 20 September 2014).

Meanwhile, according to Robert Burgess, a good credit agreement must contain some clauses as follows:

a. clauses on credit maximum, credit term, credit objective, credit form, and limit of permit;
b. interest clauses, commitment fee, and overdraft fines;
c. clauses about the bank's power to hold charges on the demand deposit account and debtor's customer loan account;
d. clauses on representations and warranties, namely clauses containing debtor's customer statements concerning the facts concerning the legal status, financial condition and assets of the debtor's customer at the time the credit is granted, ie the assumptions for the bank in making a decision to grant such credit;
e. clause on precedent conditions, ie clauses on tough conditions that must be met by the debtor customer before the bank is obliged to provide funds for the credit and the debtor's customer is entitled for the first time to use the credit;
f. clause on credit collateral and insurance of collateral goods;
g. clauses concerning the entry into force of the Terms and Conditions of the Account Statement for the credit agreement concerned;
h. clauses on affirmative covenants, ie clauses containing borrower's clients' promises to do certain things as long as the credit agreement is still valid;
i. clauses about negative covenants, ie clauses containing the promises of the borrower's clients not to do certain things as long as the credit agreement is still valid;
j. clauses on financial covenants, namely clauses containing debtor's clients' promises to submit their

financial statements to the bank and maintain their financial position at a minimum;

k. clauses concerning actions which may be taken by the bank in the context of supervision, safeguarding, rescue and settlement of credit;
l. clause on events of default, namely clauses that determine an event or events which, if it occurs, entitle the bank to unilaterally terminate the credit agreement and to immediately and collect all outstanding credit;
m. the clause on arbitration, namely clauses governing the settlement of disagreements or disputes between the parties through an arbitration body, whether an arbitration body of an ad hoc or an institutional arbitration body;
n. potpourri clauses or miscellaneous provisions or boilerplate provisions, ie clauses containing terms and conditions which have not been specifically accommodated in other clauses. Included in these clauses is the so-called Supplementary Article, which is a clause containing additional terms and conditions which have not been set forth in other articles or contain specific terms and conditions intended as conditions and provisions that deviate from other terms and conditions which have been imprinted in the credit agreement constituting the default agreement (Sjandeini, Op.cit. : 178-179).

4. Precautionary Principle in Lending

Basically the principle of prudence is a very important principle in the practice of the banking world that must be applied or implemented by the bank in running its business activities. That is, banks must always be consistent in implementing legislation in the field of banking based on professionalism and good faith. Where the principle of prudence is the principle of risk control through the application of consistent applicable legislation. The purpose of applying prudential principles is to maintain the security, health, and stability of the banking system in Indonesia.

Elucidation of Article 4 a. 1 Act no. 24 Year of 1999 on Foreign Exchange Traffic and Exchange Rate System. The precautionary principle is one of the efforts to minimize business risks in bank management, either through provisions stipulated by Bank Indonesia or the internal requirements of the bank concerned" (Undang-Undang No. 24 Tahun 1999, Op.cit, Pasal 4 a. 1). The application of the precautionary principle in Article 2 of the Banking Act explains that "Indonesian banking in conducting its business is based on economic democracy by using the principle of prudence (Undang-Undang No. 7 Tahun 1992, Op.cit, Pasal 2)". However, the regulation in the Banking Act has not been followed by a clear meaning of principle caution. Therefore, until now the meaning of the principle of prudence in the legislation still no uniformity.

According to Paripurna P Sugarda, that:

"The banking regulatory and supervisory system in Indonesia has a number of weaknesses, one of which can be seen from the different meanings of prudential principles in banking regulatory and supervisory systems. In its implementation may cause problems during its deployment. In the Banking Act no. 7 of 1992 which has been amended by Law no. 10 Year of 1998, formulated that the principle of prudence is only in a narrow scope, ie in the case of a bank running its business. In the meantime, bank health problems become aspects that are beyond the realm of prudential principles. In its journey, the formulation of prudential principles has shifted, no longer just about the business activities of banks, but also take into account the health aspects of banks, in accordance with the provisions of Law no. 23 of 1999 concerning Bank of Indonesia which has been amended by Law no. 3 Year of 2004 " (http://ugm.ac.id/en/berita/4317-perlu.dirumuskan.kembali.prinsip.kehati-hatian.dalam.pengawasan .perbankan, diakses 15 November 2014).

The Financial Services Authority regulates certain provisions relating to prudential principles, namely:

1. core capital of commercial banks;
2. minimum capital requirement;
3. net open position;
4. maximum crediting limit;
5. asset quality;

6. allowance for possible losses on assets;
7. credit restructuring;
8. financing restructuring for sharia banks and sharia business units;
9. general statutory reserve;
10. transparency of bank financial condition;
11. transparency of bank product information and use of personal data;
12. prudential principles in commercial banks' equity activities;
13. prudential principles in asset securitization activities for commercial banks;
14. prudential principles in carrying out structured product activities for commercial banks;
15. prudential principles in carrying out the agency activities of foreign financial products by commercial banks;
16. prudential principles for commercial banks that perform the delivery of part of the work to other parties;
17. implementation of anti fraud strategy for commercial banks;
18. risk-weighted asset calculation guidelines for credit risk using a standardized approach;
19. business activities and network of commercial bank offices based on core capital;
20. business activities and office network of sharia commercial banks and sharia business units based on core capital (Otoritas Jasa Keuangan, Booklet Perbankan Indonesia Tahun 2014, Edisi 1, Maret 2014, hal. 133-149).

The granting of credit facilities by a bank shall implement several provisions relating to the prudential principles stipulated in the Banking Act, such as Articles 8, 11 and 29 a.3. Subject to the provisions of Article 8 a. 1 of the Law on Banking, in the implementation of granting of credit facilities, the bank must conduct a thorough assessment of the prospective borrower. It is intended that banks gain confidence in the ability and willingness of borrowers to settle their obligations as agreed in the credit agreement which includes:

1. Character is an assessment of the nature of the debtor's customers, such as honesty, behavior, and obedience.
2. Capacity or ability, is an assessment of the ability of prospective borrowers, which is related to leadership and performance in the company.
3. Capital is an assessment of the capital structure, including the performance of the results of the capital itself from the company if the prospective debtor is an individual.
4. Collateral is an assessment of the ability of prospective borrowers to provide good collateral and have value both legally and economically.
5. Condition of Economy is an assessment of prospective business prospects of debtors associated with economic conditions (Djumhana, 2003: 40).

Furthermore, Article 8 a. 2 The Banking Act provides that banks are required to own and apply credit guidelines in accordance with provisions stipulated by Bank Indonesia. Then Article 11 regulates the Legal Lending Limit (BMPK), namely:

1. Bank of Indonesia shall stipulate provisions concerning the maximum credit or financing limit under the Sharia Principles, the granting of collateral, the placement of securities investments or other similar matters, which may be performed by the bank to the borrower or a group of related borrowers, including to companies in the group the same as the bank concerned.
2. The maximum limit referred to in a. 1 shall not exceed 30% (thirty percent) of bank capital in accordance with the provisions stipulated by Bank Indonesia.
3. Bank Indonesia shall stipulate provisions concerning the maximum credit or financing limit under the Sharia Principles, granting of collateral, placement of securities investments or other similar matters, which may be performed by the bank to:
   a. shareholders owning 10% (ten percent) or more of the paid up capital of the bank;
   b. members of the Board of Commissioners;

c. members of the Board of Directors;
d. families of parties referred to in letter a, letter b, and letter c;
e. other bank officials; and
f. companies in which there are interests of the parties referred to in letter a, letter b, letter c, letter d, and letter e.

4. The maximum limit as referred to in paragraph (3) shall not exceed 10% (ten percent) of bank capital in accordance with provisions stipulated by Bank Indonesia.
5. (4A) In providing credit or financing under the Sharia Principles, the bank is prohibited to exceed the maximum limit of credit or financing based on Sharia Principles as set forth in a. 1, 2, 3 and 4 (Undang-Undang No. 7 Tahun 1992, Op.cit, Pasal 11).
6. Implementation of the provisions referred to in a. 1 and 3 shall be reported in accordance with the provisions stipulated by Bank Indonesia.

D. Research Results

1. Application of Prudential Principles by Banking in the Granting of Credit

Every loan application submitted by the debtor candidate must be processed immediately through the appraisal and subsequently given its decision by the bank. Embodied in the form of credit analysis, which contains assessments of several aspects related to prospective borrowers. Among other aspects of law, technical production, marketing, finance, management and organization, socio-economic, environmental, guarantee and risk. Created based on written guidelines and procedures established as internal rules of the bank concerned.

This is done to determine the feasibility of prospective borrowers, business feasibility or activities of prospective borrowers, financial condition and ability to pay debtor's credit and related risks. Then the bank may give the decision to refuse or approve the loan application from the prospective debtor. This decision is awarded by an authority granted authority in accordance with the internal rules of the bank. Then notified to prospective borrowers to be followed up with guidelines and procedures that apply. To conduct a preliminary investigation by finding out about potential borrower customers to various sources.

The data must be completed by the prospective borrower in applying for the loan, among others in the form of application letter from the prospective debtor by attaching a copy of ID card (identity) and copy of Family Card, Letter of Application of Credit (SPK) provided by the bank, photocopy Taxpayer Identification Number, copy of Company Registration Certificate (TDP) for credit on behalf of the company, photocopy of Trading Business License (SIUP) for credit on behalf of the company, photocopy of Deed of Company Establishment and its deed of amendment, copy of Financial Statement, Copy of Current Account or savings books in any bank during the last 3-6 months, photocopy of documents or proof of ownership of goods to be collateral and financial data, income statement, daily sales and purchase records and price data deemed necessary, but in the process of analysis the bank may request other data as long as it relates to the credit process.

Each loan application must be thoroughly checked / analyzed by the Account Officer, for example regarding the completeness of the data / documents submitted by the prospective borrower and other matters, namely the amount of credit application must be in accordance with the need (if the amount of credit demanded is excessive then it will be burdened considerable interest), the use of credit in accordance with the purpose of business development and acceptable credit is managed as possible so that the installment schedule and repayment can be fulfilled.

Furthermore, the financial analysis of the prospective borrowers, including liquidity ratio, which is used to measure corporate liquidity, leverage ratio, that is to measure the extent of debt financed assets, activity ratio, the ratio to measure how far the effectiveness of the company in managing financial resources and profitability ratio, ie the ratio to show the final results achieved by management of any policies and decisions. The purpose of this

study is to prove or to know exactly what the required funding needs are correct, to prove whether the company's financial statements are not being manipulateded and to ensure repayment capacity of the prospective borrower and to determine the size of the credit given.

If appropriate, the Account Officer will draw up a credit proposal to be submitted to the authorized credit officer for approval. The next stage is the binding of credit and the binding of collateral which is done by signing the credit agreement and guarantee bonding agreement between the bank and the prospective debtor to sign and agree on various rights and obligations contained in two agreements:

1. Credit Agreement which constitutes principal agreement and contains various aspects related to credit, such as purpose of use, amount, currency, interest rate, time period, withdrawal requirements, interest and principal payments, warranties, and dispute settlement.
2. Accessoir binding agreement, meaning that the existence of the agreement depends on the principal agreement of credit agreement. The guarantee binding agreement may be a Deed of Assignment Rights (APHT) (for land and buildings), Fiduciary Collateral Deed (for motor vehicles), Pawn Act (for stocks, jewelery), and so forth.

In the Credit Guidebook there are several provisions concerning lending:

1. prudential principles in lending, including policies in lending, credit quality assessment policies, and policies on professionalism and integrity of officials / credit officers;
2. credit organizations and management, including the policy of owning credit instruments, policies concerning the duties, authorities and responsibilities of the board of commissioners, directors, credit units / working units and credit committees (if any) in the field of credit;
3. credit approval policy, covering the concept of the total relation of credit applicant, the determination of the credit approval authority limits, the responsibilities of the credit breaker, the credit approval process, the credit agreement, and the approval of the loan disbursement;
4. credit documentation and administration, including credit documentation and credit administration;
5. credit supervision, covering the principle of credit supervision, object of credit supervision, credit supervision coverage, and credit internal audit;
6. settlement of non performing loans, covering the principles of handling non-performing loans, preparation of non-performing loans, and handling non-performing loans (Buku Pedoman Kredit Retail Bisnis PT. Bank Negara Indonesia (Persero), Tbk, Edisi Januari 2014).

Besides stipulated in Article 8 of the Banking Act, the precautionary principle is also regulated in Article 11 regarding the Legal Lending Limit (BMPK). Legal Lending Limit (BMPK) is the maximum percentage of provision of funds allowed to bank capital (Peraturan Bank Indonesia No. 7/3/PBI/2005 tentang Batas Maksimum Pemberian Kredit Bank Umum, Pasal 1 angka 1). The purpose of the provision of the Legal Lending Limit (BMPK) is to protect the interests and trust of the community and to maintain the health and resilience of the bank, in which the bank is required to reduce the risk by disseminating the provision of funds in accordance with the provisions of the Legal Lending Limit (BMPK) has been established in such a way that it is not centered on a particular borrower and / or group of borrowers.

Bank of Indonesia Regulation no. 7/3 / PBI / 2005 concerning Legal Lending Limit for Commercial Banks, particularly Article 4 and Article 11, stipulates that all portfolios of provision of funds (credit) to related parties can be made at most 10% of bank capital. As for the provision of funds (credit) to a borrower who is not the maximum 20% of the bank's capital and for the provision of funds (credit) to a group of borrowers who are not related parties can be done at the most 25% of the bank's capital.

Furthermore, the latest article in the Banking Act relating to prudential principles is Article 29 a. 3 states that in granting credit and conducting other business activities, banks are required to take measures that do not harm the

bank and the interests of customers who entrust their funds to the bank. Regarding bank soundness, specifically regulated in Article 29 a. 2 of the Banking Law, stating that banks are required to maintain bank soundness in accordance with the provisions of capital adequacy, asset quality, quality management, liquidity, earnings, solvency, and other aspects related to the bank business, and shall conduct business activities in accordance with the principles of caution.

Thus it is clear that in the implementation of the provision of credit facilities, banks should consider the principles of healthy credit, because the credit provided by banks to prospective borrowers always contain risks. Therefore, it is necessary to guarantee the provision of credit in the sense of confidence in the ability and ability of the debtor to perform its obligations in accordance with the agreement.

2. Constraints in the Application of Prudential Principles by banks in lending.

Constraints in the application of prudential principles related to the provision of credit by banks include the following:

1. Factor of unfamiliarity of the importance of administrative credit requirements that must be met when prospective borrowers apply for credit to the bank. As a result of this, the banks tend to be blamed on the allegations to complicate the provision of credit.
2. Lack of awareness of prospective borrowers in fulfilling their obligations in accordance with the promised. Where the prospective debtor has realized or received some money from the credit, especially if the prospective borrower is a legal entity, where the debtor is often negligent to report the results of credit in accordance with the purpose of using kedit. Where the new banking party direct supervision of debtor customers who tend to start problematic, then the bank sometimes have difficulty communicating with the debtor.
3. Sometimes the banking party is fooled by an "engineering" analysis done by an internal bank with a prospective debtor as they have worked together to make the analysis.

Closing

1. Conclusion

Based on the results of the discussion, it can be summed up things as follows:

a. In the provision of credit by banks, the application of prudential principles is necessary to avoid the risk of non-performing loans. In this regard banking institutions have made various efforts to apply prudential principles in accordance with the provisions of Article 8, Article 11, and Article 29 paragraph 3 of the Banking Act. Where the banking party has conducted an assessment / analysis of the character, capability, capital, collateral, and business prospects of the prospective debtor before the credit facility is given. Then the banks also have owned and implemented the Credit Manual consequently and consistently. After that the banking party also has and implements written policy guidelines and procedures on the provision of funds to related parties, the provision of large funds, and or the provision of funds to other parties who have an interest in the bank. And maintain the level of health in accordance with the provisions of capital adequacy, asset quality, quality management, liquidity, rentability, solvency, and other aspects associated with the bank's business, and maintain public trust to him. The four attempts to apply prudential principles have been carried out consequently and consistently.

b. Constraints faced by banks in the application of prudential principles, namely the existence of factors of non-understanding of the importance of administrative requirements that must be met when prospective borrowers apply for credit to the bank and lack of awareness of potential borrowers in fulfilling their obligations and the analysis of "engineering results" the internal bank with the debtor's customers because they have worked together to make the analysis so that the bank becomes deceived.

2. Suggestions

a. It is expected that banks will be more effective in socializing and training to all banking employees, in order to improve the quality of work. This training program is not only oriented towards customer service and managerial skills in the framework of banking development.
b. In providing credit to customers, banks should be more selective and careful to avoid the risk of non-performing loans, and actually implement prudential principles by promoting banking ethics to avoid deviation in lending.

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SAFETY AS AN IMPORTANT FACTOR IN THE WORLD OF AVIATION BUSINESS IN INDONESIA

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Abstract

The implementation of air transportation is inseparable from the economic growth of the people who serve air transportation services served as well as the trends of global economic development. The implementation of aviation in Indonesia based on: The principle of benefit, the principle of joint effort and kinship, the principle of fair and equally, the principle of balance, harmony and alignedness, the principle of public interest, the principle of integration, the principle of law enforcement, the principle of independence, the principle of openness and anti-monopoly, the principle of environmental insight, the principle of state sovereignty, the principle of nationality, the principle of archipelagic characterizes. While the aims of the aviation are: To realize the orderly, safe, secure, convenient, reasonable, fair flight and avoid unfair business competition practices; Streamlining the flow of people and/or goods through the air by prioritizing and protecting air transport in order to facilitate national economic activities; Fostering aerospace spirit; Upholding the sovereignty of the state; Creating competitiveness by developing national air transport technology and industry. Talking about aviation is inseparable from safety issues. Aviation safety as a condition of fulfillment of safety requirements in the utilization of airspace, aircraft, airport, air transport, navigation, aviation and other supporting facilities and public facilities. Safety is a top priority in the aviation world, no compromise and tolerance. Factors affecting aviation safety are: Aircraft physical condition, crew condition, infrastructure and natural factors. Human resources and community roles are equally important. To ensure the safety of national aviation various efforts have been made, among others: The Government has made regulations, revised regulations, conducted ongoing supervision activities, conducted law enforcement, conducted legal action in the form of sanctions. With such efforts it is expected to provide legal protection for the parties involved. But in practice it often does not match the original purpose, namely: the existence of protection for the parties, the creation of justice, order, and legal certainty. The discussion in this study is about What factors should be considered for safety in the world of aviation business in Indonesia can be realized and How efforts to improve safety in the world of aviation business in Indonesia ?. The method used is normative juridical. In the event of a dispute concerning aviation safety, it should be solved by providing protection for the parties.

Keywords: Safety, Aviation.

INTRODUCTION

Backgrounds.

Currently the development of human civilization, especially in the field of transportation has brought into a more advanced transportation system than the previous era.[1] One of the development progress is a system that strongly supports the mobility of Indonesian society. Aviation is a unified system comprising the use of airspace, aircraft, airport, air transport, flight navigation, safety and security, the environment, as well as supporting facilities and other public facilities.[2] Currently, aviation is the most effective alternative choice because it is fast, efficient, and economical for inter-regional and inter-island transportation, especially between remote areas and large islands, whether transporting goods or transporting people or passengers.[3] One of the most important factors to consider

1 *Sution Usman Adji, Hukum Pengangkutan Di Indonesia, Jakarta: PT. Rineka Cipta, 2005, hal. 112.*

2 *Undang-Undang Republik Indonesia Nomor 1 Tahun 2009 tentang Penerbangan, Pasal 1 Angka 1.*

3 *E. Saefullah Wiradipradja, Tanggung Jawab Pengangkut Dalam Hukum Pengangkutan Udara Internasional dan Nasional, Jogyakarta,: Liberty, 1989, hal. 1.*

in aviation is about safety. This can not be separated from the growing development of aircraft technology that the regulation of the law is still very new. A nation that is advancing in aviation is a country that can apply policies within a country to create aviation security and safety.

Given the importance of aviation safety, adequate regulations are required, both national and international regulations. One of the international conventions governing international civil aviation and binding 190 countries is the Convention on International Civil Aviation or commonly known as the Chicago Convention 1944. Article 37 explains that in order to improve the safety and security of aviation the participants of the Chicago Convention 1994 shall endeavor to manage civil aviation (personnel, aircraft, aviation paths, etc.) with uniform rules, standards, procedures and organizations with standards established by the International Civil Aviation Organization (ICAO).[4] In Indonesia, one of them is Constitution of Republic of Indonesia No. 1 Year 2009 on Aviation, this constitution was born in the background: Whereas the unitary state of the Republic of Indonesia is an archipelagic characterizes by the waters and air territorial with the limits, rights and sovereignty stipulated by the Law; To achieve the national goals based on Pancasila and the 1945 Constitution of the State of the Republic of Indonesia, namely to realize the National Insight and to strengthen national resilience with a national transportation system that supports economic growth, regional development, strengthen relations among nations, and strengthen the sovereignty of the state; Role effectively and dynamically to help create a steady and dynamic national distribution pattern by ensuring optimal safety and security, and; For the development of national and international strategic environments that require the implementation of aviation in accordance with the development of science and technology, private participation and business competition, consumer protection, international provisions that are aligned with national interests, accountability of state administration, and regional autonomy.

One of the aims of aviation is to realize the orderly, safe, secure, comfortable, at reasonable prices, and avoid unhealthy business competition practices. Safety is a very important aviation destination. More people are choosing to travel using air transport rather than using land or sea transport so that the business world in aviation is growing rapidly. This is influenced by: increased economic capacity of the community, the price of tickets affordable by the community, and faster to the destination.

But behind the high growth of aviation business, there are many problems in its implementation that can affect the safety. There are several factors that influence, namely: The high growth of aviation business is not followed by the readiness of infrastructure, for example: Radar weakness, lack of apron, runway, cargo handling problems, flight delays, amateur work, internal controls on the airline does not work, the low responsibility of the airline to the users of air transport services. This shows that Indonesia has not been able to meet the security requirements and safety of international aviation. The incident caused several things, among others: delay, waste of time and fuel since the plane is ready to take off and landing, aircraft accidents.

The Government has made various efforts by making regulations, revising regulations, conducting ongoing supervision activities, enforcing the law, taking legal action in the form of sanctions. With such efforts it is expected to provide legal protection for the parties involved. To know more about "What factors should be taken to ensure that safety in the aviation industry in Indonesia can be realized" and "How to improve safety in the aviation business in Indonesia", the authors would like to research and discuss further about "SAFETY AS AN IMPORTANT FACTOR IN THE WORLD OF AVIATION BUSINESS IN INDONESIA". The method used in this study is normative jurisdiction.

Formulation of the problem.

From the background that has been described above, formulated 2 problems as follows:

1. What factors should be considered for safety in the the world of aviation business in Indonesia to be realized?
2. How can efforts to improve safety in the world of aviation business in Indonesia?

Purposes and Benefits of Research.

Based on the background and the subject matter above, the purpose and benefits of research are as follows:

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4 *Yaddy, Keselamatan Penerbangan, Teori dan Problematika, penerbit: PT. Telaga Ilmu Indonesia, 2012, hal. 5.*

1. Research purposes.

a. To know and explain the factors that must be considered for safety in the world of aviation business in Indonesia can be realized.
b. To know and explain how to improve safety in the world of aviation business in Indonesia.

2. Research Benefits.

Theoretically:

a. This research is expected to give a thought in the development of the repertoire of science especially to the material concerning aviation law and the problem of the safety role in aviation specifically in Indonesia.
b. If problems arise in flight safety, may be used as a reference to solve them.

Practically :

a. This research is expected to provide inputs to the regulator or the government in making the aviation safety regulations.
b. This research is useful to add insight by providing an overview for the readers, especially in the field of aviation law, both law students and the public about the importance of safety in aviation and its implications for solving problems that arise so as to provide protection and justice for the parties.

Research methods.

This study uses a normative juridical approach, by inventorying, reviewing, analyzing and understanding the law as a set of rules or positive norms in the regulatory system that regulates human life.[5] Specification of this research is analytical descriptive research which is a research to describe the flow of scientific communication and analyze existing problems that will be presented descriptively.[6] The type of data used is secondary data, including research-related literature materials, secondary data including: primary legal materials,[7] secondary legal materials and tertiary legal materials. Data collection in this research is done through literature study, which is a review of library materials related to the problems studied. Data were analyzed normatively-qualitative.

RESEARCH RESULT AND DISCUSSION

Aviation is defined as "a unified system comprising the use of airspace, aircraft, aerodrome, air transport, flight navigation, safety and security, the environment, as well as supporting facilities and other public facilities".[8] The word "aviation" is not the equivalent of the words "aeronautical", "flight", "aerial navigation" or "air navigation". The word "aviation" has a broader meaning which refers to the Paris Convention 1919 (Convention Relating to the Regulation of Aerial Navigation), the Havana Convention 1928(Convention on Commercial Aviation), the Chicago Convention 1944(Convention on International Civil Aviation).[9]

Talking about aviation is inseparable from safety issues. Safety and security (aviation) is an important part of the purpose of aviation. Aviation safety as "a condition for the fulfillment of safety requirements in the utilization of airspace, aircraft, airport, air transport, navigation, aviation and other supporting facilities and public facilities."[10] Aviation security is "a condition that provides protection to aviation from unlawful acts through the integration of the utilization of human resources, facilities and procedures."[11]

Operation of aviation in Indonesia based on:[12]

5 *Soerjono Soekanto, Penelitian Hukum Normatif, Jakarta: PT Raja Grafindo Persada, 2003, hal. 13.*
6 *Ibid, hal. 30.*
7 *Ibid, hal. 13.*
8 *Undang-Undang Republik Indonesia Nomor 1 Tahun 2009, Op.Cit.*
9 *K. Martono, Hukum Penerbangan Berdasarkan UURI No.1 Tahun 2009, Bandung : Mandar Maju, 2009, hal. 347-349.*
10 *Undang-Undang Republik Indonesia Nomor 1 Tahun 2009, Op.Cit., Pasal 1 angka 48.*
11 *Ibid, Pasal 1 angka 49.*
12 *Ibid,Pasal 2 dan penjelasannya*

1. **The principle of benefit,** meaning that the implementation of aviation should be able to provide the greatest benefits for humanity, improving people's welfare and development for citizens, as well as efforts to increase the defense and security of the country.
2. **The principle of joint effort and kinship**, meaning that the implementation of business in the field of flight is carried out to achieve the national objectives which in its activities can be done by all levels of society and imbued by the spirit of kinship.
3. **The principle of fair and equally**, meaning that the operation of aviation should be able to provide fair and equitable services without discrimination to all levels of society at a cost affordable to the community regardless of ethnicity, religion, and descent and economic level.
4. **The principle of balance, harmony, and alignedness,** shall be carried out in such a way that there is a balance, harmony, and alignedness between means and infrastructure, between the interests of users and service providers, between individual and community interests, and between national and international interests.
5. **The principle of public interest,** the organization of aviation should prioritize the interests of the wider community.
6. **The principle of integration,** the implementation of aviation must be a unified whole, integrated, mutually supportive, and complementary, both intra and inter-mode transportation.
7. **The principle of law enforcement,** the aviation law requires the government to enforce and ensure legal certainty and oblige every Indonesian citizen to always be aware and obey the law in the conduct of flight.
8. **The principle of independence**, the operation of aviation should be in the personality of the nation, based on the belief in its own capacities and strengths, prioritizing national interests in aviation, and taking into account the reasonable share of cargo in air transport from and abroad.
9. **The principle of openness and anti-monopoly**, the conduct of aviation business is carried out to achieve the national objectives which in its activities can be done by all levels of society and imbued by the spirit of kinship.
10. **The principle of environmental insight**, the implementation of aviation should be done in harmony with the effort of preserving the function of the environment.
11. **The principle of state sovereignty,** the implementation of aviation must be conducted in line with efforts to maintain the territorial integrity of the Unitary State of the Republic of Indonesia.
12. **The principle of nationality,** the implementation of aviation should be able to reflect the nature and character of pluralistic Indonesian nation while maintaining the principle of the Unitary State of the Republic of Indonesia.
13. **The principle of archipelagic characterizes**, every flight administration always pay attention to the interests of the entire territory of Indonesia and the conduct of flights made by the region is part of the national aviation system based on Pancasila.

International provisions also regulate such matters in particular Article 44 of the Chicago Convention 1944 as follows:[13]

"The aims and objectives of the Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to: (a) insure the safe and orderly growth of international civil aviation throughout the world; (b) encourage the arts of aircraft design and operation for peaceful purposes; (c) encourage the development of airways, airports, and air navigation facilities for international civil aviation; (d) meet the needs of the peoples of the world for safe, regular, efficient and economical transport; (e) prevent economical waste caused by unreasonable

13 *K. Martono, Op. Cit., hal. 79.*

competition; (f) avoid discrimination between contracting states; (g) promote safety of flight in international air navigation; (h) promoted generally the development of all aspect of international civil aeronautics."[14]

While the aims of the aviation are: To realize the orderly, safe, secure, convenient, reasonable, fair flight and avoid unfair business competition practices; Streamlining the flow of people and/or goods through the air by prioritizing and protecting air transport in order to facilitate national economic activities; Fostering aerospace spirit; Upholding the sovereignty of the state; Creating competitiveness by developing national air transport technology and industry.

Factors to look for so that Safety in the world of Aviation Business can be realized.

In the aviation world, there are three interrelated things, namely: security, safety and accidents or aviation disasters. This decrease in safety and security can result in aviation disasters, so aviation security and safety are interrelated and difficult to separate, therefore the use of the formulation of aviation safety is relatively often followed by "security" as well.[15]

Factors affecting aviation safety, such as: The physical condition of aircraft, crew conditions, infrastructure, and natural factors. These factors are: aircraft, personnel, aviation infrastructure, flight operations and regulatory bodies.[16] Regarding the aircraft there are things that are most relevant to safety, namely: Design and construction that meet the crashworthiness aspects so that when an accident is not found passengers are seriously injured, the airworthiness related to aircraft operation, and aircraft maintenance. Then with regard to personnel or flight crew, the existence of education and training, licensing, health and flying time limits, becomes an important effort in anticipation and optimization of flight readiness. Infrastructure of the airport with all the tools, ranging from navigation using the latest tools to a comfortable waiting room for prospective passengers. The criteria of equipment and facilities of the airport will determine the good or bad classification of the airport. Other infrastructures are air traffic signs and navigational aids outside the airport which need careful attention. Infrastructure is also closely related to security, crime prevention efforts should be done through a strict airport guard system. In addition to these factors, there are still environmental or natural factors, such as uncertain weather as a result of climate change is also a strong factor in the occurrence of aviation accidents. Prof. Oetarjo Diran mentions: "the aviation system is a typical complex an interactive socio-technical-environmental system ...".[17] K. Martono also added that accidents consist of various factors, namely : human, aircraft (engine), environment, mission, and management. [18]

From the above explanation, there are some important things that must be considered related to the aviation safety and security, namely:

1. **Aircraft maintenance.** Every person operating an aircraft shall maintain aircraft, aircraft engines, aircraft propellers, and components to maintain continuous reliability and sustainability.
2. **Safety and security in aircraft during flight.** Any Indonesian or foreign civil aircraft arriving at or departing from Indonesia may only land or take off from a designated airport. Conditions do not apply in an emergency. Any person who violates the provisions is liable to administrative sanctions in the form of: warning; freezing certificate; and/or certificate revocation.
3. **Responsibility of the carrier.** The carrier is liable for the loss of a passenger who dies, permanent disability, or injury resulting from the occurrence of air transport within the aircraft and/or up and down the aircraft.
4. **Flight navigation.** The preparation of the national aviation navigation order as referred to in paragraph (1) shall be carried out taking into account: the safety of aviation operations; effectiveness and efficiency

14 *Pasal 44 Konvensi Chicago 1944 (Convention on International Civil Aviation)*

15 *http://freelists.org/post/ppi/ppiindia-Faktor-Penyebab-Kecelakaan-Penerbangan.*

16 *E. Suherman, Wilayah Udara dan Wilayah Dirgantara , Bandung : Alumni, 1984, hal. 169.*

17 *Oetarjo Diran, Human Factors and Aviation System Safety or Culture and Large Socio-technical System, Kumpulan artikel dalam Beberapa Pemikiran Hukum Memasuki Abad XXI , Bandung : Angkasa,1998, hal. 253.*

18 *K. Martono, Op.Cit.,hal. 428-429.*

of aviation operations.

5. **Flight path.** The flight path of letter c aims to regulate the flow of air traffic. The flight path includes: airway; advisory route, controlled route and/or uncontrolled route, departure route and arrival route.
6. **Aviation traffic services.** Aims to prevent collisions between aircraft in the air and to prevent collision between aircraft or aircraft with obstacle in the manouvering area.
7. **Aviation telecommunications services.** Aims to provide information to create accuracy, regularity, and efficiency of aviation.
8. **Aeronautical information services.** Aiming for the availability of sufficient, accurate, current, and timely information required for regularity and flight efficiency.
9. **Aviation meteorology information service.** Aims to provide weather information at the airport and along a sufficient, accurate, up to date, and timely flight path for aviation safety, smoothness and efficiency.
10. **Search and Rescue Information Services.** Aims to provide quick and accurate information to assist with the search and rescue of aircraft accidents.
11. **Flight navigation personnel.** Each aviation navigation personnel is required to have a license or competency certificate.
12. **Flight navigation facility.** Flight navigation facilities consist of: aviation telecommunication facility; aeronautical information facility; and aviation meteorology information facilities.
13. **Flight radio frequency.**

In relation to aviation security and safety in Indonesia, the Government has established laws and regulations, among others: Aviation Law; Government Regulation on Aviation Security and Safety; Minister of Transportation Decree on Civil Aviation Safety Regulation (CASR), Decree of the Director General of Civil Aviation relating to the safety and security of aviation. Safety rules also include : Airspace Utilization; Aircraft Operation and Airport Development. Aviation safety goals are: Aviation safety performance targets, aviation safety performance indicators, and aviation safety achievement measurements. Aviation safety reporting system in the form of : safety data analysis and exchange; accident and incident investigation; safety promotion; safety Oversight; and Audit.

For the aviation safety is also inseparable from guidance security and aviation safety. Each airline service provider shall create, implement, evaluate and continually refine the safety management system in accordance with the national aviation safety program. Any service provider violating the provisions shall be liable to administrative sanctions in the form of : warning; license suspension; and/or revocation of permits. Another factor is about the airport, given the vital importance of the functionality of each airport needs to be managed with an integrated security system. Human resources are equally important. Provision and development of human resources in the field of aviation aims to realize the human resources professional, competent, disciplined, responsible, and have integrity. Human resources consist of human resources in the field of: aircraft; air transport; airport; flight navigation; aviation safety; and aviation security. In order to improve the organization of aviation optimally, communities have equal opportunities and have a role. in the form:

1. Monitoring and maintaining the order of the operation of aviation activities;
2. Providing input to the government in the improvement of regulations, guidelines and technical standards in the field of aviation;
3. Providing input to the government, regional governments in the framework of fostering, administering and supervising aviation;
4. Conveying opinions and judgments to the competent authority over the flight operation which has significant impact on the environment;
5. Reporting in case of non-compliance of flight procedures, or non-functioning of flight equipment and facilities;
6. Reporting in case of accident or incident to aircraft prioritizing and promoting aviation safety culture;
7. Carrying out a representative lawsuit against aviation activities that is harassing, harming, and/or

jeopardizing the public interest

8. Governments, local governments and aviation providers follow up on inputs, opinions and reports submitted by the public.

In its implementation, society participation is responsible for maintaining the order and aviation safety and security. Society participation can be conducted individually, groups, professional organizations, business entities, or other society organizations in accordance with the principles of openness and partnership.

Efforts to Improve Safety in the world of Aviation Business.

Governments and other stakeholders are responsible for establishing and realizing a culture of aviation safety. Aviation Safety is a condition of the fulfillment of safety requirements in the utilization of airspace, aircraft, airport, air transport, flight navigation, as well as supporting facilities and other public facilities. Safety is a top priority in the world of aviation, no compromise and tolerance. To establish and realize the culture of aviation safety, the Minister shall establish policies and programs of cultural measures of safety, openness, communication, as well as valuation and respect for aviation safety measures. To ensure the safety of national aviation, the Minister shall establish a national aviation safety program (state safety program) which contains:

1. Aviation safety regulations;
2. Aviation safety target;
3. Aviation safety reporting system;

The Government already has the National Civil Aviation Security Programme that available for the aviation security and safety in Indonesia by ordering passengers, aircraft, ground and community officers, and installation at the airport. The Government sees the need for a new paradigm as the safety of shared responsibility between the Government, the Aviation Company and the Service User Community. Concrete steps forward in accordance with the new ICAO provisions, the Government has implemented the Safety Management System (SMS) in the field of aviation. The Safety Management System (SMS) is a monitoring system that is a team or organization within a company that has the duty and responsibility to monitor the safety performance of emergencies, analyze risks and take risky actions by discussing periodic safety issues led by the President Director Company. The Government revised the Government Regulation and the Aviation Safety Regulations/CASR to include safety requirements by the President Director, hazard systems, risk analysis and follow up actions, safety risks, safety indicators, internal evaluations, emergency response plans outlined in airline safety manuals. The airlines set up manual safety in accordance with CASR requirements and implemented consistently and determine safety commitments to the Government by establishing safety target which is acceptable.

In addition to regulation, aviation safety monitoring is also carried out by conducting ongoing supervision activities to observe the compliance of aviation safety regulations implemented by airlines and other stakeholders including: audits; inspection; monitoring; surveillance; and others. Transportation Safety Supervision is carried out by a separate implementing unit and which then submits the result to the Minister of Communications, after obtaining the results of the report, the minister takes corrective action and legal affirmation. These legal actions can be administrative sanctions in the form of warnings, freezing of permits, revocation of operating permits, and the second is criminal sanctions.

Another effort is through law enforcement. Matters to be observed in law enforcement in aviation safety are: Law enforcement procedures; Preparation of authorized personnel overseeing the application of rules in the field of aviation safety; Community education and providers of aviation services and law enforcement; and Action. If the supervision and enforcement of the law is implemented seriously, it automatically provides legal protection for the parties involved. The interests of consumer law are the access of consumers to justice, the consumer is entitled to be protected from the harmful treatment of business actors. With the implementation of these efforts, it is hoped that no more undesirable things will happen.

Conclusion and Suggestions

Conclusion

1. Aviation safety as a condition of fulfillment of safety requirements in the utilization of airspace, aircraft, airport, air transport, navigation, aviation and other supporting facilities and public facilities. Factors affecting aviation safety are: Aircraft physical condition, crew condition, infrastructure, and natural factors. Regarding the aircraft there are things that are most relevant to safety, namely: Design and construction that meet the aspects of crashworthines so that when an accident should occur accidentally not found passengers who are seriously injured; Fluency pertaining to aircraft operation, and aircraft maintenance. Then with regard to personnel or flight crew, the existence of education and training, licensing, health and flying time limits, becomes an important effort in anticipation and optimization of flight readiness. Infrastructure of the airport with all the tools, ranging from navigation using the latest tools to a comfortable waiting room for prospective passengers. Infrastructure is also closely related to security, crime prevention efforts should be done through a strict airport guard system. In addition to these factors, there are still environmental or natural factors. As the weather is uncertain as a result of climate change. Human resources and community roles are equally important. In relation to aviation security and safety in Indonesia, the Government has established legislation containing: Arrangement, guidance, supervision, law enforcement and sanctions.

2. The Government and other stakeholders are responsible for establishing and realizing a culture of aviation safety. Safety is a top priority in the world of aviation, no compromise and tolerance. To ensure the national aviation safety, various efforts have been made, among others: First, the government has made the regulation; Second, to revise the regulation; Third, conduct continuous monitoring activities; Fourth, enforce the law; Fifth, take legal action in the form of sanctions. With such efforts it is expected to provide legal protection for the parties involved.

Suggestions

1. Revise the regulations by adjusting the current situation by considering the national interest based on Pancasila and the 1945 Constitution of the Republic of Indonesia.
2. Provide strict legal sanctions for airlines that commit flight violations.
3. Need to make an integrated planning for efforts to increase the growth of passengers and goods, including infrastructure development.
4. There needs to be an independent institution that is professional in managing the Indonesian air space from Sabang to Merauke.
5. It is necessary to decrease the cost structure of avtur Indonesia which is still relatively high compared to neighboring countries in the ASEAN region.

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THE POSITION OF ALTERNATIVE DISPUTE RESOLUTION (ADR) IN COMPLETION OF DISPUTE OF TERMINATION OF EMPLOYMENT (TE) USING BIPARTITE SYSTEM

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Abstract

The employment relationship between employers and workers is indicated by the Working Agreement either orally or in writing. Industrial Relations Dispute Settlement as stipulated in Law No. 2 of 2004, in Article 2 mentioned types of disputes that exist in the field of manpower namely; "Rights disputes, interest disputes, termination disputes and disputes between trade unions and trade unions within a company". The dispute resolution process is mentioned in article 3 which reads, "Industrial Relations Dispute must be solved by bipartite negotiation through discussion to reach agreement". Therefore, the writer had formulated the problem, that was how the position of Alternative Dispute Resolution (ADR) is in completion of dispute of Termination of Employment (TE) using bipartite system. This research was conducted by normative juridical, the conclusion from research that the writer found was ADR (Alternative Dispute Resolution) as the first step in resolving labor dispute before submitted to process of the next APS even to process of Industrial Relations Court (IRC).

Keywords: ADR, TE, Bipartite, IRC

A. Introduction

The employment relationship between employers and workers is indicated by the Working Agreement either orally or in writing. For Indonesian citizens, working and striving are obligation. We can observe in the enactment of 1945 Law which has been amended in Article 28 D paragraphs (1) and (2), paragraph (1) reads: "Everyone has the right to recognition, guarantee of protection, and legal certainty and obtain remuneration and fair and equitable treatment in the employment relationship. Paragraph (2) reads, "Everyone has the right to work and receive fair and reasonable remuneration and treatment in the employment relationship".

Thus, the opportunity to work and strive to be the hope of all citizens who are parts of Human Rights, because by working and trying, they will get enough remuneration to fulfill basic needs.

A person who works for another person or a company called a worker/laborer is obliged to comply with all rules set by the company, otherwise, the manager of the company is also required to keep in mind the conditions of the workers, especially about their salary.

Furthermore, if the workers have committed themselves to a work agreement, they are obliged to perform the assigned duties and at the same time maintain good relationships with the company in which they work. Thus, it is expected to establish a working relationship between workers and employers, as desired by the government to establish Pancasila industrial relations in every company well, so that it will create serenity in working and striving and prevent the occurrence of Termination of Employment (TE). But in practice, there is still a dispute between workers and employers, in legal concepts, disputes arise because each party insists on mutual defense or mutual assumption is right in accordance with their beliefs. So that happens the decision of Termination of Employment (TE) by the employer to the worker/laborer who is considered disobedient in doing the work while the worker assumes that he has done his duty well in accordance with the regulation of the company and cannot accept the decision of Termination of Employment (TE) by entrepreneur.

The settlement of disputes in the employment field is stipulated in the enactment of Law No. 2 of 2004 on

Industrial Relations Disputes Settlement (IRDS). Forms of Industrial Relations Dispute Settlement as stipulated in the enactment of Law No. 2 of 2004, in Article 2 mentioned types of disputes that exist in the field of employment, those are; "Rights disputes, interest disputes, termination disputes and disputes between trade unions and trade unions within a company". The way to resolve the dispute is mentioned in article 3 which reads, "Industrial Relations Disputes must be solved by bipartite negotiation by discussion to reach agreement".

From the two articles, the writer would conduct research on the disputes mentioned in article 2 on Settlement of Dispute Termination of Employment (TE) using bipartite system – one way of dispute resolution in the field of employment outside the court or ADR.

B. Formulation of the Problem

From the above description of the background, a problem that could be formulated by the writer was how the position of Alternative Dispute Resolution (ADR) is in completion of dispute of Termination of Employment (TE) using bipartite system.

C. Literature Review

Alternative Dispute Resolution (ADR) is one form of legal development in the settlement of disputes, especially in business disputes as well as in civil law, one aspect is within the scope of labor law, dispute resolution or called disputes in the enactment of Law No. 2 of 2004 on Industrial Relations Disputes Settlement (IRDS), in general, dispute settlement can be reached through the court (litigation) or outside the court (non- litigation).

Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution also recognizes the settlement of disputes outside the court, including business and economic disputes that use the term negotiation in negotiations between the two parties, whereas it is known as bipartite in the Industrial Relations Disputes Settlement. According to Joni Emirzon, negotiations can be interpreted as an attempt to resolve disputes by the parties without going through the judicial process. With the aim of reaching mutual agreement on the basis of more harmonious and creative cooperation. While, the definition of Bipartite contained in Article 1 (paragraph) 10 of Law No. 2 of 2004 on Industrial Relations Dispute Settlement reads, "Bipartite negotiations are negotiations between workers/ laborers/ labor unions and employers to resolve industrial relations disputes".

Disputes in the field of employment in term of the settlement process recognize the following terms:

a. Industrial Relation Dispute is disagreement that results in a conflict between employers or entrepreneurs with workers/laborers or unions/labor unions due to rights disputes, disputes of interests, termination disputes and disputes between unions/labor unions in one company, which is regulated in Law No. 2 of 2004 CHAPTER I General Provisions Article 1 paragraph (1)
b. Industrial Relation is a system of relationships formed between doers in the process of producing goods and services, which consists of employers, workers/laborers, and the government. Article 1 Paragraph (16) of Law No. 13 of 2003 concerning Manpower
c. Employment Relationship is a relationship between employers and workers/laborers based on employment agreements that have elements of work, wages, and orders. Article 1 paragraph (15) of Law No. 13 of 2003 concerning Manpower
d. Collective Labour Agreement is the institutionalization of participation oriented to efforts to conserve and develop the harmony of working relationships, business, and mutual prosperity. Based on the expected role of the Collective Labour Agreement, workers 'and employers' organizations should work together on work-oriented openness, kinship, mutual assistance, deliberation and consensus and are responsible for the implementation of the agreement which has been made. Article 1 paragraph (21) of Law No. 13 of 2003 regarding Manpower.

In the enactment of Law No. 2 of 2004 on Industrial Relation Dispute Settlement (IRDS) is required first to be taken through ADR (Alternative Dispute Resolution) outside the court, before proceeding through the Industrial Relations Court, this is mentioned in article 2 of the Industrial Relations Disputes Settlement which reads, "rights disputes, disputes of interests, termination disputes and disputes between unions/labor unions in one company". If there is an agreement/peace between both parties, the employer and the worker/laborer, a collective agreement

is made, then registered to the industrial relations court, otherwise, then proceed to the mediation, conciliation or arbitration process before being submitted to the Industrial Relations Court.

D. Methodology

The method used in this study is normative juridical, through library research to collect primary legal materials such as legislation and secondary legal materials namely literature and legal scientific work that discuss the practice of damping in the law system of Indonesia, and tertiary legal material to explain the terms relevant to the discussion.

The primary law material and the collected secondary law materials are then processed with a data deduction and induction management technique, as follows;

1. Deductively, it is the discussion of the starting point of things are general, then discussed a specific conclusion.
2. Inductively, it is the discussion that starts from the things that are specific, then discussed into a general conclusion.

After processing the data, then continued by analyzing data both from primary law material and secondary law material systematically in order to get the conclusion according to the discussion.

E. Results and Discussions

1. ADR (Alternative Dispute Resolution)

ADR (Alternative Dispute Resolution) in the law system of Indonesia called alternative dispute settlement or one of the non-court dispute resolution options that is settled out of court through deliberation between the disputing parties to reach agreement. In labor law, disputes between parties are known as disputes that can be settled out of court by way of Bipartite, Mediation, Conciliation, and Arbitration (non-litigation).

Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution states that there are 4 (four) kinds of procedures for dispute resolution outside the court, namely negotiation, mediation, conciliation, and arbitration. Negotiations involve the parties to the conflict directly. Negotiation is a means for the parties to the dispute to discuss the settlement without involving a third-party mediator. Mediation and conciliation involve third party that serves to connect both parties to the dispute. In mediation, third-party functions are limited only as mouthpiece while in conciliation, third parties are actively involved in proposing solutions to disputes that occur. Arbitration is a form of trial with the arbitrator as a judge, who decides for both parties to the dispute. From the title of Law No. 30 of 1999 on Arbitration and Alternative Dispute Settlement, arbitration actually includes in ADR, only the dispute settlement process is done formally such as the process of litigation. The difference from the court is the decision maker is not the judge but the arbitrator. The settlement form is better and cheaper and faster than the court. On the other hand, in reality, it still raises a number of problems. Dispute resolution will be effective when it is based on mutual trust and good faith. Based on the principle of win-win solution, not win-lose.

In Law No. 2 of 2004 on Industrial Relations Disputes Settlements, ADR can be found in the provisions of Article 1 number 10 of Law No. 2 of 2004, bipartite negotiations are negotiations between workers/ laborers/ labor unions and employers to resolve industrial relation dispute. Bipartite efforts are regulated in Article 3 to Article 7 of Law No. 2 of 2004.

2. Termination of Employment (TE)

Termination of Employment (TE) is one type of disputes in labor law. the definition of Termination of Employment (TE) can be seen from several opinions, which are:

According to Soetirisno and Wilson Situmorang in his paper said: "In general, Termination of Employment (TE) is an event that is not desired by all parties, therefore the Termination of Employment (TE) is the last option if in the sense there is no other option that can be taken".

According Halili Toha, S.H and Hari Pramono, Termination of Employment (TE) is: "Termination of Employment is the beginning of a worker from the end of having a job or the beginning of the end of achievement

ability to fund the necessities of daily life for him and his family".

According to Drs. Yunus Shamad:

The definition of Termination of Employment (TE) is a step to terminate the working relationship between workers and employers because of a certain thing. With the end of the employment relationship, the bond between the workers and the employers ends so that the rights and the obligations between them also end.

In the field of employment, the procedure of Industrial Relations Dispute Settlement is stipulated in Law No. 2 of 2004, there are four disputes, as follows, Article 1 paragraph (2) reads, Disputes of rights are disputes arising from the non-fulfillment of rights, or the result of due to differences in the implementation or interpretation of the provisions of legislation, employment agreements, regulations of company, or collective labour agreements ". Article 1 paragraph (3) reads:

Disputes of interest are disputes arising in the employment relationship in the absence of conformity of opinion concerning the making, and or changes to the terms of employment specified in the employment agreement, or the arrangement of the enterprise, or collective labor agreements.

Article 1 paragraph (4) reads: "Dismissal dispute is dispute arising from the non-conformity of opinion concerning the termination of a work relationship undertaken by either party". And, Article 1 paragraph (5) reads:

Disputes between trade unions/labor unions are disputes between trade/labor unions and other trade/labor unions within a single company, in the absence of a conformity understanding of membership, the exercise of rights and obligations to the union.

Of the four disputes, the writer discusses the dismissal disputes set forth in Article 4 paragraph (1) which would be discussed further in this paper.

3. Bipartite

Bipartite is a form of settlement between the workers/laborers and the entrepreneurs with deliberation to reach consensus. Bipartite is also known by the name of the negotiation in Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution.

The procedures for settling industrial relations disputes in the field of employment under the provisions of Law No. 2 of 2004 can be pursued through four ways set forth in the articles of the law, such ways as bipartite, mediation, conciliation and arbitration, which can be described as follows:

Before the dispute is submitted to the dispute settlement institution, any dispute must be pursued in a bipartite settlement, i.e. deliberation between workers and employers.

Industrial relations disputes must be strived to resolve in advance through bipartite negotiation by deliberation to reach consensus. Settlement of disputes through bipartite must be settled no later than 30 (thirty) working days from the date of commencement of the negotiation. If within a period of 30 (thirty) days one of the parties refuses to negotiate or has held a negotiation, but does not reach an agreement, then bipartite negotiation is considered failed.

If bipartite negotiations fail, one or both parties may record their dispute to the responsible agency in the local manpower field by attaching evidence that bipartite negotiation efforts have been made. If the evidence is not attached, then the agency responsible for manpower shall return the file to be completed no later than within 7 (seven) working days from the date of receipt of the return of the file. After receiving the records from one or the parties, the responsible agency in the local employment field shall offer the parties to agree to vote for settlement through conciliation or by arbitration. If the parties do not specify the settlement option through conciliation or arbitration within 7 (seven) working days, the agency responsible for the manpower field delegates dispute settlement to the mediator.

Any bipartite negotiations shall be made of treaties signed by the parties. Minutes of the negotiations shall at least include:

a. full name and address of the parties
b. date and place of negotiation
c. subject matter or reason for dispute
d. opinion of the parties

e. conclusions or outcomes of the negotiations
f. date and signature of the negotiating parties.

If the negotiation can reach a settlement agreement, then a Collective Agreement signed by the parties will be made. This Collective Agreement should be binding and lawful and should be done by the parties. The Collective Agreement should be registered by the parties entering into an agreement with the Industrial Relation Court at the District Court in the territory of the parties to enter into a Collective Agreement. Collective Agreement that has been registered is provided by the deed of proof of registration of the Collective Agreement and an integral part of the collective agreement.

If Collective Agreement is not executed by either party, the disadvantaged party may apply to the Industrial Relation Court at the District Court in the territory of the Collective Agreement to be registered for the determination of the execution. In this case, the execution applicant is domiciled outside the District Court where the Collective Agreement is registered, the execution applicant may apply for execution through the Industrial Relation Court to the District Court in the area of the executioner's domicile to be forwarded to the Industrial Relation Court at the State Court competent to execute.

F. Conclusion

The conclusion of this research is ADR (Alternative Dispute Resolution) acting as the first step that must be done (mandatory) in the settlement of labor disputes before proceeding to the next process. If there is no consensus in the Bipartite process in the settlement of labor disputes, further processes can be pursued through mediation, conciliation, and arbitration even until proceedings to the Industrial Relation Court.

If the Bipartite negotiations reach consensus, the Collective Agreement signed by both parties should be registered to the Industrial Relation Court at the District Court to obtain the certificate of registration as an integral part of the Collective Agreement. With the existence of the deed of proof of registration from the District Court, it creates legal consequences for the parties if they do not implement the contents of the Collective Agreement. The legal consequence is that if one party does not perform his obligations, the injured party may request the Industrial Relation Court to the District Court in the territory where the Collective Agreement is made to execute.

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International Trade Disputes Case Studies of Indonesia's Cigarette Trade Agreement Against Australia through the World Trade Organization

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Abstract

In 2011 Australia issued a Tobacco Plain Packaging Act policy which is considered not beneficial to Indonesia because it is contrary to international law. Indonesia in October 2013 to take action or step diplomacy through the Embassy of the Republic of Indonesia in Canbera. This diplomatic step is the first step to discuss bilaterally between the two countries on the policy of Australia that has implemented Tobacco Plain Packaging Act 2011. Tobacco industry contributes 1.66 percent of Indonesia's total Gross Dosmetic Product (GDP) and foreign exchange through export to the world whose value in 2013 reached 700 million US dollars. In addition, the cigarette industry is also a source of livelihood for 6.1 million people working in the cigarette industry directly and indirectly, including 1.8 million tobacco and clove farmers. The approach method used in this research is the normative juridical approach method, this approach method uses the concept of legit positivis, namely that the law is identical with the written norms created and enacted by the authorized institution or official.

On Australia's policy, Indonesia filed a lawsuit to the WTO (World Trade Organization) on the Australian policy. The role of the state against the settlement of international cigarette trade disputes that Indonesia proposes to Australia through the WTO (World Trade Organization). Australia signed the WHO FCTC on 5 December 2003 and ratified it on October 27, 2004, it does not mean that Australia can enforce the Tobacco Plain Packaging Act against Indonesia as Indonesia does not enter into the treaty. As the authors explain above that the basis of Australian law to implement the Tobacco Plain Packaging Act policy is to refer to the WHO treaty established for the first time in 2003. The settlement of trade disputes between Indonesia and Australia is that Indonesia can win this lawsuit because Australia has violated international law through violations of TRIPS, TBT and GATT. Under such terms, Indonesia shall be entitled not to be subject to the rules of cigarettes made by Australia

A. Introduction

In November 2008, the FCTC Conference of Parties discussed the guidelines for the implementation of Article 11 on Packaging and Labeling and Article 13 on Cigarette Advertising, Promotion and Sponsorship, both of which suggested that FCTC participants consider adopting plain packaging policies, and significantly strengthening political and the legal basis underlying the plain packaging policy. One response from the tobacco industry in responding to the implementation of a plain packaging policy is to show that there are a number of existing domestic and international laws that can hamper the implementation of a plain packaging policy in Australia. One objection put forward by the tobacco industry is that the implementation of a plain packaging policy may be contrary to Australia's obligations under the WTO, particularly in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and The Agreement on Technical Barriers to Trade (TBT)

The two WTO agreements tend to be the basis of any formal lawsuit brought by cigarette manufacturers against Australia through the WTO's sack settlement system. A similar case concerning tobacco products has previously been proposed before the WTO concerning complaints against regulations introduced by Canada and the United States regarding the use of certain additives and flavors in cigarettes and related products. Previously these complaints have been repeatedly in about, one of them through comments by members in the TBT Committee, which subsequently became the subject of a formal dispute under the WTO is Indonesia and Australia.

In this case there is a problem of Australian and Indonesian policies affecting Indonesia's lawsuit against WTO on the Australian policy described above. The role of the state against the settlement of international cigarette trade disputes that Indonesia proposes to Australia through the WTO (World Trade Organization).

B. Method Research

This paper method research by normatif research, which is examined is a library material or secondary data covering primary legal materials, secondary legal materials, and tertiary legal materials.

C. Problems

Based on the Background above, the problems is as follows:

1. How to resolve the dispute case between Indonesia and Australia?
2. What is the role of the Indonesian state in international cigarette trade disputes with Australia through the World Trade Organization?

D. Discussion

In 2011 Australia adopted the Tobacco Plain Packaging Act policy which is considered unfavorable to Indonesia as it is against international law. Indonesia in October 2013 to take action or step diplomacy through the Embassy of the Republic of Indonesia in Canbera. This diplomatic step is the first step to discuss bilaterally between the two countries on the policy of Australia that has implemented Tobacco Plain Packaging Act 2011. Tobacco industry contributes 1.66 percent of Indonesia's total Gross Dosmetic Product (GDP) and foreign exchange through export to the world whose value in 2013 reached 700 million US dollars. In addition, the cigarette industry is also a source of livelihood for 6.1 million people working in the cigarette industry directly and indirectly, including 1.8 million tobacco and clove farmers.

With this diplomatic effort Indonesia asked Australia whether Australia would revoke its policy of packaged cigarette packaging. Plain cigarette packaging is a box of uniform color packs accompanied by health threat warnings. In the packaging, the manufacturer can not put a trademark logo or typeface because the font type has been determined.

The response from Australia is that Australia is not in a position to do so (remove plain packaging policies) because this policy is a measure of public health and has nothing to do with trading issues. Australia declares that its policy is not directed or directed towards Indonesia, but for the whole country. Australia added that they import only a small amount of tobacco from Indonesia. The legal basis for Australia to implement this policy is that Australia wants to implement several bonds under the World Health Organization Framework Convention on Tobacco Control (WHO FCTC).

The World Health Organization Framework Convention on Tobacco Control (WHO FCTC) is an international treaty adopted by the World Health Assembly on 21 May 2003, this agreement entered into force on 27 February 2005. This agreement is a supranational agreement aimed at protecting current and future generations from the damaging effects of tobacco consumption on health, social, environmental, and economic and restricting its use in any form worldwide. This Agreement binds the arrangement of production, sales, distribution, advertising, and taxation of tobacco.

Bilateral consultations through diplomacy resulted in no results or agreements and did not get problem solving, so Indonesia on 3 March 2014 sued Australia to the WTO Panel. What Indonesia is doing is right, Indonesia takes its role as a sovereign country to express its position through non-litigation through diplomacy against Australia when this case arises. Even before Plain Packaging was still a bill (draft) on 29 April 2010 Indonesia has always been active in diplomacy towards Australia. Until finally at the peak of the agreement can not be reached, then Indonesia took steps in litigation, bringing the case to the WTO Panel.

The stages in the settlement of trade disputes in the WTO are as follows:

a. Consultations

The purpose of the dispute resolution mechanism at the WTO is to reinforce a positive solution to the dispute. The first stage is the counseling of the disputing parties. Each member shall respond appropriately within ten days to request a consultation and enter the consultation period for thirty days after the time of the request.

To ensure clarity, any application for consultation should be notified to the DSB (Dispute Settlement Body) in writing, then mentioned reasons for consultation request including legal basis for complaint. If the consultation fails and both parties agree, the matter may be submitted to the Director-General of the WTO

who will be ready to offer good offices, conciliation or mediation in resolving the dispute.

b. Forming Panels (Establishment of Panels)

If a member does not verify an answer to request a consultation within ten days or if the consultation fails to be completed within sixty days, the plaintiff may request to the DSB to form a panel to resolve the issue of panel formation. This procedure permits the DSB to immediately form a panel, no later than the second session of the panel request. If not, then it is decided by consensus. It is intended that the state being sued shall not preclude the formation of panels. In this case the determination of the Term of Reference and the composition of the panel is also submitted. The panel should be immediately organized within thirty days of formation.

The WTO Secretariat will advise three potential panelists on the parties to the dispute. If the parties disagree with the panelists within twenty days of the panel formation, the Director General shall consult the chairman of the DSB and the Chairman of the Board shall appoint a panelist. The panelists shall serve according to their capacity and shall not be subject to the instructions of the country concerned.

c. Panel Procedures (Panels Procedures)

This understanding indicates that the period in which the panel performs the test of the problem, then the Term of Reference and the composition of the panel is approved, then the panel shall report to the parties to the dispute no more than six months. In important matters, including for perishables, the time can be accelerated to three months. If there is no problem, the timing of panel formation to the circulation of reports to members should not be more than nine months.

d. Acceptance of Panel Reports to DSB (Adoption of Panels Reports)

The WTO procedure indicates that panel reports should be received by the DSB within sixty days of expenditure. Otherwise, one party notifies its decision to withdraw or consent to the endorsement of the report. DSB can not consider panel reports faster than twenty days after the reports are circulated to members. Members who object to the report are required to state the reasons in writing to be circulated before a DSB meeting in which panel reports will be considered.

e. Appellate Review

A new overview of the dispute resolution mechanism at WTO provides a possible withdrawal from one party in a panel. All requests will be heard by an appellate body established by the DSB. This body consists of seven people who are representatives of WTO membership who will serve in terms of four years. They must be experts in international law and commerce, and not affiliated with any country. Three members of the Appellate Body listening to their requests may defend, alter, or annul the panel's conclusions according to the rules, but the submission of the petition is not more than 60-90 days. Thirty days after the expenditure, a report from the Appellate Body shall be accepted by the DSB and unconditionally accepted by the parties to the dispute. Otherwise, consensus will apply to this endorsement.

f. Implementation (Implementation)

Wisdom emphasizes that the rules of the DSB are crucial in achieving effective resolution of useful disputes for all members. At the DSB meeting taking place within thirty days of the adoption of the panel, the parties concerned must declare their intention to appreciate the implementation of the recommendations. If it is not useful to immediately approve, the member will be given a reasonable period of time determined by the Dispute Settlement Body (DSB).

If it fails within the prescribed time, it is required to enter into negotiations with the plaintiff to determine the acceptable compensation of both parties to the dispute. If within twenty days there is no satisfactory compensation that can be approved, the plaintiff may request authorization from the DSB to suspend the concessions or obligations against the defendant. The procedure of determining that the DSB guarantees this authorization within thirty days from the "reasonable period of time" time limit, if consensus is to be applied. If the member concerned rejects the suspension level, it is forwarded to the arbitration. This will be completed by the original panel members. If this is not possible by an arbitrator appointed by the Director-General of the WTO. Arbitration shall be completed within sixty days of the "reasonable period of time" deadline, and the result of the decision shall be accepted by the parties concerned as final, and shall not be forwarded to other arbitration. The DSB further authorizes the

suspension of concessions consistently from the results of the arbitrator settlement. If not, there will be consensus.

Indonesia sued Australia to Dispute Settlement Body under the auspices of the World Trade Organization on March 3, 2014. Indonesia considers Australia through its policy of Tobacco Plain Packaging 2011 violating international provisions so that Indonesia is suing WTO for:

a. Technical Barriers to Trade Agreement Articles 2.1 and 2.2 (equal to claims against the United States)
b. GATT 1994 Section III: 4 (equivalent to the accountant to the United States)
c. Trade-Related Aspects of Intellectual Property Rights (TRIPS) Article:
   2.1: In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967)
   3.1 : Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection3 of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS
   15.4: The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.
   16.1: The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.
   16.3 : Article 6bis of the Paris Convention (1967) shall apply, mutatis mutandis, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or Page 327 services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use
   20: The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.
   22.2(b) : any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).
   24.3: In implementing this Section, a Member shall not diminish the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement.

Under Article 2.1 - 24.3 it can be concluded that the state should apply the same intellectual property rights treatment from within and abroad. Imported trademarks should not be complicated domestically. The trademark holder has the exclusive right to prevent other goods from having the same brand, which will be confusing later. All forms of competition must be healthy competition.

Indonesia declares that Tobacco Plain Packaging Act 2011 (TPPA) makes technical regulations that violate GATT, TBT and TRIPS sections because:

1. treat imported tobacco less favorable than domestically produced;
2. create unnecessary barriers to trade and make trade tighter than necessary to meet legitimate objectives

(taking into account the risks that its fulfillment will be created);
3. does not provide effective protection against unhealthy competition against the national of another country, and create confusion between goods from competitors;
4. fails to protect registered trademarks in other countries outside Australia;
5. placing a justified confiscation of the use of tobacco trademarks;
6. reject and cancel the trademark registration of tobacco.

Meanwhile the Australian argument is:

1. Plain packaging requirements are not discriminatory, as they apply to locally-produced and imported tobacco products with similar things;
2. Plain packaging is a necessary step to pursue legitimate objectives (protection of human health and effect on the Framework Convention on Tobacco Control), making material contributions to those goals and not more in restricting trade than necessary to meet the objectives (calculating non-compliance risk);
3. TPPA allows tobacco to have brand / name variations on the packaging (subject to certain restrictions), along with the description of the goods, brand differentiation and recognition is still possible and hence there should be no confusion between the goods of different manufacturers;
4. providing trademarks protected by the existence and not denying or canceling their registration;
5. The TPPA does not encumber the trademark of special requirements and even if it happens, because the necessary steps then it is a necessary burden.
6. reduce the attractiveness and attractiveness of tobacco products to consumers, especially young people;
7. improving notification capabilities and effectiveness of health warning alignment;
8. Reduce the ability of retail packaging from tobacco products to confuse consumers about the dangers of smoking;
9. to reduce the number of smokers.

Australia signed the WHO FCTC on 5 December 2003 and ratified it on October 27, 2004, it does not mean that Australia can enforce the Tobacco Plain Packaging Act against Indonesia as Indonesia does not enter into the treaty. As the authors explain above that the basis of Australian law to implement the Tobacco Plain Packaging Act policy is to refer to the WHO treaty established for the first time in 2003.

Under such terms, Indonesia shall be entitled not to be subject to the rules of cigarettes made by Australia. And Indonesia is entitled to a lawsuit in the WTO, as Australia has violated international law through violations of TRIPS, TBT and GATT. The settlement of cigarette disputes between Indonesia and Australia in WTO was won by Indonesia.

E. Conclusions

The settlement of trade disputes between Indonesia and Australia is that Indonesia can win this lawsuit because Australia has violated international law through violations of TRIPS, TBT and GATT. Under such terms, Indonesia shall be entitled not to be subject to the rules of cigarettes made by Australia. The role of the country in the case of international cigarette trade disputes with Australia through the World Trade Organization is to undertake diplomatic work on Australia, which diplomacy takes place before and after the Australian cigarette regulations are made. The state also plays an active role in overseeing the case until it is thoroughly resolved at the WTO.

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INVITING PEOPLE TO INVEST IN SHARIA BANKS

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Abstract

Indonesia is a predominantly Muslim country, this condition makes Indonesia as a country that has a potential market in the development of Islamic finance. The development of sharia banking over the past few years has shown rapid growth, but even many Muslims are still not using or interested in investing in Sharia Banks, in fact most of the Muslim community is more inclined to invest their money to Conventional Banks, not to Bank Syariah . The development of Sharia Banking has been growing quite rapidly. The growth of Islamic Banking has been growing since the issuance of Law of the Republic of Indonesia Number: 21 of 2008 concerning Sharia Banking and various regulations in institutional as well as related to business activities. Nevertheless, there are still many people who have not actively understood or are interested in using sharia financial services. This is certainly surprising, given that the majority of Indonesian population is Muslim, whereas Sharia Banking products are free from the vanity contracts such as maisyir (the existence of gambling elements in trade), gharar (the element of uncertainty / doubt) and interest (riba / interest) which of course this is more reassuring for Muslims, who care about the treasure that they manage.

Keywords: Banking, Sharia Principles, Investment, Sharia Characteristics, Marketing

Introduction

Banking institutions are the core of the financial system in each country, because the bank is a reference of every person, business entity, both private and state / government, to conduct transactions both in the form of money storage, accounts payable, and other services related to the problem finance.

The Bank is a very important financial institution for economic growth in a country because it connects the monetary sector and the real sector (Mishkin, 2010). In Indonesia, banks are the most popular financial institution and the first place to finance economic activities for both households and corporates. It also appears from the assets of the banking industry to control 79.5% of total assets from the financial industry (Bank Indonesia, 2012). As an intermediary institution, banks generally provide returns to depositors and ask for returns on borrowing loans. This is because the function of the banking system is as a financial intermediary institution as defined in Article 1 number 2 of Law Number 10 Year 2008 regarding the Amendment of Law Number 7 Year 1992, namely that the Bank is a business entity that collects funds from the community in the form of savings and distributed to the community in the form of credit and or other forms in order to improve the standard of living of many people.

The importance of the existence and position of the banking institution meant that it was full of arrangements from the constitutional level to the regulation on the technical level. Bank Indonesia as the holder of financial and banking authority has issued various regulations related to banking practices, as well as supervise and supervise so that the banking community actually implement various regulations in the banking sector. The obedience of banking institutions to various regulations will have an impact on increasing public confidence in banks, where trust is the spirit of the banking industry itself.

In general, the Bank is defined as a financial institution whose main business is to raise funds and distribute it to the community in the form of credit and provide services in the traffic payments and circulation of money.

In the banking system in Indonesia there are two kinds of banking operational systems, namely Conventional Bank and Sharia Bank. Indonesia since 1992 has started sharia banking which pioneered by PT BANK MUAMALAT INDONESIA (BMI), then rapidly growing in 2009 has stood 1440 Bank Syariah offices, excluding conventional banks that open a sharia business unit.

Characteristics of sharia banking system that does not use interest (riba) and based on the principle of profit sharing (mudaraba) is expected to provide a mutually beneficial banking system for the community and banks,

and highlighting the aspects of fairness in transactions, investing the values of togetherness, brotherhood in production and avoiding speculative activities in financial transactions.

From providing a variety of products and services of various banking services are expected to become a credible banking alternative banking system that can be credible by all groups of people of Indonesia without exception. The development of sharia business in Indonesia is inseparable from the development of sharia business to the society in the Islamic countries in the world.

The basic principles of sharia economy which we have known through sharia banks are universal and comprehensive ethical values and economic norms. The universality is deliberately given to the ummah to provide an opportunity to innovate (Ijtihad) and to create (Jihad) in regulating its economic system provided that it is not out of the general framework. Thus the Islamic economic system will be able to play its role as khalifah on this earth.

The Indonesian Banking Principles are regulated in Article 2 of Law Number 7 of 1992, namely: "Indonesian banking in conducting its business is based on economic democracy using the principle of prudence". What is meant is economic democracy based on Pancasila and the 1945 Constitution of the Republic of Indonesia.

The purpose of Banking in Indonesia as stipulated in Article 4 of Law Number 7 Year 1992, states that:

"Indonesian banking aims to support the implementation of national natural development in order to improve equity, economic growth, and national stability towards improving the welfare of the people"

Banking as a businessperson, for the last few years has been incessantly competing to keep its customers loyal to its products and not turn to other products. Sharia banking institutions should better reflect the attitude of trust, honesty, openness, applying prudential, professional, and customer-oriented principles. With the attitude of profesionalism, sharia banking must open up and proactive "pick up the ball" customers and non-Muslims. The image that sharia banking is only for Muslims should be changed immediately. Thus, the communications carried out no longer raise the issue of usury but the issues of professionalism.

Sharia Bank as a Sharia Financial Institution is a part of sharia economy as mentioned in the explanation of Article 49 of Law Number 3 Year 2006 About Amendment of Law Number 7 Year 1989 concerning Religious Courts. Sharia banking as an intermediary institution has an important position in economic activity. Activities undertaken by financial institutions Sharia is framed by a contract based on the principle referred to in Article 21 of the Supreme Court Regulation Number 2 Year 2008 Concerning the Compilation of Islamic Economic Law (HKES), it is stated that the contract is based on principles, namely: first, ikhtiyati / voluntary; each contract is done at the will of the parties. Avoidance of compulsion due to pressure of one party or another party. Second, mandate / keep promise; each shall be obliged to be exercised by the parties in accordance with the agreement established by the concerned at the same time to avoid the injury of the pledge. Third, ikhtiyati / caution; every contract is done with careful consideration and executed precisely and accurately. Fourth, unaltered / unchanged; each will be done with clear objectives and careful calculations so as to avoid the practice of speculation or maisir. Fifth, mutual benefit; each contract is made to fulfill the interests of the parties so as to prevent the practice of manipulation and harming either party. Sixth, taswiyah / equality; the parties in each contract have equal status and have equal rights and obligations (The principle of justice is not explicit in the principles of contract as regulated in the Compilation of Islamic Economic Law, but the meaning of justice is implied by the principle of equality / taswiyah). Seventh, transparency; each will be done with equal accountability of the parties. Eighth, ability; each contract is done in accordance with the ability of the parties, so it does not become an excessive burden for the concerned. Ninth, taisir / amenity; each contract is done by mutual convenience to each party to be able to implement it according to ability. Tenth, good faith; akad done in order to enforce the benefit, does not contain elements of traps and other bad deeds. Eleventh, for the lawful; not contrary to law, not prohibited by law and not haram.

QS.Al-Ma'idah: 1: O you who believe! Fulfill the promises "* The promise here is the faithful promise of servant to God and the covenant made by man in the association of others.

One of the principles, namely the principle of ikhtiyati / prudence must be reflected in the contracts within the environment of Islamic financial institutions, in this case including also on the contract in sharia banking. One of the contracts used in fund raising or distribution of funds in Bank Syariah is mudharabah contract.

Furthermore, in the explanation of Article 19 letter b and letter c Law no. 21/2008 concerning Sharia Banking, is given a different meaning in terms of assuming the risk between mudharabah contracts on fund raising with mudharabah contracts on fund disbursement. Based on the explanation of Law no. 10 of 1998 on Banking expressly states that mudharabah contract for fund raising there is only profit sharing is not to share loss. In contrast, the mudharabah contract in the channeling of funds in the form of financing is affirmed to share profit and share loss.

Economic theory defines or defines investment as an expenditure to buy capital goods and production equipment in order to replace and especially add to the future goods and services. Investment is commonly referred to as capital investment or capital formation. The term investment actually comes from the word Investire which means to wear or use. Based on he said, the notion of investment is to give something to others to be developed and the results of something developed will be divided in accordance with the promised.

Furthermore, according to Gitman and Joehnk (2005) in his book Fundamentals of Investing, defines the investment as follows: "Investment is any vechile into which funds can be placed with the expectation that it will generate positive income and / or preserve or increase its value" a means by which funds can be placed in the hope that it will generate positive income and / or maintain or increase its value. According to Fahmi and Hadi (2009) in his book "Portfolio Theory and Investment Analysis, in the activity generally known there are two forms of investment, namely: (1) Real Investment: Real investment generally involves tangible assets, such as land, - machinery, or factories; (2) Financial Investment: Financial investment generally involves written contract assets, such as common stock and bonds,

Many people say that the sharia market is an emotional market, while the conventional market is a rational market. That is, people are interested in doing business on the sharia market for religious reasons (in this case Islam) that are more emotional, not because they want to gain a rational financial advantage. Conversely, in conventional or non-shariah markets, people want to get the maximum financial gain, regardless of whether or not the business is distorted or contrary to religious teachings (Islam). In the opinion of K.H.Dr. Didin Hafidhuddin: "there is no dichotomy between the emotional market and the rational market. People who are in the emotional market are actually very rational in making choices, more critical, more thorough, and very meticulous in comparing with the conventional bank or insurance they have been using, before making choices to the sharia market. Budi Wisakseno (a banking practitioner) said that understanding the dichotomy between rational customers and emotional clients is wrong. That way of thinking, based on conventional secular marketing theory; all things that are based on the way of religious thought will immediately be regarded as something irrational. In this paper the authors use the method / way of collecting data or information through research library (Liabrary Research) that is research conducted through literature studies, internet and so forth that appropriate or that there is relevance to the issues discussed.

Problem Statement

How is the system of marketing (marketing) in sharia to attract people in general and Islamic society in particular to have a high interest to invest in Bank Syariah?

Discussion

Understanding Islamic Bank (Islamic Bank) in general is the operating bank based on the principles of Islamic sharia. Other terms used to refer to the entity of Bank Islam other than the Islamic Bank itself, the Interest-Free Bank, the Lariba Bank, and the Sharia Bank (Sharia Bank) .Indonesia is technically juridical as the Islamic Bank by using the term "Sharia Bank", or wholly called "Bank Based on Sharia Principles"

Since the beginning of the birth of sharia banking is based on the presence of two modern Islamic reinaissance movement, neorevivalis and modernist. The main purpose of the establishment of financial institutions based on this ethic is no other as an effort to the Muslims to underpin all aspects of economic life based on the Qur'an and As-Sunnah. Interest by most Muslims is considered a riba which is clearly and strictly prohibited by the teachings of Islam as contained in the Qur'an and As-Sunnah (Hadith Prophet Muhammad SAW).

Early attempts to implement the system of profit and loss sharing were recorded in Pakistan and Malaysia around the 1940s, namely the effort to manage the pilgrims' funds in a non-conventional way. Another institutional stub is the Islamic Rural Bank in Mit Ghamr Village in 1963 in Cairo, Egypt after the initial two modest start, the Islamic bank grew very rapidly.

The background of the establishment of Islamic banks in Indonesia is the majority of Indonesians who are predominantly Muslim, but the absence of banks that apply the principles that permitted sharia at that time. With the strong desire of the people who want financial institutions that apply the principles of sharia, then PT Bank Muamalat was born in 1992 which later followed by PT Bank Syariah Mandiri in 1999 (Sutan, 2010). Currently sharia banking in the world and in Indonesia is growing rapidly. The growth of total assets of sharia finance industry in the world in the period 2006 - 2011 has grown to double and reaches $ 900 billion. In Indonesia alone, the growth of sharia banking is very fast and is called "the fastest growing industry". Although the sharia financial industry in Indonesia is growing rapidly, but there are many obstacles that arise and can slow the development of sharia banking in Indonesia. The main problem is the lack of understanding of Indonesian society regarding financial institutions. According to a survey conducted by World Bank (World Bank, 2012), only 20% of Indonesian adult population is familiar with financial institutions. With the lack of financial literacy, only a small part of Indonesian people who know the banking products that exist in Indonesia. Moreover, sharia banks are generally younger than conventional banks. In addition to the problem of financial literacy of Indonesian society is still low, the problem also comes from Islamic banks. The main problem is the number and network of sharia bank offices that are still limited to make it difficult for the community to access the services of sharia banks. In addition to the number of branch offices, the lack of human resources who have understanding and experience of Islamic banking techniques led to the operationalization of Islamic banks in Indonesia is still less than neighboring countries such as Malaysia (Siamat, 2005).

The development of Islamic banks in the Islamic countries of the world influential to Indonesia. In the early 1980s, the discussion on Islamic banks as an economic value of Islam began to take place. However, the preface was more specific to establish a new sharia bank in Indonesia only in 1990. The Indonesian Ulema Council (MUI) on 18-19th of August 1990 held a Banking and Banking Interest Workshop in Cisarua, Bogor, West Java, with the issuance of the Fatwa Majelis Ulama Indonesia about bank interest rate. In the workshop two different views emerged on the bank interest, namely: (1) the opinion that the interest of the bank is usury and therefore the law is haram; (2) the opinion that the interest of the bank is not usury and therefore is allowed, by reason of "rukshah" .The result of the workshop is discussed more deeply at the IV National MUI meeting held at Hotel Sahid Jaya Jakarta, 22 - 25 August 1990. Based on the mandate Munas IV MUI, formed a working group to establish an Islamic bank in Indonesia. The working group called the MUI Banking Team, is in charge of approaching and consulting with all related parties On November 1, 1991, PT Bank Muamalat Indonesia (BMI) was established as a result of the work of the MUI Banking Team. In 1992 Bank Muamalat Indonesia started operation. In the early establishment of Bank Muamalat Indonesia, the existence of these sharia banks has not received optimal attention in the national banking industry. The legal basis of bank operations that use the sharia system is categorized as "bank with profit-sharing system", there are no details of Sharia law base and the types of business allowed. This is very clearly reflected in Law No. 7 of 1992, in which the banking discussion with the profit-sharing system is described only in passing and is a mere insertion. The government then amended Law No. 7 of 1992. The amendment of some content of Act No. 7 of 1992 was set forth in Law Number 10 Year 1998. This law reinforces the existence of sharia banking in Indonesia.

Era of Law Number 10 Year 1998, banking law policy in Indonesia embraced dual banking system (dual banking system). This policy essentially provides an opportunity for conventional commercial banks to provide sharia services through the Islamic window mechanism by first forming a Sharia Business Unit (UUS). As a result, after this law, many conventional banks have participated in providing sharia services in Indonesia. The sharia service is getting better and easier with the issuance of Bank Indonesia Regulation (PBI) Number 8/3 / PBI / 2006 which introduces the concept of Office Chaneling. Office Chaneling essentially is that to provide sharia services of Conventional Commercial Banks that already have UUS in its Head Office, no longer need new infrastructure such as buildings, office equipment, employees, and information technology.

The development of Sharia Banking in the reform era was marked by the issuance of Law no. 10 Year 2008 About Banking. The law is regulated in detail the legal basis as well as the types of business that can be operated and implemented by the Sharia Bank. The Act also provides guidance for conventional banks to open sharia branches or even convert themselves totally into sharia banks,

The growth of sharia banks in the country has become brighter, since Law no. 21 of 2008 concerning Sharia Banking. Optimism is still the main grip of sharia businessmen amid increasingly tight banking business competition. The Sharia Bank has great potential to be the first and foremost choice for the Customer in their choice of transactions. This is shown by the acceleration of growth and development of sharia banking in Indonesia is growing rapidly.

The main principles of Islamic banks consist of a ban on usury on all types of transactions; the implementation of business activities on the basis of equality, fairness and transparency; the formation of mutually beneficial partnerships; as well as the necessity of obtaining business profits halal. Sharia banks are also required to issue and administer zakat in order to help develop the community environment

Business activities that can be undertaken by a Sharia (BUS) Commercial Bank is wider than the Sharia Business Unit (UUS) of a Conventional Bank. The business activities that can only be done by BUS, namely: (1) guarantee the issuance of securities; (2) custody for the benefit of others; (3) become trustee; (4) equity participation; (5) founders and managers of pension funds; (6) issues, offers, and trades long-term securities of sharia.

In PBI no. 9/19/2007 Article 2 jo Article 3 states that the fulfillment of Sharia principles in fund raising activities, distribution of funds and services, is carried out as follows:

1. In fund raising activities by means of, among others, Akadi Wadi'ah and Mudharabah;
2. In financing activities in the form of financing by using Mudharabah Akad, Musyarakah, Murabaha, Salam, Istishna, Ijarah, Ijarah Muntahiya, Bittamlik, and Qardh; and
3. Daslam service activities by using among others Akaf Kafalah, Hawalah, and Sharf.

DIFFERENCES BETWEEN INVESTMENT AND MAKING MONEY

There are two fundamental differences between investments by lending money. These differences can be examined from definition to meaning of each.

1. Investment is a business activity that contains risks because it deals with elements of uncertainty. Thus, the returns are uncertain and not fixed;

2. Leveraging money is a business activity that is less risky because the acquisition of returns in the form of interest is relatively fixed and fixed

Islam encourages people toward real and productive endeavors. Islam encourages the entire community to invest and prohibit lending money. In accordance with the above definition, saving money in Islamic Bank is included in the category of investment activity because the returns from time to time are uncertain and not fixed. The size of the re-acquisition depends on the actual results of the business and the bank as a mudharib or fund manager.

Bank Syariah actually has many advantages, among others:

1. Sharia Bank does not use interest system (usury)

Riba is setting the interest or overstating the loan amount upon repayment

2. The system used is profit sharing system;
3. Transparant
4. Empowering people's economy;
5. Saving the nation's economy;
6. Hold the monetary crisis

There are still many people who are not interested in investing in Syariah Banks, as people still think that Sharia Bank is:

1. Banks based on religion;
2. Banks for Muslims or Muslims only;
3. Banks with small interest rates;
4. Banks that have complicated terms such as Ijarah, Wadi'ah, Mudaraba, Musharaka and others
5. Banks whose products are not varied;
6. Sharia Bank but not Sharia and the same with Conventional Bank.

• Sharia banks are based on Islamic laws, for example, not lending and then not lending interest (riba) and prohibiting investments in forbidden industries such as liquor or gambling industry;

• Although based on Islam, but Sharia Bank is a bank inter-religious, cross-ethnic and cross-tribal. So Sharia Bank is intended for the general public and has the function of banks in general (save, transfer funds, pay bills, pay taxes, and others);

• Sharia Bank does not apply interest rate (usury), but profit sharing system between customer and bank in the form of partnership, not creditor - debtor like Conventional Bank;

• The existence of Islamic Banking iB institutions make the terms of Islamic banking using the Arabic language already in Indonesia. Example: iB Savings, insurance iB, KPR iB and others;

• Bank Syariah has a variety of products that outline into three banking products. First, the product of fund distribution with the principle of buying and selling (ba'i), rent (Ijarah), and profit sharing (syirkah). Second, fundraising products include: demand deposits, savings deposits and deposits with wadi'ah and mudharabah principles. Third, service products such as sharf (buying and selling of foreign currency), and Ijarah (lease) whereby banks take profits through the services and rewards of the lease.

• Sharia Bank is an Islamic bank for the sake of achieving falah (material and spiritual prosperity) covering aspects of justice, balance and benefit. This province is not embraced by conventional banking in general.

CONCLUSION

Education and socialization on the syariah banking system to date is still being done by the existing Islamic Banks in Indonesia, socialization, marketing strategy become the key word in accelerating growth of sharia banking in Indonesia, so it is expected to increase awareness and interest of the society to sharia banking with the principle of justice that is the hallmark of the Islamic banking system, given the enormous number of Muslim populations in Indonesia, is still a potential that has not become a major force in the implementation of Islamic banking system.

It is time for sharia economic system driven by sharia banking to be a solution to the Indonesian economy. The spirit of justice and honesty in Islamic economics are the main pillars of sharia economy. The main thing that underlies the presence of sharia economic system in Indonesia which is one of the nation's development solutions and the state is because of the demands of Muslims awareness of the teachings of their religion, which as the largest Muslim nation with the majority Muslim population, so the demand for the implementation of Islamic economic system has inevitably.

To improve competitiveness in the era of globalization, Islamic banks should be able to have their own strengths in attracting Indonesian customers and the world community both in terms of innovative products, profit margins to customers as well as for the results of competing tersebut.untuk one of the efforts to compete with foreign banks perl existence the specific strategies of Indonesian sharia banks to improve competitiveness and market share more broadly not only glued to the majority Muslim population of Indonesia. Four special strata of Islamic banks to improve competitiveness in the era of globalization, namely: (1) establishing qualified human resources (SDI) qualified in the field of Islamic economics, (2) expansion of sharia bank market segment is not only intended for the Muslim community, but non-Muslims can enjoy it; (3) acceleration of sharia banking products to make product innovation, must be to develop its products so that people are interested in transactions in Sharia Bank; (4) the use of modern IT systems.

The Sharia Banking industry in Indonesia is growing, but the numbers are still fewer compared to conventional Banks both in terms of number of customers or asset and banking financing. This is due to the low perception, understanding and awareness of the community regarding the Sharia Bank.

Spiritual leadership is needed in managing a business. Sharia-based business puts forward attitudes and behaviors that are sympathetic, always friendly to others, and others are easily friendly and partner with them. A business even if it is engaged in business related to religion, if not able to give happiness to all parties, is not yet implement spiritual marketing.

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LEGAL PROTECTION ON THE DEMAND OF ADVANCE PAYMENT BOND IN INSURANCE COMPANY

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Abstract

This study aims to provide legal views on legal events in the implementation of counter work that uses state finances (APBN/D) with involving the principal party involved in a contract of work, namely Principal (Provider / Service) and Obligee (The Project Owner/ User Service) and Surety (Guarantor in this case Insurance Company). The study was conducted using a review of Surety Ship Surety and Surety Ship Surety Sharing cases and the liquidation of guarantee required by the Obligee to Surety due to a breach by Principal. The insurance company as the surety, in this case, the issuance of the deposit guarantee is often faced with a dilemma of legal action committed by the Principal which breaches the employment contract granted by the obligee, so that the Obligee makes a claim for the disbursement of surety. Default occurs because there is an unlawful contribution committed by the Principal against Surety, at the time of execution of work in violation of the Principal's principle of openness and good faith so that the Obligee easily ultimately delegates the risk to Surety. The conditions of default in the Presidential Regulation on the Procurement of Goods / Services are only declared by one Party, ie declared or ordered by Obligee Parties only. Whereas in cases of disbursement of surety bonds, the fact of the occurrence of default can also be that the Obligee Parties contribute to the default. The unconditional clause in the suretyship policy covers the basic principles of insurance.

Keywords: Default, Unlawful Actions, Advance Payment

Background

The service user in the procurement of goods/services (Obligee) requires assurance from the Provider of goods/services (Principal) to mitigate the risks of possible risks due to the inability or failure or failure of the Principal's obligation to fulfill its obligations to the Obligee.

Surety Guarantees or terms used in insurance marketing are known under the name "surety bond" whereas in the former Minister of Finance Regulation or the Financial Services Authority (OJK) is currently called "suretyship". Surety Guarantee is an innovative product of an insurance company as an effort to take over potential risk of loss which may be experienced by one of the parties to the trust given to the other party in the execution of the contract agreed upon by them. Surety Guarantee from Insurance Company is an alternative form of guarantee other than Bank Guarantee or ather guarantee.

The legal basis for issuing suretyship/bonds of insurance companies is the Regulation of the Minister of Finance No.124 / PMK010 / 2008 (PMK.124) on the Implementation of Credit and Suretyship Credit Line.

According to article 1 point 3 of PMK.124, that Suretyship is a line of general insurance business that guarantees the Principal's ability to perform obligations under the principal agreement between Principal and Obligee. The types of guarantees under section 67 paragraph 2 of Regulation of the President of the Republic of Indonesia Number (Pepres) No.54 of 2010 and the last by Pepres article 137 paragraph (1) Pepres No: 16 of 2018, that the Guarantee on Procurement of Goods / Services consists of:

a. Bid Security;
b. Guarantee Rebuttal Appeal.
c. Performance bond;
d. Advance payment guarantee;
e. Maintenance Guarantee;

The legal relationship in suretyship is different from the general insurance product, that is, in the insurance coverage agreement only involves two parties, between the Insured / the Customer as the user of the insurance and the Insurer / Insurance Company. While in suretyship or surety bond, the agreement involves three (3) parties,

namely Surety (Insurance Company) as the guarantor, Principal (Project Implementer / Contractor) Obligee (Project Owner). Warranty is granted if the Principal fails to perform its obligations as agreed with the Obligee, Surety shall be liable to the Obligee to settle the Principal's obligations.

Suretyship / Surety Bond is an additional agreement (accessory), meaning Surety Bond can only be issued if there is an underlying contract, such as auction invitation, work order, work contract and 100% project completion report. In Article 28 paragraph (1) of Pepres No: 16 of 2018, the form of Contract consists of: a. proof of purchase/ payment; b. receipts; c. Work Order Letter (SPK); d. agreement letter; and e. mail order.

The guarantee disbursement process shall be conducted in the event of a breach of a promise (default) committed by the Principal Party or under Article 8 paragraph (1) PMK 124 General Insurance Company shall make payment of compensation to the creditor or Obligee due to the inability or failure or non-fulfillment of the debtor or Principal liability with the principal agreement. The condition of the suretyship policy/certificate is known as two conditions (term & condition) in the liquefaction process of Guarantee, namely conditional clauses, and unconditional clauses.

The condition of the unconditional clause is expressly stated in Article 1 paragraph (35) and subsequently in article 67 paragraph (3) of Pepres No. 4 of 2015, that the guarantee of Procurement of Goods / Services as referred to in paragraph (2) must be unconditional, at the latest within 14 (fourteen) working days, after the default letter from KDP / ULP is received by the Security Issuer.

In Pepres the latest amendment of Government Procurement of Unconditional Goods / Services is not stated in the definition of guarantee letter in Article 1 paragraph (48) of Pepres No. 16 of 2018, but it is mentioned in Article 130 paragraph (4) that the Guarantee Form is:

a. unconditional;
b. easy to melt; and
c. must be disbursed by the issuer of the guarantee no later than 14 (fourteen) working days after the disbursement letter from the Election Working Group / PPK / Party authorized by the Election Working Group / KDP accepted.

Although the condition of the policy is unconditional, in the process of disbursement of guarantee or payment of compensation to creditor or Obligee did by Surety is given if Principal cannot or does not fulfill the obligation as debtor or Principal in accordance with the principal agreement. The disbursement process in Pepres No.54 of 2010 after the letter of default from KDP / ULP received by the Security Issuer and more firmly (arrogantly) in Pepres number 16 of 2018 has eliminated the default statement replaced by after the disbursement letter from the Election Working Group / Parties authorized by the Election Working Group / KDP are accepted.

The conditions of default or the failure or failure or failure of Principal obligation in accordance with the principal agreement, in Pepres conducted unilaterally by the Obligee Party by issuing only a statement of default which later in the last Pepres replace with a letter of disbursement.

Problem Statement

In this paper, it concentrates its discussion on one of the suretyship forms, Advance Payment Bond, by looking at some facts that the problems that arise in the Advance Payment Bond process on the implementation of work by the government goods/service providers most of the work projects are not completed on schedule. In many cases, the Adverse Payment Bond is not solely due to the mistake or inability of the insurance company to guarantee the disbursement of the advance deposit, but it must be considered regarding the background of the process of appointing the Goods / Services Provider as the executor of the work by PPK / PA.

The problem with the problem is how the insurance company as an Advance Payment Bond publisher must protect itself against the demands for the disbursement of the down payment, while it is proven that the unlawful act is the Provider of the Goods / Services. Therefore, the paper formulation in this paper is "How Legal Protection Against Advance Payment Bond Disbursement For Insurance Company".

DISCUSSION

Regulation Per Law is created and enforced with the aim of providing a fair and balanced treatment to the justice seeker community. All elements of the society of the same rank shall be treated equally, so as to be discouraged from discriminatory acts. Regulations per Law strongly support equitable and fair treatment for all citizens. Good law should be in accordance with the laws that live in the community, for if it does not, the result will be unenforceable and will face challenges.

Legal justice in the formal sense means everyone is equal before the law and there is no discrimination. The law applies to all communities who choose to resolve their issues through the courts, in ways established in the applicable Law. Requirements for building a legal instrument that meets fair, rapid, transparent and efficient principles are not only put into law, but also on independence in law enforcement.

On the verdict of a civil case no. 01 / Pdt.G / 2016 / PN.Jkt.Sel, in a civil dispute concerning the demand of advance payment bond on the implementation of PUPTP project work (Development of Cutting Felling Business) Central Java Province between PT. Kanaha as Provider of Goods / Services with Committing Officer / KDP or Budget User of Ministry of Agriculture Director General of Animal Husbandry and Animal Health cq Directorate of Animal Cultivation / Participant of Defendant pursuant to Contract Agreement. 2.370 / PL.210 / F4 / 09/2013, dated September 2, 2013, then everything that happens in the hearing is as stated in the minutes of examination of the case and is considered as an integral part of a decision.

In order to provide a verdict of justice that really creates certainty and reflects justice, the judge as the state apparatus conducting the judiciary must know the true case and the legal rules that will be stipulated both written rules of legislation and written law.

The issue of civil disputes is about the unlawful acts committed by Defendant I as the Provider of Government Goods / Services which has transferred the work to another party, but not executed, so the CO / PA considers that the Provider has defaulted not completed the work on time the promised. Legal considerations of the Panel of Judges, that the meaning of unlawful acts as referred to in Article 1365 are acts that violate the provisions of the law, violate the subjective rights of others and violate the propriety to be ignored in the community.

That based on the evidence of Payment Order / SPM from the Committing Officer (PPK) to the Defendant I / PT. Kanaha, then PT. Kanaha is bound by Contract of Agreement No: 2,370 / PL.210 / F4 / 09/2013, dated September 2, 2013, under the Agreement of Procurement Agro-business Development of Cutting Fuel Supply Cut (PUPTP) of Central Java and Yogyakarta Region. However, after receiving the cash advance payment, Defendant I / PT. Kanaha diverts the performance of such work to another party based on an Authentic Deed made before the Notary. While the transfer is never notified to PT. Mega Pratama Insurance (AMP) / Plaintiff as the Insurer / Guarantor (Surety) for the down payment.

Whereas the provision of Article 1338 paragraph (3) of the Civil Code states that agreements should be executed in good faith and must be fulfilled both on the pre-treaty (before the agreement) and on the execution of the agreement. All legally-made agreements act as laws for those who make them, thus the principle of good faith requires all parties to the agreement to be open and provide relevant material information and facts to other parties. So the actions of PT. Kanaha / Defendant I who has transferred the work to Defendant II without notifying is violating the principle of good faith required in the provisions of Article 1338 paragraph 3 of the Civil Code and also violates the Plaintiff / PT. AMP, thus fulfilling the notion of committing acts against the law.

Nevertheless, the Panel of Judges considered that although there was an unlawful act committed by Defendant I and Defendant II, the unlawful act has not caused any real loss to the Plaintiff / PT. AMP because the demand

for disbursement of Advances has not been disbursed. The plaintiff has the right to file a claim for damages due to an unlawful act only if it has actually paid the deposit guarantee.

In the civil law the principles of responsibility can be distinguished as : 1) The principle of responsibility based on the element of error (Liability based on fault) In Indonesia applied the principle of responsibility based on errors on the principle of concordat as: outlined in Article 1365 Civil Code known as the Action Against Law (PMH), as for the elements of PMH: (a) The existence of an element of unlawful act of the defendant; (b) The act may be blamed on him; (c) Any losses suffered by the plaintiff as a result of the error, and 2). Principles of Responsibility based on Presumption of Liability A principle of responsibility that is also based on error, but with emphasis on the reversal of the burden of proof (Shifting of the burden of proof).

That corporate civil liability in the form of compensation, according to Pinto is quoted from Bahruddin Salam, Moral Ethics: Moral Principles in Human Social Life, Renika Cipta Jakarta 1997, pp. 28 and quoted from Isa Wahyudi, Busyra Azheri, Corporate Social Responsibility: Principles, Arrangements and Implementation, Equivalent of press and INSPIRE, Malang, 2011 p. 4, which states, that Liability (responsibility) indicates to the consequences arising from the consequences of failure to meet the standards, while the form of responsibility is realized in the form of compensation and recovery as a result from damage and loss.

The responsibility to pay compensation under the law is an act that violates the law that causes harm to others, requiring the guilty maker to indemnify (Article 1365 Civil Code), namely actual Loss (actual loss) and future Losses. The actual disadvantages are those that are easily seen in real or physical terms, both material and immaterial. This loss is based on concrete matters arising from the unlawful act of the perpetrator; while future losses are expected losses that will occur in the future due to unlawful acts by the offenders. This future compensation shall be based on actual losses to be imagined in the future and will occur in a real way.

Legal protection expected by Plaintiff / PT. AMP as an Insurance Company that provides surety, in this case, is not yet fulfilled the sense of justice just because there is no real loss. Not yet fulfilled the sense of justice due to the decision of the Panel of Judges did not punish the Defendant to return the deposit directly to the Obligee / Defendant of the Defendant. In other words, the verdict of the Panel of Judges still provides an opportunity for the Obligee / Defendant of the Defendant, in this case, to request for the disbursement of the down payment to the Surety so that the loss becomes real. On the other hand, the Obligee (Actors of the Defendant) has actually provided the opportunity and opportunity to Defendant I and Defendant II to commit the act unlawfully with the proof of transfer of work and appoint the winning bidder that did not meet the provisions of tender requirements in Article 19 paragraph (1) a, b, m and o, Presidential Regulation No. 70 of 2012 on the Second Amendment to Presidential Regulation No. 54 of 2010 on Procurement of Government Goods / Services.

The principal agreement which has been made by the Defendant (Principal) and the Participant of the Defendant (Obligee) as the principal agreement has been violated even before the project implementation process, the Defendant has been decided as the winner in the tender process proving no capacity as required in the Perpres. Indeed, the Panel of Judges has given justice to all the litigants, but in this case, does not provide legal certainty over the ruling given to Defendants I and II.

The insurance company in conducting its business in the field of guarantee, placed in the weakest position there is no legal protection for him. Even if only because the Principal or Obligee committed against the law and the unprofessionalism of the Principal Party or Obligee Party. The dilemma faced by the Guarantor will continue as long as the morals of the perpetrators and the implementation of the work both facilitated by the RAPBN and the private sector still take refuge in their actions protected by a surety bond.

Although Article 6 of Government Regulation Number 54 the Year 2010 states;

g. avoid and prevent the misuse of authority and / or collusion for the purpose of personal gain, class or other parties directly or indirectly harming the state; and

h. does not accept, does not offer or promise to give or receive gifts, remuneration, commissions, rebates and anything from or to anyone known or reasonably suspected to be related to the Procurement of Goods / Services.

As an example of a legal problem is the KDP or a party who has a job (Obligee) in the market surety bond, does not accommodate the clause KKN (collusion, corruption, and nepotism) which states clearly in the policy. This is evidenced by the provision of OJK regarding the inclusion of the KKN clause, then the provision is withdrawn by OJK several months later although the use of the term is suspended while its implementation.

The Financial Services Authority (OJK) dated September 18, 2013, has issued Circular Letter Number: SE-04 / NB / 2013 concerning Inclusion of the Clause in the Suretyship Policy for Not Guarantee Losses caused by the Practice of Corruption, suretyship insurance products to include a clause in the issuing suretyship policy not to guarantee loss, caused by:

a. Practice KKN,
b. Fraud/forgery of the information submitted in the bidding document,
c. The action indicated is due to the matters referred to in letters (a) and (b) above, which are carried out by the principal or obligee.

As a result of the polemic in the application of the clause by the insurer community (insurance industry) and the refusal from other Government Departments as Users of Goods / Services or Budget Users, finally on April 18, the Year 2014 OJK issued circular number: S-127 / NB .2 / 2014. By letter No. S-127 / NB.2 / 2014 that suretyship re-use clause as stipulated in Presidential Regulation No. 54/2010 concerning Procurement of Government Goods / Services as amended the latest by Presidential Regulation 70 the Year 2012, it is necessary to include the KKN clause as referred to in SE-04 / NB / 2013.

OJK issued a policy in SE-04 / NB / 2013 is with the intention to support Government programs in eradicating the practice of Corruption, Collusion, and Nepotism (KKN). Indirectly by ensuring that the KKN clause is against the Government program as if the Insurance Company or OJK itself encourages the existence of KKN.

On the other hand rejecting SE-04 / NB / 2013 that the KKN clauses imply that it is contradictory to Article 67 paragraph 3 of Perpres 54 of 2010 and its amendment, which follows an 'unconditional' clause in the disbursement of collateral. The perpetrators of KKN have taken refuge behind the provisions of Presidential Regulation Number 54 the Year 2010 and its amendment. Several other cases in the AMP that led to the Principal defaulted were because the perpetrators did not comply with the provisions on KKN and gratification. The delay of work or not in accordance with the required specifications is due to the game of budget usage made by irresponsible elements. However, the insurance company as surety is helpless with the provision of this 'unconditional' cluster. So there is no other way the insurance company should seek legal protection through a lawsuit in court. However, the effort to prove the default is an effort that is not easy to prove in the Court. Various cases in the procurement of goods/ services are very thick with acts of KKN, but only the smell that smells, while his form to become a legal fact is difficult to prove. In this case, the advances received are not Principal / PT. Kanaha who received it but the Defendant II who received the project's project delegation. Whether this whole advance is used for the process of procuring beef cattle as an object in the agreement guaranteed by the insurer, is difficult to prove otherwise in the fact that the achievement made is nil (0).

The rule of law is quite big in relation to the implementation carried out in law enforcement. In other words, according to Satjipto Raharjo in his Law Enforcement Problem page 25, that the success or failure of the law enforcement apparatus in carrying out his duties actually began since the rule of law should be executed. The law aims to neutralize or divert conflict to a balance acceptable to society, unless the law has a coercive and binding

nature, although coercion is not the most important element of the law since not all acts or restrictions can be imposed.

The presence of law in society among others is to integrate and coordinate the interests that can conflict with each other. In this regard, the law must be able to integrate it so that the conflicts of interest can be minimized. The law protects a person's interests by allocating a power to him to act in the framework of that interest. The law always moves, changes, follows the dynamics of human life. In fact, the law is for man, the law does not exist for himself and his own necessities.

Apart from the discourse above one of the means which has an important role in harmonizing and balancing the rights and interests of the parties in a dispute in court is a judge. The important role of the judge as a discourse that can resolve the dispute in the face of justice in society, based on economic democracy supports the implementation of national development in order to improve the distribution of development and its results, economic growth and national stability towards improving people's standard of living many.

Independence in law enforcement is that the independence of law enforcement officers is very important in solving legal problems. The conscientious use of the law to achieve the order or state of society as aspired or to make the desired change. Therefore, independence in law enforcement is needed:

1) Law as one of the means of change to realize the goal of the state is the realization of social justice for all nations;
2) The effectiveness of the operation of the law shall be determined by the independence of the law enforcement apparatus which is not oriented to the individual interests of the law enforcement apparatus but must be in the corridor of the righteous law for the sake of the living order of a prosperous, orderly, secure and peaceful nation;
3) With the independence in law enforcement to be free from the interference of the authorities or certain parties that aims to eliminate or reduce the enforcement of justice law, so that justice and legal certainty will be felt by the community.

In the implementation of the law, the independence of judges as law enforcers is crucial in resolving disputes before the courts in order to bring about justice and legal certainty.

Conclusions and Recommendations

\Legal considerations of the Panel of Judges, that the meaning of unlawful acts as referred to in Article 1365 are acts that violate the provisions of the law, violate the subjective rights of others and violate the propriety to be ignored in the community.

The Defendants (I and II) have committed against the law and the Obligee Party (KPA) and are suspected of knowing it. Therefore, due to the nature of the advance guarantee provided by the AMP as surety (guarantee) is the accecoir, where in the main agreement there is one party has committed the act unlawfully, then by law the agreement is void. If the main agreement is nullified then the judge should see justice against the plaintiff by returning the guarantee to the parties making the principal agreement and surrendering the loss is the burden of the parties to the agreement.

As a suggestion is that legal protection should be given to the insurance company by accommodating the policies that have been issued by OJK to support the eradication of corruption, collusion, and nepotism. Conditions 'unconditional' in the policy so as not to be interpreted and immediately ignore the legal problems in a procurement process of goods/services. Likewise, the definition of default is only granted to one party KDP / ULP (Committing Officer / Procurement Services Unit) alone that determines the default or not especially for

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THE APPLICATION OF PAYMENT REGULATION IN THE USE OF TOLL ROAD SERVICES THROUGH THE ELECTRONIC MONEY AND ITS CORRELATION WITH BANKING LIQUIDITY IN THE PERSPECTIVE OF LAW AS A MEANS TO RENEW OR MANIPULATE SOCIETY (LAW AS A TOOL OF SOCIAL ENGINEERING)

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Abstract

Regulation of the Minister of Public Works and Housing of the Republic of Indonesia No. 16 / PRT / M / 2017 dated 15 September 2017 concerning Non-Cash Transactions on Toll Road is a public policy of the Government in the service of toll road usage which is a written law that must be obeyed by every toll road service use. The purpose of this article is to discuss the general concept of implementing the policy of applying the payment obligation of toll road usage through Electronic Money transaction in relation to the government's interest in maintaining banking liquidity as well as from the perspective of Law For A Tool for Social Renewal (Law As A Tool of Social Engineering). The compilation of this article is conducted with the main referral sources from various literatures and regulations relating to electronic money transactions from the government as well as banking and / or central banks, supplemented by the author's thoughts on the topics presented. The method of research using socio legal research method. Which shows that the implementation of payment policy through electronic money is influenced by several factors such as the demands of the public toll road users to the government, to ensure effective, efficient, safe and comfortable service and to overcome the toll gate jam due to the high volume of vehicles traffic of toll road users. Besides the demands of technological developments in payment systems that can facilitate toll road accessibility and cut transaction time at toll gates. Dimensions that can be used to evaluate the policy of toll transactions through electronic money include how far the social changes to the legal sector changes, as well as how far the legal changes can affect the social changes in the behavior of toll road users in line with one of the functions of the law that is as a means of community engineering. In addition, it also evaluates its correlation with banking liquidity where the toll road users have paid before the transaction occurs (pre paid) through agents of banking institutions. Meanwhile, the evaluation of policy implementation of non-cash transactions of toll roads needs to be comprehensively covered which includes ex ante, on-going and ex post evaluation in the implementation of public policy. In making innovations and breakthroughs in service to toll road users, discretion can be conducted on the implementation of public policy as long as it does not conflict with prevailing norms and regulations.

Keywords: E-toll Policy, Effectiveness and Legal Validity as Social Change of Society, banking liquidity, policy dimension and discretion.

I. Introduction

A. Background

The problem of service of toll road service besides congestion caused by high traffic volume of vehicles on toll road also because of congestion caused by congestion of toll gate which queue in conducting toll payment transaction by using cash which is very influenced by the use of relatively long time in return cash from officers to users of toll road services, which also occasionally occur unethical behavior of toll road users. Whereas the social dynamics of Indonesian society in conducting payment transactions of goods and services using electronic money has started since 2009 which is based on the spirit of banking entity in increasing the smoothness and security of financial transactions along with the development of information and communication technology, payment instrument is done in the form of electronic money issued by banks or non-bank institutions, whose legal basis is based on Bank of Indonesia regulation no 11/12 / PBI / 2009, then amended to Bank Indonesia Regulation no

16/8 / PBI / 2014 on Amendment to Bank Indonesia no 11 / 12 / PBI / 2009 on Electronic Money (Electronic Money). In payment transactions for toll road use services whose payments are required to use electronic payment instruments shall be effective on September 15 in the year of 2017 pursuant to Regulation of the Minister of Public Works and Housing of the Republic of Indonesia no 16 / PRT / M / 2017 on non-cash toll transactions on toll roads. This Ministerial Regulation has a relationship between social change with the law sector, the interaction relationship in the sense that there is an effect of social change on the legal sector, while on the other hand the change of law initially payment of toll transactions can use cash payment at the toll payment gateway, then amended its rule as a legal change which requires the payment of transactions using toll road services using Electronic Money (Electronic Money) also affect the social changes of toll road services. Legal changes that can affect the social change in line with one of the functions of the function of law as a means of social change, or means of social engineering, so that law is a tool of social engineering, a term first initiated by the expert law of Roscou Pound (Fuadi, 2013: 248).

This legal change as a legal fact on the basis of the public will as a compromise between the written law as the need of the legal community for the creation of legal certainty (positivism law) and living law as a manifestation of the role of society in the formation of law and legal orientation (Ibid, pp. 248) which also serves as a social control to strengthen civil society in controlling anti-social behavior, as well as the law as a social contour mechanism which is the main function of the state and works through the systematic and orderly implementation of forces implemented by the ministry of PUPR cq Jasamarga appointed to carry out the function, which is also a means of social engineering, which has created a legal system to achieve the objectives of law and order which emphasizes the law as a tool of social engineering which includes accommodating three groups of interests which are protected by law in this case by the rules of enforcement of payments for the use of toll road services through electronic money which includes public interest, social interest, and private interest (Andro Meda, "Legal Sociology (Sociological Jurisprudence Flow) "is accessed at http://akhyar13.blogspot.com/2014/05/sosiologi-hukum-aliran-sociological_8330.html, on June 20, 2018, at 14.11 WIB).

Legal changes in the enforcement of regulations requiring payment of the use of toll services with electronic money payment instruments concerning some legal aspects such as the legal aspects of the banking system because non-cash toll transactions are toll-rate collection / payment activities using means of payment other than cash, which in the practice there are three systems includes the front system, from start control system, antenna and reader and top up, then the middle system is the whole system that connects between the front end and back end systems, then the back end system as the whole system that completes the payment process from the front end to the system provided by the bank. Electronic payment instruments are issued by banks or non-bank institutions licensed by Bank of Indonesia, as principals responsible for the management of systems and / or networks among its members, both acting as publishers and / or acquirers, in electronic money transactions in cooperation with its members under a written agreement, in which the value of electronic money deposited by holders and administered by the issuer is not a deposit as is the rule of the banking law, but the value of such electronic money is a float fund ie all electronic money received by the issuer of the proceeds of electronic issuance and or refilling which is still a liability to the holder and the trader, whose execution is calculated through the clearing operation by a bank or institution other than a bank which calculates the financial rights and obligations of each issuer and / or acquirer in the context of the transaction of money electronic (Article 1 PBI no 16/8 / PBI / 2014). Apart from that it also involves the legal aspect as a means aimed at changing the behavior of the people in accordance with the predetermined objectives (Soerjono, 2009: 135). Therefore this ministry Regulation of PUPR is a law that serves as a tool to organize and manage the community that will lead to changes in the mindset of people who forced the behavior in payment transactions that initially can be paid with cash changed as obligation to use electronic money, which would certainly produce legal progress and an atmosphere of civility that will be envisaged as a civilized society that will be reflected in every toll road user which will move on to three main dimensions including that law actually serves as regulating and managing society, law as balancing the fulfillment of the needs of the public interest, and the law serves as a watchful eye in maintaining and continuing human civilization (Deden Kusdinar, Legal Changes in Community Change, http://www.kusdinar.id/2014/03/perenan-hukumdalam-perubahan-masyarakat.html, on May 8 2017). In addition to the above application of E-tol payment

rules is a public policy basically an effort based on rational thinking to achieve the ideal goals include justice, efficiency, freedom and the goals of the toll road users as a justification of the policy based on the law.

B. Problem Formulation

1. How far is the effect of legal changes on the social changes in the behavior of toll road users on the provision of electronic money transactions on the highway as a means of law engineering (law as tool of social engineering)?
2. How fa is the value of electronic money of toll service users to banking liquidity?
3. How far is the implementation dimension of E-tol regulation as public policy which is known as the implementation of good governance?

C. Research

Methods The type of this research is qualitative research (Patilima, 2007: 5.) With socio legal research approach. Study socio legal research is an alternative approach that examines the doctrinal against the law. The word socio in socio legal study presents the relation between the context in which the law resides. Hence why when a socio legal researcher uses social theory for analytical purposes, researchers are often not aiming to pay attention to sociology or social science alone, but also a focus on law and legal studies (Irianto, 2012: 3). In this study the authors conducted a textual review of regulations that require payment of tolls with electronic money and regulations governing the operation and issuance of electronic toll cards by banks or non-banks based on permission from Bank of Indonesia. Data on the effect of legal changes on social change can be seen through the pieces of scientific studies and pieces of mass- media news, interviews with officials of Jasamarga, Banking, Bank of Indonesia, and the Ministry of Finance. After the data is collected, the data obtained will be analyzed in perspective qualitative consisting of three data reduction activities, data representation, and conclusion.

II. DISCUSSION

Article 6 The Regulation of the Minister of Public Works and Housing of the Republic of Indonesia No. 16 / PRT / M / 2017 dated September 15, 2017 concerning non-cash toll transactions on toll roads, paragraph 1, letter a, explicitly stipulates that the implementation of non-cash toll transactions is entirely on all toll roads per 31 October 2017, subsequently in sub-paragraph b stipulates that the full implementation of transactions using touch-based technology as of October 31, 2017, then in paragraph 2 that at the time of application of non-cash toll transactions are in effect the entire toll road segment does not accept cash transactions, non-cash based on the principle of interoperability ie the non-cash toll transaction system may function between the existing systems at each BUJT (Business Entity Toll Road) and / or non-cash toll transaction system in other transaction sectors, and apply nonexclusive principles in an open sense to all electronic money publishers without exclusivity, as well as applying the principle of payment system which must be in accordance with the provisions of legislation (article 5).

In the implementation of the provisions concerning the arrangement of non-cash toll transactions is provided in articles 13, 14 and 15 which in essence that the implementation of non-cash toll transactions is carried out by an executing entity formed by a consortium of toll road business entities which requires the implementation of non-cash transactions with key agreed work indicators with the toll road executive body with the following requirements:

a. Able to financially include providing bailout funds in the event that the final settlement process can not be completed in accordance with Standard Operating Procedures agreed between BUJT and Electronic Money Publishers;
b. Able to complete the process of settlement with a high degree of accuracy;
c. Provide monitoring system for the implementation of Non-cashToll Transactions;
d. Provide facilities and infrastructures of Non-cash Tariff Transaction in accordance with the technical specifications set out in standard operating procedures; and

e. Other key working indicators set out in standard operating procedures.
Furthermore in article 1 the 7th item in this Ministerial Regulation explicitly stipulates that the back end system is the whole system that completes the payment process from the front end to the system provided by the bank, which is then in article 1 the fifth digit of Bank of Indonesia Regulation no 16/8 / PBI / 2014 explicitly stipulates that the principal is a bank or non-bank institution responsible for the management of systems and / or partners among its members acting as publisher and / or acquirer, in electronic money transactions whose cooperation with its members is based on a written agreement, whereas in its sixth digit it is defined that the issuer is a bank or institution other than a bank issuing electronic money.Then in the 11th figure defines a float fund is all the value of electronic money received by the issuer upon the proceeds of the issuance of money electronic and / or top up is still the issuer's obligation to the holder and to the merchant and further in the 15th digit determines that digital financial services is a payment and financial services service performed in cooperation with third parties and uses mobile and web-based technology tools and tools in inclusive financial framework, while digital financial services agents are third parties who cooperate with publishers and act for and on behalf of publishers in providing LKD.

The provisions of the Regulations set forth in the Ministerial Regulation above are applicable law for the users of toll services as legal facts and adapt to the public willing to emphasize the law on the discipline of law theory as a tool of social engineering that is law as a tool to renew or engineer society in accommodating the interests that must be protected by law include:

1.) Public Interest, namely the interests of the state as a legal entity and the interests of the state as a guardian of community interest;
2.) Social Interest, namely the interests of peace and order, the protection of social institutions, the prevention of moral decline, the prevention of rights violations and social welfare;
3.) Personal Interest (Privat Interest), ie individual interest, family interest, property rights.

Therefore, the regulation requiring payment using toll services means law as a tool of social engineering which is adapted to the situation and condition of the community of toll road users who are already familiar or familiar in the payment transaction of goods or services using electronic money tools, although for the community of toll road users previously accustomed to transactions using cash.

The conception of law as a tool of social engineering is at the core of the pragmatic legal realism that Muhtar Kusuma Atmaja later developed in Indonesia as a renewal of society, arguing that it prioritizes legislation in the process of legal reform (Atmaja, 2006: 9). In order that in the course of the legislation aimed at reforming it can proceed as it should, the legislation should be established in accordance with what is at the heart of the sociological jurisprudence, that is, the good law should be in accordance with the law that lives in the community (Rasidi and Ira Tania Rasidi, 2007: 74), so as to avoid the problem of soft development ie the established law turned out to be ineffective which may occur due to factors derived from forming law, law enforcement, justice seekers, as well as other groups in society and the factors that must be identified.

The law in modern society has a prominent feature of its use being made consciously by its people, so that the law is not only used to affirm the customs and behavioral patterns contained in the society, but instead to direct them to the desired goals, deemed incompatible, creating new patterns of behavior and so on, so that law leads to the use of law as an instrument of law as a tool of social engineering (Satjipto, 2006: 206). Roscoe Pound considers law as a tool of social engineering (social as a tool of social engineering and social controle) aimed at creating harmony so that it can optimally meet human needs and interests in society, while justice is a symbol of harmonious and impartial harmonious efforts in striving for the interests of the members of the community concerned, so that for the ideal interests it is necessary forcible forces carried out by the state authorities (Meda, 2017). In legal theory as a tool for engineering of societies, there are two theories that support found by Roscoe Pound that is the theory about the effectiveness of law and theory about the validity of the law, which told Hans Kelsen the theory of legal effectiveness means people actually acting in accordance with the legal norms as they should do, that the norms are applied and obeyed. Whereas the validity of the law means that the legal norms are binding, that one should do as required by legal norms, that one should obey and obey the legal norms. The theoretical validity of law or the legitimacy of the law (legal Validity) is a theory that teaches how and what its

conditions for a rule of law to be legitimate and valid so that it can be applied to society, if necessary by a forced effort, a rule of law that meets the following requirements:

1. The rule of law shall be formulated in various forms of formal rules, such as in the form of articles of the Constitution, the Law and other forms of regulations, international rules such as in the form of treaties, conventions, or at least in the form of customs;
2. Such formal rules shall be made lawfully, for example if in the form of legislation shall be made by parliament together with the government;
3. By law, the rule of law can not be canceled;
4. Against the formal rules there are no other juridical defects. For example which is not against the higher rules;
5. The rule of law should be applicable by legal applying bodies, such as courts, police, prosecutors.
6. The rule of law must be accepted and obeyed by the public;
7. The rule of law must be in accordance with the soul of the nation concerned.

The results of the research on the legal norms of the Regulation of the Minister of Public Works and Housing of the Republic of Indonesia No. 16 / PRT / M / 2017 dated 15 of September 2017 concerning non-cash toll transactions on toll roads and Bank of Indonesia Regulation no 16/8 / PBI / 2014 have been eligible function of law as a tool of social engineering that has fulfilled the requirement of three main dimensions of the Ministerial Regulation that the law actually serves as a means of managing toll road users, which is offset by the needs or interests of toll road users through the provision of cards electronic toll accessible through banks and non-banks as publishers that are easily accessible agents which are appointed by the government, both new toll road users in toptrnasaction, and this regulation also serves as a supervision to maintain human civilization. In the regulation of the Minister of PUPR and the regulation of Bank of Indonesia also meets the requirements of legal effectiveness which can be proven that the toll road user community actually acts in accordance with the established rules and regulations requiring the toll road users to pay for the services of toll roads with electronic money, has been properly implemented and compromised even in the process of initially being compromised by some toll road users who are forced to pay through cash transactions. Likewise, the Regulation of the Minister and Bank of Indonesia shows evidence that the regulation is eligible for validity of law as the facts against the legal norms which have been applicable when the toll road users have complied with legal norms and already have legionary powers that have binded road users tolls.

Whereas the Ministerial Regulation governing the obligation to pay for toll services through electronic money transactions has been applicable to the public because in this Ministerial Regulation the legal norms have fulfilled the following requirements (Fuadi, 2013: 109):

1. The rule of law in the regulation has been formulated into the regulations of the Minister of PUPR in the form of formal or formal rules, or in other words, qualify for codification.
2. The process of formation of this Ministerial Regulation is made legally through mechanisms that have been in accordance with the Laws and Regulations that are as regulated in Act number 12 of 2011 on the Formation of Legislation.
3. This Ministerial Regulation because it is legally established and has binding power is not possible to be canceled.
4. Regarding this Ministerial Regulation there is no juridical defect and has been in accordance with the hierarchy of regulations above it.
5. The rules of law in this Ministerial Regulation have been applicable by the toll road governing bodies namely Toll Road Regulatory Agency (BPJT), Toll Road Enterprises (BUJT), Electronic Money Publishers, ie financial or non-financial institutions issuing payment instruments in the form of electronic money and business entities implementing non-cash transactions called Business Entities Implementing as well as in the event of legal problems these legal principles, it can be applied also by law enforcement officers.
6. The rules in this Ministerial Regulation have been accepted and have been complied by the users of toll road services users.
7. The rules in this ministerial regulation have been in accordance with the soul of the Indonesian nation.

That against this Ministerial Regulation, it has fulfilled the requirements of legal effectiveness and legal validity both of which have a very relevant relation that is fulfilling the standard of validity because it is based on the condition that the norms stipulated in this ministerial regulation meet the requirements as a norm and enter into an order which is fully effective, and qualifies the effectiveness of the law because in this Ministerial Regulation qualifies a condition of validity even though a condition is not a reason of validity, but the norms in this rule have qualified as a covering order of those norms which are fully effective, although the relationship between validity and effectiveness can be understood only from the perspective of dynamic legal theory which addresses the problem of reasoning about the validity and concept of the legal order. While the one discussed from the standpoint of static theory is the validity of the law. (Kelsen, 2014: 56).

This Ministerial Regulation has fulfilled the requirements of legal validity as the fulfillment of the requirements outlined above but also to this Ministerial Regulation has fulfilled the requirements of elements determined by some experts (Fuadi, Op Cit. : 111) includes:

1. That the rule of law regulated in this Ministerial Regulation has conformity with the higher regulation namely Government Regulation no 15 year of 2005 concerning Toll Road, Minister of Public Works Regulation number 11 / PRT / M / 2006 on the Authority and Task of Implementing the Road Toll at the Director General of Binamarga, Toll Road Regulatory Agency and Toll Road Enterprises, Regulation of the Minister of Public Works No. 16 / PRT / M / 2014 on Minimum Toll Road Service Standard, Regulation of Minister of Public Works and People's Housing No. 15 / PRT / M / 2015 on the Organization and Working Procedures of the Ministry of Public Works and People's Housing, and Regulation of the Minister of Public Works no. 43 / PRT / M / 2014 on the Toll Road Regulatory Body, which to the Ministerial Regulation is clear that it is not in "off the track" (Ultra Vires).
2. That this Ministerial Regulation is a consistent part or as a subsystem with the existing regulatory fields as described in point 1 above.
3. That this Ministerial Regulation has been in accordance with social reality in society, because the instrument of payment in the form of electronic money is sociologically a part of the prevailing requirement of the community in the transaction of goods or service payment which has been implemented since 2009, so that with this Minister Regulation has been run or effectively in the community, especially toll road users.
4. That this Ministerial Regulation as a legal framework is fully supported by internal toll road operators and their respects are respected both morally and politically.
5. That this Ministerial Regulation as a rule of law is a legal reality that lives in the community and is a transcendental normative reality in an ontological perspective.

Whereas the test of the validity of the law in the Ministerial Regulation requiring toll road users to pay using electronic money in accordance with Hans Kelsen's opinion that a rule of law has been valid since its proper enactment, even though the initial time of enactment of this Ministerial Regulation occurs, there is still rejection or is not accepted by toll road users, however after a few months of socialization and education, the reality is that now all road users have accepted as a binding and conscientious obligation, so that the rules of law in this Ministerial Regulation have the power as a rule of law which has the legal nature as: command prohibition (Forbidden), authorized (authority), force, right, and obligation.

This Ministerial Regulation also has fulfilled the requirements of legal effectiveness as fulfillment of the requirement in the opinion of Hans Kelsen because in the rule of law in this ministerial regulation is eligible and has been applied, and has been accepted also by the community of toll road users.

The enactment of the Ministerial Regulation on the provisions requiring payment of the use of toll services via electronic money has functioned as law:

a. Law as social control.

Rules requiring road users to pay with electronic money have become a nomatic aspect of the social life of users of toll roads and may even be expressed as a deviant definition of behavior which has effects, where in this Ministerial Regulation the nature of obligations, prohibitions, demands , the provision of compensation, rights and authority, which gives the meaning that this Ministerial Regulation is a set of human behavior that is the behavior of the users of toll road. This behavior can be defined as something distorted, considering to the users of

toll road failure to comply with this regulation may be subject to sanctions, therefore this Ministerial Regulation serves as a law that directs users of toll roads to do so according to this Regulation for the sake of the realization of tranquility (Raharjo, 1983:.85). This Ministerial Regulation is a law that qualifies which has a function of social control because this function has been run by two parties namely the Government in this case the Toll Road Regulatory Agency, Toll Road Enterprises, and Non-Cash Managing Entity Business entity that has the authority as the state where this government owns power is based on the ruling class of the Ministerial Regulation in the form of codified written rules. In addition, this Ministerial Regulation is also run by the community itself. The function of law as social control in this regulation has been running well because there are supporting elements both related to the substance or legal matter regulated in this Ministerial Regulation is made well and clear and the implementers of the above mentioned bodies have been implemented very legitimacy, therefore against this law, has functioned as a means of social control of both the government in the provision of toll road services associated with financial management, as well as functioning as a means of social control for toll road users to control its behavior in the use of toll roads that must comply with legal norms applicable.

b. Law as social engineering

In line with Sucipto Raharjo's opinion that law as a means of social engineering, innovation, social engineering is not only used to reinforce the patterns of behavior that exist in society, but also to direct the desired goals, habits that are deemed unnecessary, creating new patterns of behavior and so on (Raharjo, 1983: 39). That in this Ministerial has reinforced the patterns and behavior of the toll road users who previously transacted their payments using cash, after the Ministerial Regulation, these customs and behaviors have directed the use of payment with electronic money and directed to be in line with the Government's objectives and has become or created new patterns of behavior and this is in accordance with the desired government and supported also with the will of the community, so that the Ministerial Regulation which has been created has a legal function as a tool of engineering, as a social engineer, as a tool to change the community to a goal which in the desire together which is to direct to change the patterns of habits to pay with cash and strengthen the patterns of behavior into a habit as something more trusted and more adhered to toll road users conduct transactions on the highway with cash (Soekanto, 2000: 79).

That this Ministerial Regulation has fulfilled the conceptual requirement of law as a tool of social socialization in Indonesia (law as a tool of social engineering) as in Muhtar Kusuma Atmaja's opinion that:

In the rules set forth in this Ministerial Regulation entirely in the form of a codified rule whose mechanism of formation is in conformity and based on the Laws Regulation No. 12 of 2011 concerning the Establishment of Laws and Regulations. Apart from that the soul or philosophy in the substance of the law set out in this rule clearly shows the sensitivity to the society where the theoretical conception that law as a means of renewal using the approach of cultural philosophy of Nordod and the policy oriented approach of Laswell and McDougal (Atmaja, 1976: 9).

In addition, the Ministerial Regulation has fulfilled the requirements of three ethical and moral benchmarks in order to realize the function of law as a tool of social engineering, namely the fulfillment of human rights aspect, the fulfillment of justice aspect and the fulfillment of accessibility aspect of society the establishment of this Ministerial Regulation (Atmasasmita, 2003: 342). This Ministerial Regulation has also fulfilled the corresponding rules between the values in this regulation and its legal norms, namely the values contained in this Ministerial Regulation are in conformity with the socio-cultural values of Indonesia and its legal norms have been formalized in legal norms in the form of Ministerial Regulation (Fakhruloh, 2000)

This Ministerial Regulation is also a public policy because the legal norms enumerated in this rule include rules governing non-cash transactions for users of toll roads contained in official documents

recorded in the State Gazette (Islami,1999: 13) which is a Legislation issued by the authorities in this case the Ministry of PUPR in order to achieve the purpose of the implementation of toll road services to overcome congestion and further to accountability of financial management of toll roads. This Ministerial Regulation as public policy is intended to achieve the ideal goal of obtaining justice, efficiency, security, freedom, and the goals of the government and users of toll road services themselves. Justice in this context is defined as if it is alike (treating likes and alikes), whereas efficiency is defined as getting the most out put from a certain number of in

put. Security means minimum satisfaction of the needs of toll road users, whereas freedom is defined as the ability to do something as long as it does not interfere with other individuals (Wibowo, 2004:18). As a public policy this Ministerial Regulation has functioned as a law to be used as a means to achieve the goal, because technically this Ministerial Regulation can do things as follows: 1. This Ministerial Regulation is a means to ensure certainty and provide predictability in the lives of toll road users; 2. This Ministerial Regulation is a means of the government to enforce the law and apply sanctions, and this Government Regulation has been able to be used as a means to distribute as a resource in the management of toll road services as well as financial management of payments for the use of toll road services from service users, these resources include the existing resources in the toll road and bank resources as well as other banks as the issuer of electronic money and the positive impact is from the aspect of the government banking which has had fresh and cheap funds as pre-paid transactions that do not include deposits that can positively impact to the banking liquidity strengthening.

III. CONCLUSION

The rule of law on the Regulation of the Minister of Public Works and Housing of the Republic of Indonesia no 16 / PRT / M / 2017 dated 15 of September 2017 concerning non-cash toll transactions on toll roads and Bank of Indonesia Regulation no 16/8 / PBI / 2014 has fulfilled the legal function law as a tool of social engineering that has fulfilled the requirements of the three main dimensions of the Ministerial Regulation that the law actually serves as a means of managing toll road users, which is offset by the needs or interests of toll road users through the provision of toll electronic cards which can be accessed through banking as well as non-bank as publishers which are easily accessible by government-appointed agents, both new toll road users in top up transaction.This regulation also serves as monitoring to maintain human civilization. In the regulation of the Minister of PUPR and the regulation of Bank of Indonesia also meets the requirements of legal effectiveness which can be proven that the toll road user community actually acts in accordance with the stipulated rules and regulations requiring the toll road users to pay for the toll road services with electronic money,which has been properly implemented and compromised, even in the process of initially being compromised by some toll road users who are forced to pay through cash transactions. Likewise, the Regulation of the Minister and Bank of Indonesia shows evidence that the regulation is eligible for validity of law as the facts against the legal norms which have been applicable when the toll road users have complied with legal norms and already have legionary powers that have binded road users tolls.

That against this Ministerial Regulation has fulfilled the requirements of legal effectiveness and legal validity both of which have a very relevant relation that is fulfilling the standard of validity because it is based on the condition that the norms stipulated in this ministerial regulation meet the requirements as a norm and enter into an order which is fully effective, and qualifies the effectiveness of the law because in this Ministerial Regulation qualifies a condition of validity even though a condition is not a reason of validity but the norms in this rule have qualified as an order which covers those norms which are fully effective. That in this Ministerial regulation has reinforced the patterns and behavior of the toll road users who previously transacted their payments using cash, after the Ministerial Regulation, these customs and behaviors have directed the use of payment with electronic money and directed to be in line with the Government's objectives and has become or created new patterns of behavior and this is in accordance with the desired government and also supported with the will of the community, so that the Ministerial Regulation has been created which has a legal function as a tool of engineering, as a social engineer, as a tool to change the community to a goal which is wanted together that is directing to change the patterns of the habit of paying with cash and cementing patterns of behavior into a habit as something more trusted and more adhered to toll road users who conduct transactions on the highway with cash. This Ministerial Regulation has fulfilled the requirements of three ethical and moral benchmarks in order to realize the function of law as a tool of social engineering, namely the fulfillment of human rights aspect, the fulfillment of justice aspect and the fulfillment of public accessibility aspect in the formation of this Ministerial Regulation.

This Ministerial Regulation has also fulfilled the corresponding rules between the values in this regulation and its legal norms, namely the values contained in this Ministerial Regulation are in conformity with the socio-cultural values of Indonesia and its legal norms have been formalized in legal norms in the form of Ministerial Regulation.

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LEGAL ENFORCEMENT SYSTEM FOR DOCTOR'S PROFESSIONS

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Abstract

The medical doctor profession has been getting a lot of critical attention lately from some part of the society because of disappointments towards some doctors' services. There are suspicions by some on their roles in the processes of law, and also on their neutrality and subjectivity when they have to sit as expert witness in cases involving other medical doctors. Even the existence of Council on Medical Ethics (MKEK) is viewed as being non-neutral. People tends to believe that they will always lose in cases of law against medical doctors.
The publication of the law UU No.29 year 2004 on the practice of medicine couldn't avoid the same suspicion. Some believes that this law only protects the interests of the medical profession and doesn't accommodate the interests of the patients. The main issues are where the law stands for the medical profession, how it protects the medical doctors in providing medical care, and what the roles of medical doctors in upholding the law.
This research uses the normative judicial approach, sourced from literature study of laws and bylaws on health and medicine topics

Keywords:
Medical profession, protection of law for doctors, systems for upholding the law related to the medical profession.

A. Background

Technological developments and science are advancing increasingly rapidly today, causing some negative influence on the views and ways of thinking of the community, especially in the field of medical services. This is evidenced by the proliferation of lawsuits or cases of alleged malpractice and other problems by patients against their doctors. Doctor's profession is often in the spotlight very visibly among the public, there are many cases of claims against doctors and other issues related to the medical profession. Some people are not satisfied with the service and dedication to the profession of medical doctors in the community, because their hopes could not be fulfilled by the doctor or there's a gap between expectation and reality obtained by the patient. Incidents that raise many questions at the moment are that where in some cases public officials who are caught and have to face the judicial process. Result of the examination by the doctor made the officials able to postpone the judicial process, even up to dismissing the judicial case. This raises suspicions on some people about the role of doctors in the enforcement process of law.

Many and excessive reported cases of malpractice reported by various mass media and electronic media, worried the doctors and can haunt them in carrying out their service to help patients. These news don't necessarily convey the whole thing factually correctly and they just mislead people who actually need other medical help.

Keep in mind that no doctor have the intention to kill the patient. In treating patients, doctors always remember the oath that was once spoken when they began to dedicate his profession.

Sometimes, even though the doctor himself in not in a good health or tired, he would still go to serve patients who need his help because his sense of duty.

On the other hand, there may indeed be a small number of doctors who perform their duties or provide treatment to their patients but fail to pay attention to the ethical boundaries of the physician profession and do not understand the service standards required by their expertise. In such cases, the rights of the patient must also be considered.

With the understanding of the existence of medical risk in addition to malpractice in terms of law, it is hoped

the doctors will be able to provide better health service efforts. Besides, if the doctor understands it, they will be more calm and will try to do his job to the best of his abilities. Most people often suspects the doctors' neutrality and objectivity when they have to sit as expert witnesses in cases involving other doctors. People judge that if they go to court against doctors, they will always lose.

The medical profession is not a field of science that can certainly be measured. Medical profession according to "Hippocrates" is a combination of science and art. As when making a diagnosis it is an art of doctor, because after hearing the patient's complaints doctors will use their imagination and make careful observations of the patients. Knowledge of theories of medicine and experience that has been received so far become the basis for diagnosing the patient's illness and expected diagnosis will be closer to the truth.

On the other hand, the current positive media information can often be the initial suggestion of a case-related settlement process relating to health services, particularly in matters relating to poor health care quality at government hospitals or community clinics. But on the downside it is often unbalanced and doesn't cover doctors who make new discoveries sufficiently.

The existence of Law No. 29 of 2004 on medical Practice is often regarded by the public as protecting only the interests of doctors, not accommodating the interests of the community (the patient).

These issues are very interesting for us to look at together, especially from the eyes of the law and not from the point of view of politics. Although judging from the nature of state administrative law, this is the evidence to show that the laws of state administration are sensitive to politics. However, what we need to know is how the law enforcement system for this doctor profession.

B. Formulation of the problem

Based on the description above background it can be formulated problem as follows:

1. What is the legal standing for the doctor as a profession ?
2. What is the legal protection of physicians in providing medical services?
3. What is the position of the doctors profession in the law enforcement system ?

C. Research methods

This study uses a normative juristic approach. The data sources used are primary data and secondary data. Data collection is by interview, literature study and document study. Data processing is through data selection, data classification, and data systemization. The processed data are presented qualitatively, then further drawn for conclusions.

D. Discussion

1. Legal position for doctors as a physician profession

In the practice of the medical profession there is often a conflict between doctors and patients, which may not be resolvable by ethical rules. In such circumstances, the rule of law may be enforced so that the doctors will not be able to escape the problems and obligations of the parties involved in such disputes or cases. This is because in the end the settlement must be returned to the real terms of rights and authority with obligations and responsibilities.

In the past, the doctor's relationship with his patient was more paternalistic. Patients generally can only accept everything that a doctor says without any questions . With increasing public awareness it experienced a very significant change. At this time legally a doctor is a partner of a patient who is equal to his position, the patient has certain rights and obligations, just like the doctor. Even when a person is in a state of illness, his legal standing remains the same as a healthy one. It is a mistake to assume that a sick person is always unable to make a decision, because in general the patient is actually an independent legal subject and can make decisions for his own sake.

Understanding these rights and obligations is becoming increasingly important, because in reality the disputes arising are actually due to a lack of understanding of the matter by the disputing parties.

"Bernard Barber" says that the profession contains the following essences :

a. Requires advanced science that can only be studied systematically.

b. Its primary orientation is towards more benefit to society.
c. Have control mechanism of the behavior of the profession holder.
d. Has a Reward system.

Meanwhile, according to E.Sumaryono in his book "Legal Profession Ethics" stated that:

1) A profession consists of a limited group of people with special expertise and with that expertise they can function in other societies in general.

2) Another notion, a profession is a title or position in which the person who bears it has special knowledge obtained through "Training" or other experience, even obtained through both so that the professional can guide or give advice or even serve others in his own field.

So from that sense, we can find special traits contained in the general view of the profession as:

a) Preparation or special training.
b) Refers to membership that is permanent, resolute and different from other memberships.
c) Acceptability as a service motive.

If we quote the opinion of "Van der Mijn" that : health services (including doctors) is a profession based on secrecy and trust as is the profession of law advocates (Soerjono , 1989: p.131).

Based on that, it is precisely what has been formulated in the Law No. 29 of 2004 Article 1 paragraph II, which states that: The medical profession or dentistry is a medical or dental work carried out by a scientific, educational competencies acquired through tiered education and ethical codes to serve society.

Judging from the definition of the profession above, it can be seen how serious the consequences of professional physicians are in law enforcement system. What is done not only be accounted professionally but also legally, morally and socially. What to do should follow the control from the community. The point is that the doctor and patient must respect the respective rights and. It is unfortunate that doctors often "Forgotten" the ethics of the profession, where doctors so freely provide information about the patient, simply because a television or radio interview or make a copy of patient's Medical Record and distributed it to journalists.

William H. Roach in his book Medical Record and Law says that "Record that must be kept", so doctors must keep the patient secret. In further explanation it is said in The Medical Record, consist of four types of data concening an individual patient : (1) Personal (2) Financial (3)Social and (4) Medical.

Another point of the various issues in the face shows that it is lacking appreciation of the position of doctors in carrying out his profession. For example, if a doctor examines a patient who happens to be an a public official in legal case, whatever his diagnosis it is suspected of being " subjective", the question should be about the medical doctor's accuracy if the physician violates the medical professional standards or violates medical ethics. All were under oath, so that the doctor's responsibility (as a professional) must be placed on the profession.

In the Medical Practice Law no. 29 of 2004 Article 52 states that: "Patients in receiving services in medical practice have the right to seek the opinion of other doctor or dentist". So from this article it can be interpreted that the right to second opinion is the right of the patient. And the doctors' profession works objectively and is objectively valued as well.

From that description, it will one day return the doctor in the legal position as the holder of the profession with all the consequences of the implementation of his obligations and rights. The birth of the Medical Practice Law should generate new hope for the physicians themselves and the public at large. This is as stated in article 3 of Law no. 29 of 2004, that the regulation of medical practice aims to :

a. Provide protection to patients;
b. Maintain and improve the quality of medical services provided by doctors and dentists; and
c. Provide legal certainty to the public, doctors and dentists.

The problem that arises later is in the implementation and conditions. How is the manifestation in medical service that the doctor should do?

2. Legal Protection of Doctors in Providing medical services

There are several things that become legal protection for the doctor if alleged of medical malpractice, namely: The legal basis of law that provides legal protection to doctors in the medical profession, the things that doctors

must do to avoid the lawsuits, and the reason for penalization of doctors suspected of malpractice.

1. Legal grounds protecting physicians in case of malpractice allegations are contained in article 50 of the Medical Practice Law article 24 paragraph (1), 50 articles 27 paragraph (1) and Article 29 of the Health Act and Article 24 paragraph (1) of the PP Health workers.
2. Things a doctor should do to avoid a lawsuit:
   a. a. Informed Consent
      In carrying out his profession, informed consent is a duty that must be met by a doctor. Informed Consent stipulates the notion of an agreement given by the patient or his family after being informed of any medical action that will be committed on him and any of its risks.
   b. Medical record
      Doctors are also required to make "Medical Record in every activity of health services to patients. Medical record settings are exposed in Article 46 paragraph (1) of the Medical Practice Act. The medical record is a file containing records and documents about the patient's identity, examination, treatment, actions and services provided to the patient. Medical records are made with a variety of benefits, namely for the treatment of patients, improvement of service quality, education and research, financing, health statistics as well as the provision of legal issues, ethical disciplines.
3. Reasons for the Abolition of Punishment against Medical Practitioners Alleged Medical Malpractice
   a. Risk of Treatment
      According to Danny Wiradharma, the risk of treatment consists of:
      1) Risks that are inherent.
      Any medical action performed by a doctor carries a risk, therefore the doctor must run the profession in accordance with applicable standards. Risks that can arise such as hair loss due to chemotherapy with cytolatics.
      2) Hypersentivity reactions.
      Excessive body immune response to foreign influx (medication) is often unpredictable.
      3) Complications that occur suddenly and unexpectedly.
      It often happens that the patient's prognosis appears to be good, but suddenly the situation worsens and the patient even dies . For example the occurrence of amniotic fluid embolism.
   b. Medical Accidents
      Medical accidents are often considered to be the same as medical malpractice, because they cause harm to the patient. These two circumstances should be distinguished, because in the medical world doctors attempt to heal rather than harm patients. In the event of a medical accident, the doctor's accountability leads to the manner in which the accident occurred occurs or the doctor must prove the occurrence of the accident.
   c. Contribution Negligence
      Doctors can not be blamed if the doctor fails or is unsuccessful in the treatment of his patient if the patient does not explain truthfully about the history of the disease he has suffered and the drugs he had suffered during illness or disobeyed the instructions and instructions of the doctor or refused the treatment agreed upon. This is regarded as a patient error known as the contribution negligence or the patient is guilty. Honesty and obedience to doctor's advice and instructions is considered a patient's obligation to the doctor and himself.
   d. Respectable Minority Rules & Error of (in) Judgment
      The field of medicine is a very complex field, as in a treatment effort there is often a disagreement or the same opinion about a suitable therapy for a particular medical situation. Medical science is an art and a science in addition to technology matured in experience. So it can be how to approach a disease is different for one doctor from another. But still must be based on science that can be accounted for. Based on the above circumstances arise a legal theory by a court called respectable minority rule, ie a doctor is not considered to be negligent if he chooses from one of the many recognized ways of treatment.

The doctor's mistake to choose an alternative medical action in his patient then emerging a new theory called error of (in) judgment commonly referred to as medical judgment or medical error , where the choice of medical action from doctors who have been based on professional standards turned out to be wrong.

e. Volenti Non Fit Iniura or Asumption of Risk
Volenti Non Fit Iniura or asumption of risk is an old legal doctrine which may also be imposed on medical law, a previously known assumption of a high medical risk to the patient if a medical action is taken against him. If there is a complete explanation and the patient or family agrees (informed consent), if there is an unaccountable risk for his or her medical action. Besides that this doctrine can also be applied to cases of forced return (going home by self-will even though doctors have not allowed), then such a thing frees doctors and hospitals from demands.

f. Res Ipsa Loquitur
The doctrine of res ipsa loquitur is directly related to the burden of proof, ie. the burden of evidences of the plaintiff (patient or his family) to the defendant (medical personnel). Against a certain negligence which is obvious, so that a layman may know or according to general knowledge between the layman or the medical profession or both, that defects, injuries, injuries or facts are evident from the negligence of medical action and such matters do not require proof of the plaintiff but the defendant must prove that the action is in the category of negligent or false.

3. Law Enforcement System for Doctor Profession

The birth of Medical Practice Law seems to be disturbing the public, as well as the doctors themselves. The difference is seen that the community is represented by Legal Aid Foundation on Health followed by several other LSSM who are concerned about the health service problem, then filed a judicial review . While the doctors community prefer not to take the legal path, instead held various forms of discussion. And even meet the mandate of the Act and then formed Indonesian Medical Council at the central level. But it is unfortunate that professional organizations with direct interest in this law are not careful to see the contents of the Act. When examined seriously, there are many inadequacies or defects since its inception.

Prof. Dr. Willa Chandrawilla Supriadi, SH,.CN in his inaugural address at UNPAR Bandung, calling for an over-criminalization of this Act against the practice of doctors, generalizing all the neglect of duty as a crime in this Act example: in article 79,

" Sentence with a maximum imprisonment of 1 (one) year or a maximum fine of Rp 50.000.000, - (fifty million rupiah) for each doctor or dentist who:

a. By deliberately not installing the nameplate as meant in Article 41 paragraph (1).
b. Deliberately does not make the medical record as referred to in Article 46 paragraph (1).
c. By deliberately not fulfilling the obligations referred to in article 51, letter a, letter c, letter d, letter e. . "

The legal system according to Friedman is a system that includes the legal structure, legal and cultural substances that are part of the structure. It is necessary to set the mechanism and the limits of responsibility and others. Example: provision of physician rights and obligations (in articles 50 and 51 of Act No. 29 of 2004 on Medical Practice. The profession of doctors when viewed from the substance of the law is also part of them, so its involvement needs to be regulated through the code of ethics, the law of discipline. The law is regulated in Chapter VIII on the discipline of doctors and dentists (from chapters 55 to 70). The profession of doctors when viewed from the side of the legal culture, contains the basic things that are the personality of society, namely the doctor as a professional is bound and must meemgang principles of public interest services (profession noble), so should really keep the profession in the eyes of society. In the meantime, if you look back at the oath of hippocrates (oath of ancient doctors), here you have to show how noble the position of a doctor, so have consequences for moral responsibility and erik large enough too.

One thing to understand is that one responsibility is related to the other. This is in view of what Veronika Kumalawati has said in his book: "Law and Ethics in the Doctor's Profession" that: to protect the interests of society is not enough to be governed only by ethical rules, but also the necessity of law.

Based on the description above, it should be understood that in the law enforcement system, the doctor's profession has an important position, especially in the context of law enforcement process. Doctors need their role in law enforcement process. The role of the physician in this context is within the framework of the implementation of his obligations.

From some examples of cases described also visible doubts on the role and position of doctors in law enforcement system, the deficiency of that trust can come from the 'self' doctors and outside "self" doctors. Allegations can be assumed that the doctor concerned is not professional. Therefore the thing to do is an understanding of the legal status of the physician profession and how to place a doctor in a position of participation within the law enforcement system. Implementation of duties based on oath and professional code of ethics and legal provisions will greatly assist the law enforcement system. To achieve this, a supervisory mechanism involving professional organizations such as IDI is required.

In Article 54 paragraph (2) of Law Number 29 Year 2004 stated that: Supervision and guidance becomes the responsibility of Indonesian Medical Council (KKI) together with professional organizations. The authority of the regulation and the imposition of sanctions by this institution is also as part of the law enforcement system (Indonesian Law).

E. Closing statement

As the end of this description can be stated that the doubts of the legal position of the doctor as a holder of the profession came from various parties, including coming from among the doctors themselves. Assessment that the work of doctors is subjective not only come from the community, but also caused by the implementation of the duties of doctors who are not keeping his objectivity, so forgetting the patient's rights that become obligations, one of which is keeping his medical secrets.

Based on the issues raised, it can be drawn conclusion as follows:

1. The legal position of the physician profession means that the doctor has a noble position as the holder of the profession, then the doctor is burdened with rights and obligations that are quite heavy and also must run the profession very strictly.
2. There are several things that become legal protection for doctors when alleged to have commited a medical malpractice, consisting of: the legal foundations that provide legal protection for doctors in running the medical profession, the things that should be done by doctors to avoid lawsuits and the reasons for penalization against doctors suspected of medical malpractice.
3. The role of physician profession in the system by the physician concerned, but the parties related to the implementation of the profession and the responsibilities of the physician profession and there must be a function to supervise the implementation of medical practice (MKEK / KKI).

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LEGAL PROTECTION TO A HOUSING CONSUMER RESULTING DUE TO THE HOUSEHOLD DEVELOPER (CASE STUDY OF COURT DECISION NO. 16/PAILIT/2013/PN.NIAGA.SBY)

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Abstract

There are weaknesses in Law no. 37 Year 2004 concerning Bankruptcy and KPPU especially relating to rights and protection to consumers. For example in this research is Bankruptcy Decree No. 16/PAILIT/2013/PN.NIAGA.SBY against the developer PT Dewata Abdi Nusa where in the bankruptcy court decision does not accommodate the rights of consumers to get compensation and compensation. So this is contrary to the provisions set forth in Law no. 8 of 1999 on Consumer Protection. Insofar as bankruptcy court court decisions should not harm creditor, debtor, including parties such as labor, suppliers, distributors, or consumers. So with the tendency of consumers who do not get a full compensation certainly contrary to the provisions of consumer protection. The research method used to solve the above problems is the Normative Juridical approach. The literature is used as the main material, namely the primary legal material consisting of basic norms or rules, rules or basic rules, and legislation. In addition, secondary legal materials are used as secondary data covering primary, secondary, and tertiary legal materials of research results of academics and legal experts.

Keywords: Consumer, Creditor, Debtor, and Bankrupt.

A. Introduction

In the Act No.37 of 2004 on Bankruptcy and PKPU there are many loopholes and weaknesses that make the consumer suffered huge losses despite the existing Law no. 8 Year 1999 on Consumer Protection and it certainly makes potential consumer victim. For example as in Bankruptcy Decree No. 16/PAILIT/2013/PN.NIAGA.SBY. which involves only bankruptcy applicant Bank Rakyat Indonesia as a separatist creditor and another creditor namely H. Abdul Azis who has receivables related to bankruptcy of PT Dewata Abdi Nusa. But in the court decision of PT Dewata Abdi Nusa bankruptcy there is no provision on consumer protection. This is certainly very detrimental to the consumer rights that are neglected due to the court decision.

The court decision of bankruptcy of PT Dewata Abdi Nusa can not be separated from the provisions of Bankruptcy contained in Law No.37 of 2004 on Bankruptcy and PKPU where the bankruptcy can occur by only looking at the minimum terms of debt and creditors as regulated in Article 2 paragraph (1) and Article 8 paragraph (4) of Law No.37 of 2004 on Bankruptcy and PKPU. But the impact of bankruptcy on some other parties such as consumers as forgotten. Basically good bankruptcy conditions provide benefits not only to debtors but also to all creditors. The bankruptcy court decision should not harm creditor, debtor, including parties such as labor, suppliers, distributor, or consumer. So with the tendency of consumers who do not get a full compensation certainly contrary to the provisions of consumer protection.

Between consumers with developers Graha Dewata Housing had previously occurred contractual relationship ordering housing units as stipulated in the Sale and Purchase Agreement (PPJB). PPJB is made between developers and consumers which contains rights and obligations of the parties. According to Law no. 8 of 1999 on Consumer Protection, the consumer is any user of goods and / or services available in the community, whether for self-interest, family, other persons or other living beings and not for trade.

So it needs to be studied more deeply about the legal protection of consumers on developers who experienced bankruptcy so that bankruptcy not only provide benefits to all creditors but also all parties, including consumers and for the articles in the Act of bankruptcy has a bargaining position balanced for consumers.

B. Research Methods

This study was conducted using the Normative Juridical approach. The literature is used as the main material, namely the primary legal material consisting of basic norms or rules, rules or basic rules, and legislation. In addition, secondary legal materials are used as secondary data covering primary, secondary, and tertiary legal materials of research results of academics and legal experts.

C. Problem Formulation

Based on the above background then the main issues of this study are: Is there a legal protection against consumers of Graha Dewata Housing declared bankrupt based on Court decision No. 16/PAILIT/2013/ PN.NIAGA.SBY?

D. Discussion

Since PT Dewata Abdi Nusa's bankruptcy court decision was granted by the court and the court declared that the bankruptcy claimed to be declared bankrupt with all the legal consequences there is a major influence experienced by various parties in the bankruptcy. One of the legal consequences of bankruptcy that happened to the developer of PT Dewata Abdi Nusa as the debtor loses the right to take care of his property and the administration and ordering of the bankruptcy property is handed over to the curator appointed by the Court to manage and settle the debtor's bankrupt property. This is in accordance with Article 16 paragraph (1) of Law No.37 of 2004 on Bankruptcy and PKPU and under the supervision of a supervisory judge, so that the Developer of PT Dewata Abdi Nusa can not fulfill their obligation completely.

The developer of PT Dewata Abdi Nusa has been declared bankrupt by the Commercial Court of Surabaya through court decision no. 16/PAILIT/2013/PN.NIAGA.SBY. The court decision was filed by PT Bank Rakyat Indonesia H. Abdul Aziz as a creditor of separatist and other creditors. The bankruptcy court decision caused the developer of PT Dewata Abdi Nusa to have no more power over his company's property. All matters pertaining to the bankruptcy property will be submitted to the receiver and divided according to the receivables of each creditor.

The court decision by PT Dewata Abdi Nusa developer bankrupt in its legal consideration is based on Law No.37 of 2004 on Bankruptcy and PKPU Article 2 paragraph (1) stating "Debtor having two or more creditors and not paying off at least one debt that has fallen time and may be billed, declared bankrupt by a court court decision, either on his own request or on the request of one or more of his creditors "and Article 8 paragraph (4) which reads:" The petition for bankruptcy statements shall be granted if there is a simple fact or circumstance proving that to be declared bankrupt as referred to in Article 2 paragraph (1) has been fulfilled ". Elucidation of Article 2 paragraph (1) states that what is meant by "Creditor" in this paragraph is both concurrent creditors, separatist creditors as well as preferred creditors.

Especially with respect to separatist creditors and preferred creditors, they may apply for bankruptcy statements without loss of collateral rights to the material they possess to the debtor's property and the right to take precedence. The existence of such provisions, then the concurrent creditor will experience the possibility of not getting a full compensation.

The consequences that arise after the court decision of bankruptcy of PT Dewata Abdi Nusa developer is neglected consumer rights as contained in Law no. 8 of 1999 on Consumer Protection. Consumers as buyers of housing units have not received the rights that should be owned and have not received compensation. This is certainly related to the position of the consumer as a concurrent creditor who does not get priority in the division of bankrupt property. The bankruptcy verdict in fact does not consider the rights of consumers so that consumers experience losses both in terms of material and immaterial. Consumers also have not got their rights in the form of Right to Build Certificate which should be obtained if they have paid the housing units.

Law no. 37 of 2004 concerning Bankruptcy and PKPU determines that business actors or inslovensy debtors can not act in running their business, this will certainly harm the consumer who has fulfilled obligations in accordance with the agreement and expects the rights obtained after the agreement arose between the parties. The provisions of the Bankruptcy Act there is no regulation on how the arrangement of the consumer to obtain the right as appropriate.

Developers as business actors should be committed to perform their obligations as mentioned in Article 7 of Law no. 8 Year 1999 5 on Consumer Protection are:

a. Have good faith in doing business.
b. Conduct correct, clear and honest information about the conditions and warranties of goods or services and provide explanations of use, repair and maintenance.
c. Treat or serve consumers properly and honestly and non-discriminatively; business actors are prohibited to discriminate consumers in providing services; business actors are prohibited to discriminate the quality of service to consumers.
d. Ensure the quality of goods or services produced or traded under the provisions of the applicable quality standards of goods or services
e. Provide an opportunity for consumers to test or try certain goods or services and provide guarantees and warranties.
f. Provide compensation, indemnification or compensation for losses arising from the use, use, and benefits of traded goods or services.
g. Provide compensation for damages or reimbursements if the beats or services received or utilized are not in accordance with the agreement.

E. Conclusions

Graha Dewata Housing Consumers do not get legal protection on the verdict. 16/PAILIT/2013/PN.NIAGA.SBY. Legal protection has not been obtained by consumers due to legal uncertainty experienced by Graha Dewata housing consumer due to Bankruptcy Court decision PT Dewata Abdi Nusa. Legal protection is also not obtained by consumers because consumers do not get their rights as contained in the Sale and Purchase Agreement between developers and consumers. This is due to the provisions in Law no. 37 Year 2004 concerning Bankruptcy and PKPU has not been accommodated and not correlated with the provisions in Law no. 8 of 1999 on Consumer Protection so that in the court decisions of bankruptcy cases many violate the rights of consumers.

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Legal Review of Absolute Authority Commission for the Supervision of Business Competition In Auction Case of Build Operate Transfer

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Abstract

Commission for Business Competition Supervision (KPPU) commission established to supervise business actors in running their business activities in order not to monopolize and or unfair business competition. Absolute Authority of the Business Competition Supervisory Commission (KPPU) is part of the implementation of legal aspects in contact with economic aspects. The legal basis of KPPU is regulated in Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition (Law No. 5/1999 on LPMPUBC). The approach method used in this research is the normative juridical approach method, this approach method uses the concept of legit positivis, namely that the law is identical with the written norms created and enacted by the authorized institution or official.

In practice, the objective of the formation of this law has not been reached optimally, it can be seen in the implementation of the KPPU's authority to supervise until prosecute if there is unhealthy business competition or monopoly of BOT auction, among others in KPPU's decision namely the decision of Case No. 07 / KPPU-L / 2012, No. 16 / KPPU-L / 2014 and No.01 / KPPU-L / 2015. Violations relating to the auction of the Build Operate Transfer (BOT) system in Decision of the case no. 01 / KPPU-L / 2015 leads to the mistakes of business actors, namely "Persengkokolan" regulates and or determines the winning bidder so that it can lead to unfair business competition.

A. Introduction

Absolute Authority of the Business Competition Supervisory Commission (KPPU) is part of the implementation of legal aspects in contact with economic aspects. In the business world, competition is seen as a positive thing. In Economic Science Theory of perfect competition is an ideal market condition. In legal science the ideal condition of the market can run in an orderly manner if the law (legislation) is used as the main benchmark. Regulations governing monopolistic restrictions are stipulated in Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition (Law No. 5/1999 on LPMPUBC).

Consideration of the regulation of Law no. 5/1999 About LPMPUBC is that it takes a legal benchmark for every person who strives in Indonesia. Entrepreneurs must be in a healthy and fair competition situation so as not to cause a concentration of economic power to certain business actors, notwithstanding the agreement that has been implemented by the Republic of Indonesia against international agreements. In practice, the objective of the formation of this law has not been reached optimally, it can be seen in the implementation of the KPPU's authority to supervise until prosecute if there is unhealthy business competition or monopoly of BOT auction, among others in KPPU's decision namely the decision of Case No. 07 / KPPU-L / 2012, No. 16 / KPPU-L / 2014 and No.01 / KPPU-L / 2015. In the ruling, it is suspected that there is unfair business competition or monopoly, but it is sometimes the decision to harm business actor. Notabene business actors also help the construction of government projects with practical. Some of these decisions must be reviewed so that KPPU and business actors are not mutually hostile, because business actors are often harmed and the authority of KPPU supervises business actors in order not to conduct unfair business competition.

B. Research Methods

This paper was arranged using normative juridical research type, that is research focused to study the application of positive law principles. Normative juridical is an approach that uses positivist legit conception. This research uses approach of legislation and case approach.

The specification used is descriptive research specification that is a research that aims to provide a concrete

description or explanation of the object or problem under study without taking conclusions in general.

In this study it is generally distinguished between data obtained directly from the public and library materials. Obtained directly from the community is called primary data (or baseline data), whereas those obtained from library materials are commonly called secondary data.

The results are presented in the form of descriptions arranged systematically, meaning that the secondary data obtained will be linked with each other tailored to the problems studied, so as a whole is a unified whole in accordance with the needs of research.

C. Problem Formulation

1. What is the absolute authority of KPPU to decide a case that could harm the Business Actor?
2. How is the difference of the KPPU's judicial concept juxtaposed with the judicial power in Indonesia?
3. How are the breaches related to the auction with the Build Operate Transfer (BOT) system contained in the contents of Decision No. 07 / KPPU-L / 2012, No. 16 / KPPU-L / 2014, and 01 / KPPU-L / 2015 which can be dealt with by KPPU and how is the subsequent legal action?

D. Discussion

1. KPPU Absolute Authority In Breaking Up A Case That Can Adversely Affect the Business Actor

   The absolute authority of KPPU in deciding a case that could harm the business actor can be seen in the duties and authorities of KPPU which has been regulated in several Legislation Regulations. The Law regulates KPPU's duties and authorities very detailed and very Powerful set up.

   The Commission's duties other than stipulated in the Antimonopoly Law, are also governed by the Commission Regulation. The Commission's duties in the Antimonopoly Law are set out in Article 35, namely:

   The Commission's duties include:

   1) Conduct an appraisal of agreements which may result in monopolistic practices and or unfair business competition as provided for in Articles 4 to 16;

   2) Conduct an assessment of the business activities and or actions of business actors which may result in monopolistic practices and or unfair business competition as provided in Article 17 to Article 24;

   3) Conduct an assessment of the presence or absence of abuse of dominant position which may result in monopolistic practices and or unfair business competition as stipulated in Article 25 to Article 28;

   4) Take action in accordance with the competence of the Commission as stipulated in Article 36;

   5) Provide advice and consideration to government policies relating to monopolistic practices and or unfair business competition;

   6) Develop guidelines and / or publications related to this Law;

   7) Provide periodic reports of the work of the Commission to the President and the House of Representatives.

   The KPPU's duties above are very absolute starting from the examination and until the verdict is read, its notabenenya when in the general court of judicial investigation is carried out by the public prosecutor that is in the prosecutor's office, the judgment and decide an authority case existed in the Institute of Justice. Concerning the authority of the Commission is regulated in Article 36 of the Antimonopoly Law, namely:

   1) Receiving reports from the public and or from business actors on the alleged occurrence of monopolistic practices and or unfair business competition;

   2) Conducting research on the alleged existence of business activities and or actions of business actors which may result in monopolistic practices and or unfair business competition;

   3) Conducting investigation and / or examination of cases of alleged monopolistic practices and or unfair business competition reported by the public or by business actors or found by the commission as a result of his research;

   4) Summing up the results of the investigation and or examination of the presence or absence of

monopolistic practices and or unfair business competition;
5) To call a business actor alleged to have violated the provisions of this law;
6) To call and present witnesses, expert witnesses and anyone deemed aware of any violation of the provisions of this law;
7) To request the assistance of the investigator to present the business actor, witness, expert witness or any person referred to in letter e and letter f, who is not willing to fulfill the commission's call;
8) Request information from government agencies in relation
9) by investigation and or examination of business actors in violation of the provisions of this law;
10) Obtain, examine, and or appraise letters, documents or other evidence for investigation and or examination;
11) Deciding and determining whether or not there is a loss on the part of another business actor or community;
12) Notify the decision of the commission to business actors suspected of monopolistic practices and or unfair business competition;
13) To impose sanctions in the form of administrative actions to business actors that violate the provisions of this law.
The handling of cases in the field of business competition by the Business Competition Supervisory Commission is regulated in Law no. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, which is further implemented in the Regulation of Business Competition Supervisory Commission. 1 of 2010 concerning Procedures for Handling Cases. The scope of case handling by the commission as set forth in Article 2 of Commission Regulation no. 1 Year 2010 on the Procedures of Handling Cases (hereinafter referred to as Commission Regulation) which includes:
1) Handling of cases based on Reporting Reports;
2) Handling of cases based on Reporting Reports with a request for compensation, and;
3) Handling cases based on the initiative of the Commission.
In reporting pekara on the wrong subject that can report when the company meets the element of the monopoly is at the initiative of the Commission, the Commission in question is KPPU itself. KPPU can report companies that fulfill the monopoly element.
Such a lot of authorities can be owned by 1 (one) institution, the notes are those in general court divided into several institutions, whereas in the case of this monopoly from the report until the decision of a case is settled by KPPU. It can be concluded that the absolute authority of KPPU.

2. Differences of KPPU's Justice Concept Juxtaposed With Judicial Power In Indonesia

a) KPPU's Judicial Concept

The handling of cases in the field of business competition by the Business Competition Supervisory Commission is regulated in Law no. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, which is further implemented in the Regulation of Business Competition Supervisory Commission. 1 of 2010 concerning Procedures for Handling Cases. The scope of case handling by the commission as set forth in Article 2 of Commission Regulation no. 1 Year 2010 on the Procedures of Handling Cases (hereinafter referred to as Commission Regulation) which includes:
1) Handling of cases based on Reporting Reports;
2) Handling of cases based on Reporting Reports with a request for compensation, and;
3) Handling cases based on the initiative of the Commission.

b) The stages of case handling by the Business Competition Supervisory Commission can be described as follows:
a. Report Submission
b. Clarification.
c. Study, Research and Supervision of Business Actor in Case Handling Initiative.
   1) Commission Review

2) Research
3) Control of business actors

d. Investigation
e. Filling
f. Commission Council Assembly.
1) Preliminary Examination
2) Advanced Examination.
g. Commission's Decision.

c) The Concept of Perdilan in Judicial Power

Basically KPPU with a general court under the judicial authority will not be separated. When the KPPU's Decision on the Monopoly case against the Reported Party, if the reported objection to the KPPU Decision can be settled in the District Court.

In the examination of business competition case is regulated about legal effort that can be done by business actor. Article 44 of Law Number 5 Year 1999 states in paragraph: (2) "Business Actor may file an objection to the District Court no later than 14 (fourteen) days after receiving the notification of the decision". And in paragraph (3) "Business actors who do not file an objection as referred to in paragraph (2) shall be deemed to receive a decision of the commission". Therefore, the regulation in paragraph (2) is a regulation concerning legal effort that can be done by business actor who is not satisfied with what has been decided by KPPU, and in paragraph (3) is the regulation about time of decision of KPPU has fixed legal force. Regarding the procedure for the filing of these remedies is regulated in the Supreme Court Regulation (Perma) Number 3 Year 2005. In addition to these remedies, if the parties have objected to the decision of the District Court, they may file an appeal to the Supreme Court. If the parties still object to the decision that has been permanently enforceable law, extraordinary remedies may be made. The legal basis of remarkable legal remedies can be found in Law Number 4 of 2004 on Judicial Power and Law Number 14 Year 1985 on Supreme Court Jo. Law Number 5 Year 2004 Concerning the Amendment of Law Number 14 Year 1985 regarding the Supreme Court.

d) Basic and Case Decision Analysis.

Starting from a report received by the Secretariat of the Business Competition Supervisory Commission on the alleged violation of Law No.5 of 1999 regarding 5 (five) Tender Packages at Public Works Department, Asahan Regency, North Sumatera, Fiscal Year 2013.

After the Commission Assembly considers Report of Alleged Violation, Response of each Reported Party, Statement of Witnesses, Information of Experts, Information of Reported Party, Letters and / or documents, Conclusion of the result of the hearing, that the Commission Assembly assesses, analyzes, concludes and decides the case based on sufficient evidence of whether or not there has been a violation of Law Number 5 Year 1999 allegedly committed by the Reported Parties in this case. The Commission Assembly shall conduct the following assessment and analysis:

1. About Alleged Violations
2. Regarding the fulfillment of Article 22 of Law Number 5 Year 1999

Article 22 of Law Number 5 Year 1999 states that

"Business actors are prohibited to conspire with other parties to arrange and / or determine the winning bidder so as to lead to unfair business competition"

2.1. Elements of Business Actor
2.2. The Conspiracy Elements
2.3. Other Party Elements
2.4. The element regulates and / or determines the winning bidder
2.5. Elements may lead to unhealthy competition

3. About the Decision Dictum
   a. To declare that Reported Party I, Reported Party II, Reported Party III, Reported Party IV, Reported Party V, Reported Party VI, Reported Party V, Reported Party VIII, Reported Party IX, Reported Party X, Reported Party XII, Reported Party XII, Reported Party XIII Reported Party XIV XVI, the Reported Party XVII was proven legally and convincingly violating Article 22 of Law No.5 of 1999.
   b. Punishing Br. Suwarno Mariono as Reported Party XI, paid a fine of Rp.105,000,000.00 (One hundred and Five Million Rupiah) to be deposited to State Treasury as a revenue deposit of fines of violation in the Business Competition Division of the Business Competition Supervisory Commission through Government bank with the code of acceptance 423755 (Fines Income Violation in the Field of Business Competition).
   c. Punishing Br. Rusli, as Reported Party XI, paid a fine of Rp.107.000.000,00 (One Hundred Million Rupiah) to be deposited to State Treasury as a revenue deposit of fines of violation in the Business Competition Division of the Business Competition Supervisory Commission through Government Bank with the code of acceptance 423755 Fines Income Violation in the Field of Business Competition).
   d. Punishing Sdri. Yuniani Astuti as Reported XVI, paid a fine of Rp.1.073.000.000,00 (One billion seventy three million Rupiah) to be deposited to the State Treasury as a revenue deposit of fines violation in the Business Competition Division of the Business Competition Supervisory Commission through Government banks with acceptance code 423755 (Income Fines Violation in the Field of Business Competition).
   e. Banned PT Gilang Pratama Jaya as Reported Party II, PT Mentari Jasa Mulia as Reported Party III, PT Menara Kharisma Internusa as Reported Party IV, PT Deli Surya Jaya as Reported Party V, PT Dwi Tunggal Bersama as Reported VI, PT Bin Ali as Reported Party VII, PT Syahputra Anugrah Rijky as VIII, PT Fermada Tri Karya as Reported Party IX and PT Bersaudara Dua Boru as Reported X to participate in tender in road construction field using Sub-Regional Assistance Fund (BDB) of North Sumatera Provincial Budgets and APBD Fund of Asahan Regency at Dinas Asahan Regency Public Works for 2 (two) years since this decision has permanent legal force.
   f. Prohibit Br. Suwarno Mariono as Reported Party XI, Br. Edi Purnomo as the Reported Party XII, Br. Sulianto as the Reported Party XIII, Br. Wahidi as Reported XIV, Br. Rusli as the Reported Party XV, and Sdri. Yuniani Astuti as Reported Party XVI to participate in tender in the field of road construction using Sub-Regional Assistance Fund (BDB) of North Sumatera Provincial Budgets and APBD Fund of Asahan Regency at Public Works Department of Asahan Regency for 2 (two) years since this decision has permanent legal force.
   g. Commanding Br. Suwarno Mariono as Reported Party XI, Br. Rusli as the Reported Party XV, and Sdri. Yuniani Astuti as Reported Party XVI to report and submit a copy of proof of payment of the fine to KPPU.
   h. Highlighting the contents of the KPPU case decision Number: No. 01 / KPPU-L / 2015, dated September 2, 2015, that the Commission's Commission Assembly in its decision states that Reported Party I, Reported Party II, Reported Party III, Reported Party IV, Reported Party V, Reported Party VI, Reported Party V, Reported Party VIII, Reported Party IX, Reported Party X, Reported Party XII, Reported Party XII, Reported Party XIII, Reported Party XIV, Reported Party XV, Reported Party XVI, Reported Party XVII proven legally and convincingly violated Article 22 of Law Number 5 Year 1999. Against KPPU case decision above, the authors highlight in the legal considerations of the KPPU Assembly on the aquo case decision, among others, first, there is no violation of Article 47 paragraph (1) and (2) letter g of Law No.5 Year 1999 related to the Commission KPPU Commission's authority in giving consideration and decision of the aquo case especially in imposing administrative sanctions against Reported Parties; Secondly, the basic principles of law in consideration and aquo decisions do not conflict with the provisions of Law No.5 Year 1999, Third, Putu san KPPU Commission Councils within the Aquo case are in line with the provisions of Article 35 letter b and Article 36 of Law Number 5 Year 1999 concerning the duties and authorities of KPPU, Fourth, Based

on the legal facts revealed in the aquo decision that the fulfillment of the elements of Article 22 Law Number 5 Year 1999 has been fulfilled and proven by Reported Party I, Reported Party II, Reported Party III, Reported Party IV, Reported Party V, Reported Party VI, Reported Party V, Reported Party VIII, Reported Party IX, Reported Party X, Reported Party XI, Reported Party XII, Reported Party XIII , Reported Party XIV, Reported Party XV, Reported Party XVI, Reported Party XVII.

E. Conclusions

Business Competition Supervisor is a commission established to supervise business actors in running their business activities in order not to monopolize and or unfair business competition. The Status of the Commission is set forth in Article 30. Membership of the Commission is set forth in Articles 31, 32, 33. The Commission's duties are stipulated in Article 35. The absolute authority of Absolute is provided for in Article 36. To impose sanctions in the form of Administrative Measures provided for in Article 47 paragraphs 1 and 2 a, b, c, d, e, f, g. If the business actor feels unfairly treated against the KPPU's decision, then it can file an objection to the District Court as regulated in Article 44 paragraph (2) and if the business actor does not file an objection within 14 (fourteen) days shall be deemed to receive the KPPU decision as regulated in Article 44 paragraph (3). If it is deemed to have accepted the KPPU's decision but will not implement it, the Commission shall have the authority to delegate criminal cases to investigators to conduct investigations as regulated in Article 44 paragraph (4). The Commission's Decision as referred to in Article 44 paragraph (4) shall be sufficient initial evidence for investigators to conduct an investigation. And also the existence of Criminal Procedure regulated in Article 48 and Additional Criminal is regulated in Article 49, Law Number 5 Year 1999 About Prohibition of Monopolistic Practices And Unfair Business Competition.

To carry out and supervise Law Number 5 Year 1999, the Commission in carrying out its Act of Acts is based on the Regulation of KPPU Number: 1 Year 2010 on the Procedure of Case Handling is one of the rules that become the legal basis for the law in KPPU because the Law Antimonopoly Law Number 5 Year 1999 About Prohibition of Monopolistic Practices and Unfair Business Competition.

Whereas, Violations relating to the auction of the Build Operate Transfer (BOT) system to the Decision of the case no. 01 / KPPU-L / 2015 leads to the mistakes of business actors, namely "Persengkokolan" regulates and or determines the winning bidder so that it can lead to unfair business competition.

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THE IMPORTANT ROLE OF FOOD SECURITY AGENCY ON THE FOOD SECURITY CONSOLIDATION IN INDONESIA (FACING GLOBALIZATION ERA)

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Abstract

Food is an important and strategic commodity for the Indonesian people, considering that food is the basic human need that must be fulfilled by the government and society together as mandated by Law No. 7 of 1996 on food. The Law states that the Government provides regulation, guidance, control and supervision while the community organizes the process of production and supply, trade, distribution and role as consumers who are entitled to adequate food in quantity and quality, safe, nutritious, diverse, and affordable by their purchasing power. Food security is very broad dimension and involves many development sectors. Successful development of food security is determined not only by the performance of one sector but also by other sectors. Thus the synergy between sectors, government and society synergy (including the business world) is the key to the successful development of food security. The problems is: How is the role of food security agencies to stabilize food security in facing globalization era?As a country with a large population and a vast territory, food security is an important agenda in Indonesia's economic development. Food insecurity becomes a very sensitive issue in the dynamics of Indonesian social and political life. Being able to realize national food security, region, household and individual based on self-reliance of domestic food supply becomes very important for Indonesia. Independence is increasingly important amid world conditions that experienced food, energy and financial crisis marked by international food prices experienced a drastic surge; increasing food demand for alternative energy (bio-energy); a global economic recession that has resulted in the declining purchasing power of the masses against food; a foreign food invasion ("westernization of the diet") potentially causes more nutrients and increases dependence on imports.

Keywords: Food Security Agency, Consolidation, Globalization

I. Introduction

A. Background

We are now experiencing a variety of changes, Not only in the country but also internationally. These changes occur not only in one area, but also cover all areas such as politics, economics, education, socio-culture, and technology. The changes we often hear with the term of globalization. Global globalization has brought many positive and negative effects, especially in our country. Almost all aspects of people's lives are influenced by the presence of globalization which some accept even some also reject it. But society can not deny the influence of globalization because globalization is running in accordance with the development of the times. One of the areas that greatly affect our nation is certainly in the economic field. Because the economy is one of the factors driving the development of a nation. The era of globalization filled with challenges of change and obstacles of course greatly affect the economic aspects of our country that will determine the direction of development of our country.

Regarding economic aspects, food security is an integral part. Food security is generally based on the approach of food availability. On the basis of this approach, the World Bank (1988) in Pakpahan et al (1993) defines food security as an adequate food supply for all residents to live actively and healthily.

Food security is always associated with the stability of food prices, especially rice, or the main food of a country. Based on Presidential Regulation No. 24 of 2010 concerning Status, Duties and Functions of State Ministries and Organizational Structure, Duties and Functions of Echelon I of State Ministries, stated that the Food Security Agency is a supporting element in the Ministry of Agriculture. [1]

Food Security Agency headed by Head of Agency who is under and responsible to the Minister. Food Security

1 *Peraturan Presiden Nomor 24 Tahun 2010 tentang Kedudukan, Tugas dan Fungsi Kementerian Negara serta Susunan Organisasi, Tugas dan Fungsi Eselon I Kementerian Negara.*

Agency has the duty to carry out assessment, development and coordination in the field of food security. In performing the duties as referred to in Article 1146, the Food Security Agency shall function:[2]

1. Assessment, preparation of policy formulation, development, monitoring and stabilization of food availability, and prevention and control of food insecurity;
2. Assessment, preparation of policy formulation, development, monitoring and stabilization of food distribution and food reserves;
3. Assessment, preparation of policy formulation, development, monitoring, and consolidation of food consumption and diversification patterns;
4. Assessment, preparation of policy formulation, development, monitoring and supervision of fresh food safety; and;
5. Implementation of administration of Food Security Agency.

The right to food has been formally recognized by many countries in the world, including Indonesia. Lately, the issue of food as a basic matter is increasingly vociferously voiced in various world forums, no less the theme of World Food Day 2007 is about the Right to Food. Food Security has also been established to be a mandatory affair for central, provincial and district / municipal governments that increasingly emphasizes the importance of building food security more seriously. The world food and financial crisis in 2008 (the monetary crisis) also emphasized the importance of strengthening food security in Indonesia based on independence.

As a country with a large population and a vast territory, food security is an important agenda in Indonesia's economic development. Food insecurity becomes a very sensitive issue in the dynamics of Indonesian social and political life. To be very important for Indonesia to be able to realize national food security, region, household and individual based on self-reliance of domestic food supply.

Independence is increasingly important amid world conditions that experienced food, energy and financial crisis marked by international food prices which experienced a drastic surge; increasing food demand for alternative energy (bio-energy); a global economic recession that has resulted in the declining purchasing power of the masses against food; (d) a foreign food invasion ("westernization of the diet") potentially causes more nutrients and increases dependence on imports. Food insecurity and poverty are still a major problem in Indonesia. Food insecurity has a positive correlation and is closely related to poverty.

B. Problem Formulation

Based on the above background, formulated problem that will be discussed in this research is: How is the role of food security agency to stabilize food security in facing globalization era?

II. Theoretical Framework

Globalization is a comprehensive process or worldwide where everyone is not bound by the state or territorial boundaries, meaning that individuals can connect and exchange information wherever and whenever through electronic and printed media. Understanding of globalization by language is a global process. Globalization can make a country smaller because it hopes interstate communication in various fields such as information exchange and trade. According to Laurence E. Rothernberg globalization is the acceleration of the intensification of interaction and integration between people, companies and governments of different countries.While Anthony Giddens said that globalization is the intensification of social relationships worldwide so that connecting between events that occur in one location to another and cause changes in both.

III. Discussion

Secretariat of Food Security Agency, is an Echelon II work unit in the Agency of Food Security Agency of the Ministry of Agriculture. In accordance with the Regulation of the Minister of Agriculture No. 61/ Permentan / OT.140 / 10/2010 on the Organization and Working Procedure of the Ministry of Agriculture, the Secretariat of the Food Security Agency has the duty of "providing technical and administrative services to all organizational

2 *Ibid, Pasal 1146.*

units within the Food Security Agency". In addition, considering that based on Presidential Regulation No. 83 of 2006, BKP is also ex officio as Secretariat. Implementation of the Food Security Council (DKP) Activities, the BKP Secretariat also provides technical and administrative services to the Food Security Council (DKP) and coordinates the activities of the Smallholder Livelihood Development Project in Eastern Indonesia (SOLID) in accordance with the SOLID Financing Agreement, LOAN No. L-I-835-ID and Grant No. G-I-C-835-10, dated July 5, 2011.

Food security is very broad dimension and involves many development sectors. Successful development of food security is determined not only by the performance of one sector but also by other sectors. Thus the synergy between sectors, government and society synergy (including the business world) is the key to the successful development of food security. Food security is very important for the development of a nation, because as a fulfillment of human rights in the field of food, one of the pillars in national resilience, and the existence of national sovereignty. Related to that, Law No. 17 of 1996 on Food has formulated, among others: (1) Food Security is the condition of the fulfillment of food for the household which is reflected from the availability of adequate food, whether quantity or quality, safe, halal, and affordable; and (2) food security is a shared responsibility between the government and the community. In this connection, all components of the nation from government to society must work together in building synergy food security.

Improved System of Government Institutions (good governance) and management system is an important agenda in government reform that is being implemented. A government management system that focuses on improving accountability and at the same time improving outcome-oriented performance is known as the Government Agency's Performance Accountability System (SAKIP). SAKIP is implemented with the ability of each government agency, this means government agencies independently plan, implement, measure and monitor performance and report to higher institutions. Paradigm shifts in national development and accountability of the performance of government agencies, demanding good governance and clean government.

Along with the change of paradigm, the Secretariat of Food Resilience Agency as an institution managing food security development on Food Security Agency, should be able to realize its accountability in carrying out coordination function and implementation of activities from planning, management to program evaluation and food security development activities. Accountability can be seen through the competencies, synergies, and performance generated by the institution, as well as the existence of minimal service standards. In line with the change of governmental administration from centralization to decentralization, then in governance should be supported by law enforcement and transparency.

Food is an important and strategic commodity for the Indonesian people considering food is a basic human need that must be met by the government and society together as mandated by Law No. 7 of 1996 on food. The Law states that the Government provides regulation, guidance, control and supervision while the community organizes the process of production and supply, trade, distribution and role as consumers who are entitled to adequate food in quantity and quality, safe, nutritious, diverse, and affordable by their purchasing power.

Ministry of Agriculture as an institution directly related to the problem of food security technically, has a vision and mission in building food security. The vision of the development of food security is the realization of food security based on national resources in an efficient and sustainable way to a prosperous society. Furthermore, the mission of food security development is to increase the empowerment and independence of the community / farmers to develop local resource-based food security through the development of agribusiness system and business which is competitively sustainable, decentralized and populist.

The problem of food and nutrition crisis in Indonesia should be able to be addressed fundamentally and continuously through production development program in the utilization of local agricultural food resources, by increasing the empowerment of food industry and farming community. Government Regulation No. 68 of 2002 on Food Security as the enforcement regulation of Law No.7 of 1996 affirms that in order to meet the growing consumption needs from time to time, food supply efforts are conducted by developing food production systems based on resources, institutions, and local culture, developing the efficiency of the food business system, developing food production technology, developing food production facilities and infrastructure and maintaining

and developing productive land.

Economic globalization can be defined as an economic life globally and openly, without recognizing territorial or territorial boundaries between countries with each other. The trade and investment activity side moves towards the liberalization of world trade and investment as a whole. Economic globalization is closely related to free trade. Free trade is trying to create an increasingly wider trading area and remove the obstacles of non-transparent international trade. The notion of economic globalization is a process of economic activity and trade, where various countries around the world become one and increasingly integrated market forces without any state barriers or territorial constraints. This globalization of the economy means the necessity of eliminating all restrictions and barriers to the flow of goods, services and capital.

Food security is a concept that evolves from simple, broad, and qualitative to more assertive, specific, and more quantitative. The widely accepted definition of food security is Acces For All People At All Times To Enough Food For An Active And Healthy Life. The meaning is that every person at all times has access physically and economically to food enough to live healthy and productive. Law No. 7 of 1996 explains that food security is a condition of food fulfillment for every household, which is reflected in the availability of adequate quantity and quality of food, safe, equitable, and affordable.

Food security is only one element of the social system of a society as a whole. Therefore, if the awareness of food security has influenced government policy, it will be seen from the policy in the economic, political, environmental, and social and cultural sectors of the community. The system and all institutions in society must have a vision to achieve food security. To achieve the vision of food security in need three dimensions of food security, namely: the dimensions of availability, the dimension of access, and the dimension of utilization.

Based on the various concepts mentioned above, it can be concluded that food security is a condition of availability of food in quantity and quality sufficient for the needs of the community that can be accessed easily based on the ability of people's purchasing power and distributed mereta in all levels of the region and strata of society.

Development of food security can not be separated from regional autonomy. Both of these are indispensable to support the existence of food to the level of the household. In the era of regional autonomy the role of autonomous regions is very important to improve local food stocks. The autonomous region must be able to provide sufficient food stock for all the people. If the area is a poor area then it is the duty of the local regent or mayor to be responsible for overcoming and finding a way out.

The food security system has been decentralized throughout the autonomous region that includes planning, implementation, and evaluation. This policy is balanced by the decentralization of 85 percent of the Ministry of Agriculture budget to autonomous regions, and the rest for central government operations. The central role only makes strategic and normative policies, while the technical implications of the field are submitted to autonomous regional governments. This is because the area as the basis of the existence of a society that is continuously dynamic of course must think locally food security of its people, so people are not difficult to get food to connect his life that is always dynamic .

Nainggolan explained that regional autonomy provides flexibility in determining development priorities of each region, including through the development of food security with attention to the things as follows:

1.) Involves the active participation of all stakeholders under the coordination of DKP (Food Security Council).
2.) Implement development programs that directly benefit the community.
3.) Develop cooperation between regions and between regions and centers.
4.) Maintain productive land and water supply for agriculture.

Food policy is not a policy that needs to get priority. Regions are more concerned with policies to increase their PAD than food security policies. This is caused by the increase of PAD which is one of the indicators of successful implementation of regional autonomy in addition to the increase of GRDP. But without realizing the threat of malnutrition and hunger at any time it can be experienced by the community because of the lack of understanding of the regions in the management of land allocation. In this case, the transformation of the national

economy from agrarian to the excellence of the manufacturing industry requires land for a very large industrial sector. This is offset by the vigorous region in campaigning to attract investors.

Inadequate land management will result in reduced productive lands for agriculture, resulting in increasingly marginalized agricultural land and occupying marginal lands. Objective conditions in each region indicate that not all regions have suitable land for agricultural activities. So that in areas that do not have suitable land should intensify agriculture and purchase food products through inter-regional trade. Strategies that need to be implemented by the government in building food security in the era of regional autonomy are:

a.) Streamlining supplies and facilitating the affordability of people to food,
b.) Protecting the domestic / regional economic system from unfavorable competition especially the global trade pressure,
c.) Develop a strategy with proper justification, so as not to contradict the agreed tenet of international trade organization.

Food security is manifested by the workings of the food economy system consisting of subsystems covering availability of production, post-harvest and processing, subsystems of distribution and subsystems of consumption interact with each other on an ongoing basis. These three subsystems are one unity supported by various inputs of natural resources, institutional, culture, and technology. This process will only run efficiently by community participation and government facilitation.

Community participation (farmers, fishermen etc) starts from the process of production, processing, distribution and marketing as well as services in the field of food. Government facilitation is implemented in the form of macro and micro economic policy in trade, service and arrangement and intervention to encourage food self-sufficiency. The output of food self-sufficiency development is the fulfillment of food, quality human resources, food security, economic resilience and national resilience.

Thus, the food and nutrition security system is not only about the production, distribution and supply of food at the macro level (national and regional), but also concerns the micro aspect, ie access to food at the household and individual levels and the nutritional status of household members, children and pregnant women from poor households. Although conceptually the definition of food security includes the micro aspect, but in everyday implementation is still often emphasized on the macro aspect of the availability of food.

Government policy in the field of food has not been too good. Farmers' complaints of low grain prices and consumer unrest regarding high rice prices are among the indicators of national food policy weakness. Ideally, food policy benefits farmers as producers and consumers as users. Whatever the government will do in the field of food, the interests of the two components can not be ignored.

The government's rice import policy is often misdirected. Especially if the import is done in the harvest time. The rice import activities should be suppressed when entering the harvest season, because if the imported rice comes in during the harvest, local rice must be sold. This is because the price of imported rice is cheaper than local rice. Conversely, if entering the famine season, the government in this case Bulog must make various efforts to anticipate. One of them imports rice for national food supply.

It can be concluded that, food security is very broad including time dimension, target dimension and socio-economic dimension of society, so that required many indicator to measure it. From the time dimension, the measurement of food security is done at various levels of global, national, regional to household level and individual. At the global, national and regional levels of food security indicators that can be used is the level of food availability with respect to variable damage levels of plants / livestock / fisheries, the ratio of stocks with food consumption, PPH scores, food security conditions, government food fund institutions.

Conclusions

Local food commodities which are developed can assist local communities in sustainable food fulfillment, especially for household food needs. This needs to be supported by inter-sectoral cooperation, including the agricultural sector, industry sector, banking and cooperatives sector, labor sector, and trade / marketing sector. Due to the fact that through cooperation between these sectors the community can access the availability of food

both nationally and regionally in the face of globalization era. Food Security in the era of globalization needs to involve the community in a participatory way in every development planning especially the development of regional food security, because by involving the community in a participative way, the government can definitely and proactively know the problem of food shortage in every individual society and directly grow and develop maintaining the tradition of providing food barns that once existed, individually or collectively, to reserve their food for the sustainability of their lives.

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THE ARTICLE 76 OF LAW NUMBER 15 YEAR OF 2001 REGARDING THE BRANDS AND RELATIONSHIP WITH SMALL MICRO AND MEDIUM ENTERPRISES

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Abstract

Brand protection is an important thing, given the rapidly growing world of commerce today. For manufacturers, the brand is not only to distinguish its products with other similar company products, but it is also intended to build corporate image, especially in marketing. For consumers the Brand is used as a recognition of a good, high quality or safe to use due to the reputation of the brand. However, this brand protection when associated with the activities of Small Micro and Medium Enterprises is still experiencing difficulties, especially in the application of Article 76 of Law Number 15 Year 2001, where there are still many business actors of Small Micro and Medium Enterprises who do not know the importance of brand protection, so there are still many among those who violate the Article. The number of business actors of Small Micro and Medium Enterprises that commits a breach in the brand of the products it produces that is by putting the famous brands on their products become big questions about the socialization done about the importance of IPR, that is how the existence of Article 76 Undang-Of Law Number 15 Year 2001 concerning Brands in Small Micro and Medium Enterprises and how the obstacles in the implementation of Article 76 of Law Number 15 Year 2001 on Brand and its relation with these Enterprises and how to solve it. By using descriptive analytical research that is means to investigate an event to describe the actual situation as it is clearly and in detail through literature study and interviews to authorized officials. In this study obtained many violations of the Article which is caused by the previous business actors of Small Micro and Medium Enterprises to register on its brand to the Directorate General of IPR because of several obstacles. The constraints can come from the external or internal. In practice, Article 76 of Law Number 15 Year 2001 has not been widely used to resolve disputes between business actors of small micro and medium enterprises in terms of the use of well-known brands, where the parties prefer settlement methods with alternative dispute resolution. In addition to overcoming obstacles in the registration of brands conducted by Small Micro and Medium Enterprises, it is required the role of government in overcoming them. This is related to the task of the government in empowering the Small Micro and Medium Enterprises which contained in Law No. 20 of 2008 on Small Micro and Medium Enterprises.

Keywords: Review, Brand, Venture

Introduction

As we understand together that Small Micro and Medium Enterprises should be empowered in accordance with Law Number 20 Year 2008 regarding those Enterprises, since they are included in the economic field. Those Enterprises themselves have long been a role that are quite active in helping the economic development in Indonesia. Economic development itself is defined as a process that causes the income per capita population of a society increases. Where the increase in income per capita is a reflection of the emergence of improvements in the economic welfare of society. (Lia Amalia, 2007: 1)

The role of Small Micro and Medium Enterprises can be seen at a time when Indonesia experienced a quite difficult phase of monetary crisis, during the monetary crisis those Enterprises still survive even they have increased in development and look very clear in the economy of ndonesia.

Previously those Enterprises received less attention in Indonesia, but since the economic crisis hit Indonesia where many big businesses are down, most Small Micro and Medium Enterprises still survive and even the number is increasing. It was during this time of the monetary crisis that the most rapid and recoverable Small Micro and

Medium Enterprises of the economic crisis were compared with other businesses that had larger scales that had collapsed during that period.

According to data from the Minister of Cooperative and SME Affairs (Menegkop and UKM) and the Central Bureau of Statistics (BPS), there were about 39.7 million small micro enterprises (UMK) in 1997, with an average annual sales of less than Rp.1 billion per unit, or about 99.8 percent of the total business units that year. In 1998, when the economic crisis reached its worst point with the enormous negative impact on almost all sectors of the economy in Indonesia, many companies from all business scales went bankrupt or reduced the volume of activities drastically, the Small Micro and Medium Enterprises that still survive. (Sincerely, 2009: 47).

In the economic development in Indonesia Micro, Small and Medium Enterprises are always described as a sector that have a fairly active role for economic development in Indonesia, because most of the population of Indonesia has a low educational background and have a livelihood to meet the needs of life by doing small business activities in both traditional and modern sectors. The role of Micro and Small Medium Enterprises is an important part of every development plan.

The role of Micro and Small Medium Enterprises in national development is very large. This can be seen in the contribution provided by Small and Medium Micro Enterprises to employment, income distribution, rural economic development and as a driver of the increase in manufacturing / non-oil exports. This makes Small and Medium Micro Enterprises have important reasons why the government should develop the Small and Medium Micro Enterprises themselves.

Development of Small and Medium Enterprises needs to get considerable attention both from the government and from the people of Indonesia itself in order to further develop more competitive with other economic actors. Future government policy needs to be made more conducive for the growth and development of Micro Small and Medium Enterprises in Indonesia. The government needs to increase its role in empowering Small and Medium Micro Enterprises in addition to prioritizing mutually beneficial business partnerships between large entrepreneurs and small entrepreneurs and improving the quality of their human resources.

From the data shows that the Small and Medium Enterprises sector contributes greatly in the economy and in overcoming the problem of unemployment and labor in Indonesia. In addition, Micro Small and Medium Enterprises also contribute significantly to Gross Domestic Product (GDP), where more than half of our economy is supported by the production of Small and Medium Enterprises as much as 59.3%. (Puspa Kriselina, 2011)

Of the many Small and Medium Micro Enterprises that are developing in Indonesia and not just limited to the mentioned business fields, the existence of Micro Small and Medium Enterprises can not be separated from its association with Intellectual Property Rights (IPR). Starting from products generated from the activities of Small and Medium Micro Enterprises, the technology used, the design of each product produced, as well as the use of trademarks or service marks for marketing purposes.

In the trade of goods or services, the brand as one form of intellectual work has an important role for the smooth and increasing trade in goods or services. Brands have strategic and important value for both producers and consumers alike. For manufacturers, the brand not only distinguish its products with other similar company products, but it is also intended to build corporate image, especially in marketing. (Djumhana, 2006: 78).

A trademark for legal protection can be done by way of registered with the competent authority, then its registration may be made at the mark office located in the jurisdiction in which the company holding the mark is domiciled.

The way and procedures for filing a request for registration of marks in Indonesia have been regulated in the provisions of Law No. 15 of 2001 on marks. It also provides for renewal requests for renewal of registered trademarks, requests and recording, changes and redemptions of brand registration requests and inclusion of brand registration numbers.

Protection of trademarks registered at the Directorate General of IPR shall be for a period of 10 (ten) years and shall be retroactively effective from the date of receipt of the registration of a mark, as contained in article 28 of Act No. 5/1999. 15 of 2001 on Marks.

Protection of the brand is also intended as protection to the public, especially to the consumer so that they are not mistaken for a good quality goods or quality below the quality of the original goods, so as a guarantee of the

quality of a good. It is also intended as a safeguard against the producer as a legitimate owner of property rights, which is due to sales turnover due to the forgery and impersonation of its goods resulting in loss.

There are many rules that have been completely and firmly regulate the brand, but it can not be used as a guarantee of non-infringement, it is seen with the still widespread of counterfeit goods in the market.

A well-known brand usually can not be separated from acts of violation of IPR, such as counterfeiting, imitation, piggyback reputation and others. If the mark is legally registered, in the event of a violation of the rights of the mark, the rightful owner or right holder may file a lawsuit.

Problems

As for the main subject of discussion is the Study of Article 76 of Law Number 15 Year 2001 About Brand and Its Relationship With Small and Medium Micro Enterprises, this main issue will be described as the following issues: How are the constraints in the implementation of Article 76 of Law Number 15 Year 2001 About Brand And Its Relationship With Small and Medium Micro Enterprise and how to solve it?

Discussion

The Constraints Arising in Brand Registration by Small and Medium Micro Enterprises

Judging from the legal aspect of the brand problem becomes very important, in relation to the issue of the need for legal protection and legal certainty for the owner or the holder of the brand and the legal protection of the community as a consumer of a good or service that uses a brand to not be fooled by other brands, it can not be denied again that the problem of the use of famous brands by unauthorized parties, is still much happening in Indonesia and the fact is really realized by the government, but in practice a lot of obstacles.

Similarly, the registration of trades conducted by small and medium business actors also encountered obstacles in practice. Constraints that occur both from external and internal.

External obstacles in the registration of brands conducted by the business actors of Small and Medium Micro Enterprises are:

1. Non-cooperation between Small and Medium Enterprises with Large Enterprises concerning business activities. therefore Big Business has not maximally give access to the description of wide business activity to business actors of Small and Medium Micro Enterprises, which among others concerning the importance of registration of brand for production of Small and Medium Micro Enterprise themselves.

2. Insufficiency of intensive role by the government in socializing the importance of brand registration to Small and Medium Micro Enterprises, therefore there are only a small number of small and medium business actors assume that the registration of the brand is very important to protect the production. In this case the government insufficiencys in providing socialization programs such as seminars, workshops, counseling, and so forth. In addition, the government has not fully covered all activities of Small and Medium Enterprises in the regions, especially rural areas, so that small and medium micro enterprises located in rural areas are less informed and knowledgeable about the development of brand law.

While the obstacles in registering the brand by the business actors of Micro Small and Medium Enterprises that come from internal constraints are:

1. Culture and insufficiency of Understanding of IPR
   The number of Small and Medium Micro Business actors who do not register their trademarks with the Directorate General of Intellectual Property Rights become a culture that is continued by other Small and Medium Micro Business Actors. Small and Medium Micro Business actor has a mindset that does not change from time to time so as to become entrenched among the business actors of Small and Medium Micro Enterprises. Socialization that is less intensive causes not all actors of Micro Small and Medium Enterprises get clear information about the importance of the brand.
2. Insufficiency of Legal Awareness of Small and Medium Micro Enterprises Against the Impact of Unregistered Marks.
   In general, Small and Medium Micro Business actors come from a group of people who have low and inadequate education. In addition to formal education that insufficiency of knowledge, the knowledge about the law was also still low. So that Small and Medium Business actors do not know and understand

the importance of brand registration, and they are not aware of the impact of unregistered brand

3. Cost.
   So far, most small and medium business actors that have not registered their brands with the Directorate General of Intellectual Property Rights know that in registering the brand requires a fee, but basically not the cost on the registration of the brand which is the main reason of the business actors of Micro Small and Medium Enterprises who have not registered its brand.The main reason is the cost of developing the brand they have listed themselves. The registered trademarks must be developed to build their image (brand image) in order to be recognized by the public, in addition they must also create a research and development division of their brands to be able to produce products that are always up to date. For this reason small and medium businesses are more interested in using well-known brands than using their own brands that they have registered, because using a well-known brand brings substantial profits and from facts in the field proves it. From the consumer side also prefer goods and services that already have a brand on the market. So that small and medium business actors prefer to use well-known brand.
4. Long Bureaucracy
   Registration of brands that pass through several processes becomes one of the reasons why the business actors of Micro Small and Medium Enterprises have not registered their brands with the Directorate General of Intellectual Property Rights. Brand registration which takes approximately 12 months from the beginning of registration starting from substantive inspection until the announcement of whether the registered trademark is accepted or not, it is considered too long by the Small and Medium Micro Business actor. In addition, the issue of long time certificate issuance is also the reason. Requirements to be submitted are also deemed by Micro and Small Business Actors too complicated, thus making the registration process longer.The registration process takes long time because the business actors of Micro Small and Medium Enterprisesthemselves do not complete the requirements needed to register the brand. As regulated in Law Number 15 Year 2001 regarding the mark, the registration of the mark shall be started from applying for the registration of the mark to the Director General of IPR by enclosing the terms set forth by the Directorate General of Intellectual Property Rights, and shall be examined by the Director General of IPR concerning the completeness of the registration requirements. If all the requirements are completed then the Directorate General of Intellectual Property gives the date of receipt of the trademark application called filling date. Filling date is the date of commencement of the calculation of protection period for the registered trademark. Furthermore, after examination of administrative completeness of the application of the mark within thirty days from the date of receipt (filling date), the Directorate General of Intellectual Property Rights shall also conduct substantive examination of the request, whether the mark is filed by a good-faithed applicant or the mark fulfilling the requires the brand to be denied registration or the mark can not be registered. The substantive examination is completed within a maximum of nine months. After all inspections have been performed and the application is approved for registration within a maximum of ten days the Director General of IPR shall announce the request in the Official Gazette of Marks. The announcement lasted for three months. During the announcement period, each party may submit a written objection to the Directorate General of Intellectual Property Rights at the expense of which, if there is sufficient reason accompanied by evidence that the mark can not be registered or must be rejected. However, if there is no objection from certain parties, the Director General of HKI shall issue and grant the Mark Certificate to the applicant within thirty days from the date of the end of the announcement period. Bureaucracy that is too long in the registration of the brand becomes one of the reasons why the business actors of Micro Small and Medium Enterprises have not registered its brand.

The settlement Efforts Overcoming Brand Registration Constraints In Small and Medium Micro Enterprises

Micro Small and Medium Enterprises are productive businesses owned by individuals or individuals and / or individual business entities that have criteria of Small and Medium Micro Enterprises. In the business world, Micro Small and Medium Enterprises should be empowered through government, regional government, business, and society synergistically in the form of climate growth and business development on Micro Small and Medium Enterprises so as to grow and develop into a strong and independent business. To support this there must be

protection from the government to synergistically empower through the establishment of various legislation and policies from various aspects.

Economic life and securing the maximum possible support, assurance, opportunity and business support to support this need to be supported in the provision of funds by governments, local governments, businesses and communities through banks, cooperatives and non-bank financial institutions. This is where there is a need for partnership in the business relation, either directly or indirectly on the basis of mutual benefit or on the basis of the principle of mutual need, trust, strengthen and benefit which involves the business actors of Micro Enterprises, Small Business actors, Medium Business actors and Big Business actors.

Similarly, the constraints experienced by Small and Medium Micro Enterprises in terms of registration of Marks should be given convenience as they are still related to Article 12 of Law Number 20 Year 2008 regarding Micro Small and Medium Enterprises concerning licensing, in which the government is obliged to simplify the procedure of business licensing type with one-stop integrated service system or commonly called one stop service. It make them easier and faster and the cost incurred by small and medium business actors cheaper in taking care of licensing for their business activities, including in doing brand registration.

Besides, the role of government in educating the business actors of Micro Small and Medium Enterprises to be more knowledgeable in terms of licensing is very necessary, especially for business actors of Micro Small and Medium Enterprises in the countryside so that there is an awareness of the importance of brand registration. With the awareness of self-business actors of Micro Small and Medium Enterprises, it is expected to encourage them to be law-abiding by registering their brands and not using other well-known brands, therefore violation of Article 76 of Law Number 15 Year 2001 regarding this brand can be avoided.

In addition to the licensing, the government can also provide motivation to the business actors of Micro Small and Medium Enterprises by providing socialization of creativity development, this case the business actors of Small and Medium Enterprises can be more creative in producing products, by creating innovations on a product that is rarely in the market, avoiding the use of other brands that are more familiar before.

Empowerment of Micro Small and Medium Enterprises is in accordance with what is mandated in the Decree of the People's Consultative Assembly Number XVI / MPR-RI / 1998 on Political Economy in the framework of Economic Democracy, Micro, Small and Medium Enterprises where Small and Medium Micro Enterprises need to be empowered as an integral part of the economy of the people who have the position, the role, and the strategic potential to realize a more balanced, developing and equitable national economic structure.

Close

The insufficient knowledge in the field of law especially Law Number 15 of 2001 on the brand causes the business actors of Micro Small and Medium Enterprises do not know the importance of brand registration. In producing and marketing their products they use well-known brands. The existence of Article 76 of Law Number 15 Year 2001 regarding brands in Small and Medium Micro Enterprises is a barren law, because this Article can not be fully implemented in practice in the field.

Implementation of Article 76 of Law Number 15 Year 2001 concerning the trademarks conducted on Small and Medium Enterprises in the field has not been fully implemented. Those who are disadvantaged by the Small and Medium Micro Enterprise actors whose brands are used usually only use Article 76 of Law Number 15 Year 2001 as a tool for educating them to be more ethical in running their business activities by not using the famous brand owned by other parties.

The way of settlement done by the aggrieved party is by using alternative of dispute settlement, considering the characteristic of Micro Small Medium Business actors who mostly only come from low educated group. Consequently they do not understand well about law. Therefore the dispute settlement is not done through the court, but it uses a more out-of-court route to get settlement.

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THE CONSUMER PROTECTION OF STANDARD CLAUSE IN AIRCRAFT TICKETS REGARDING CANCELLATION AND / OR DELAY

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Abstract

Brand protection is an important thing, given the rapidly growing world of commerce today. For manufacturers, the brand is not only to distinguish its products with other similar company products, but it is also intended to build corporate image, especially in marketing. For consumers the Brand is used as a recognition of a good, high quality or safe to use due to the reputation of the brand. However, this brand protection when associated with the activities of Small Micro and Medium Enterprises is still experiencing difficulties, especially in the application of Article 76 of Law Number 15 Year 2001, where there are still many business actors of Small Micro and Medium Enterprises who do not know the importance of brand protection, so there are still many among those who violate the Article. The number of business actors of Small Micro and Medium Enterprises that commits a breach in the brand of the products it produces that is by putting the famous brands on their products become big questions about the socialization done about the importance of IPR, that is how the existence of Article 76 Undang-Of Law Number 15 Year 2001 concerning Brands in Small Micro and Medium Enterprises and how the obstacles in the implementation of Article 76 of Law Number 15 Year 2001 on Brand and its relation with these Enterprises and how to solve it. By using descriptive analytical research that is means to investigate an event to describe the actual situation as it is clearly and in detail through literature study and interviews to authorized officials. In this study obtained many violations of the Article which is caused by the previous business actors of Small Micro and Medium Enterprises to register on its brand to the Directorate General of IPR because of several obstacles. The constraints can come from the external or internal. In practice, Article 76 of Law Number 15 Year 2001 has not been widely used to resolve disputes between business actors of small micro and medium enterprises in terms of the use of well-known brands, where the parties prefer settlement methods with alternative dispute resolution. In addition to overcoming obstacles in the registration of brands conducted by Small Micro and Medium Enterprises, it is required the role of government in overcoming them. This is related to the task of the government in empowering the Small Micro and Medium Enterprises which contained in Law No. 20 of 2008 on Small Micro and Medium Enterprises.

Keywords: Review, Brand, Venture

Introduction

As we understand together that Small Micro and Medium Enterprises should be empowered in accordance with Law Number 20 Year 2008 regarding those Enterprises, since they are included in the economic field. Those Enterprises themselves have long been a role that are quite active in helping the economic development in Indonesia. Economic development itself is defined as a process that causes the income per capita population of a society increases. Where the increase in income per capita is a reflection of the emergence of improvements in the economic welfare of society. (Lia Amalia, 2007: 1)

The role of Small Micro and Medium Enterprises can be seen at a time when Indonesia experienced a quite difficult phase of monetary crisis, during the monetary crisis those Enterprises still survive even they have increased in development and look very clear in the economy of ndonesia.

Previously those Enterprises received less attention in Indonesia, but since the economic crisis hit Indonesia where many big businesses are down, most Small Micro and Medium Enterprises still survive and even the number is increasing. It was during this time of the monetary crisis that the most rapid and recoverable Small Micro and

Medium Enterprises of the economic crisis were compared with other businesses that had larger scales that had collapsed during that period.

According to data from the Minister of Cooperative and SME Affairs (Menegkop and UKM) and the Central Bureau of Statistics (BPS), there were about 39.7 million small micro enterprises (UMK) in 1997, with an average annual sales of less than Rp.1 billion per unit, or about 99.8 percent of the total business units that year. In 1998, when the economic crisis reached its worst point with the enormous negative impact on almost all sectors of the economy in Indonesia, many companies from all business scales went bankrupt or reduced the volume of activities drastically, the Small Micro and Medium Enterprises that still survive. (Sincerely, 2009: 47).

In the economic development in Indonesia Micro, Small and Medium Enterprises are always described as a sector that have a fairly active role for economic development in Indonesia, because most of the population of Indonesia has a low educational background and have a livelihood to meet the needs of life by doing small business activities in both traditional and modern sectors. The role of Micro and Small Medium Enterprises is an important part of every development plan.

The role of Micro and Small Medium Enterprises in national development is very large. This can be seen in the contribution provided by Small and Medium Micro Enterprises to employment, income distribution, rural economic development and as a driver of the increase in manufacturing / non-oil exports. This makes Small and Medium Micro Enterprises have important reasons why the government should develop the Small and Medium Micro Enterprises themselves.

Development of Small and Medium Enterprises needs to get considerable attention both from the government and from the people of Indonesia itself in order to further develop more competitive with other economic actors. Future government policy needs to be made more conducive for the growth and development of Micro Small and Medium Enterprises in Indonesia. The government needs to increase its role in empowering Small and Medium Micro Enterprises in addition to prioritizing mutually beneficial business partnerships between large entrepreneurs and small entrepreneurs and improving the quality of their human resources.

From the data shows that the Small and Medium Enterprises sector contributes greatly in the economy and in overcoming the problem of unemployment and labor in Indonesia. In addition, Micro Small and Medium Enterprises also contribute significantly to Gross Domestic Product (GDP), where more than half of our economy is supported by the production of Small and Medium Enterprises as much as 59.3%. (Puspa Kriselina, 2011)

Of the many Small and Medium Micro Enterprises that are developing in Indonesia and not just limited to the mentioned business fields, the existence of Micro Small and Medium Enterprises can not be separated from its association with Intellectual Property Rights (IPR). Starting from products generated from the activities of Small and Medium Micro Enterprises, the technology used, the design of each product produced, as well as the use of trademarks or service marks for marketing purposes.

In the trade of goods or services, the brand as one form of intellectual work has an important role for the smooth and increasing trade in goods or services. Brands have strategic and important value for both producers and consumers alike. For manufacturers, the brand not only distinguish its products with other similar company products, but it is also intended to build corporate image, especially in marketing. (Djumhana, 2006: 78).

A trademark for legal protection can be done by way of registered with the competent authority, then its registration may be made at the mark office located in the jurisdiction in which the company holding the mark is domiciled.

The way and procedures for filing a request for registration of marks in Indonesia have been regulated in the provisions of Law No. 15 of 2001 on marks. It also provides for renewal requests for renewal of registered trademarks, requests and recording, changes and redemptions of brand registration requests and inclusion of brand registration numbers.

Protection of trademarks registered at the Directorate General of IPR shall be for a period of 10 (ten) years and shall be retroactively effective from the date of receipt of the registration of a mark, as contained in article 28 of Act No. 5/1999. 15 of 2001 on Marks.

Protection of the brand is also intended as protection to the public, especially to the consumer so that they are not mistaken for a good quality goods or quality below the quality of the original goods, so as a guarantee of the

quality of a good. It is also intended as a safeguard against the producer as a legitimate owner of property rights, which is due to sales turnover due to the forgery and impersonation of its goods resulting in loss.

There are many rules that have been completely and firmly regulate the brand, but it can not be used as a guarantee of non-infringement, it is seen with the still widespread of counterfeit goods in the market.

A well-known brand usually can not be separated from acts of violation of IPR, such as counterfeiting, imitation, piggyback reputation and others. If the mark is legally registered, in the event of a violation of the rights of the mark, the rightful owner or right holder may file a lawsuit.

Problems

As for the main subject of discussion is the Study of Article 76 of Law Number 15 Year 2001 About Brand and Its Relationship With Small and Medium Micro Enterprises, this main issue will be described as the following issues: How are the constraints in the implementation of Article 76 of Law Number 15 Year 2001 About Brand And Its Relationship With Small and Medium Micro Enterprise and how to solve it?

Discussion

The Constraints Arising in Brand Registration by Small and Medium Micro Enterprises

Judging from the legal aspect of the brand problem becomes very important, in relation to the issue of the need for legal protection and legal certainty for the owner or the holder of the brand and the legal protection of the community as a consumer of a good or service that uses a brand to not be fooled by other brands, it can not be denied again that the problem of the use of famous brands by unauthorized parties, is still much happening in Indonesia and the fact is really realized by the government, but in practice a lot of obstacles.

Similarly, the registration of trades conducted by small and medium business actors also encountered obstacles in practice. Constraints that occur both from external and internal.

External obstacles in the registration of brands conducted by the business actors of Small and Medium Micro Enterprises are:

1. Non-cooperation between Small and Medium Enterprises with Large Enterprises concerning business activities. therefore Big Business has not maximally give access to the description of wide business activity to business actors of Small and Medium Micro Enterprises, which among others concerning the importance of registration of brand for production of Small and Medium Micro Enterprise themselves.

2. Insufficiency of intensive role by the government in socializing the importance of brand registration to Small and Medium Micro Enterprises, therefore there are only a small number of small and medium business actors assume that the registration of the brand is very important to protect the production. In this case the government insufficiencys in providing socialization programs such as seminars, workshops, counseling, and so forth. In addition, the government has not fully covered all activities of Small and Medium Enterprises in the regions, especially rural areas, so that small and medium micro enterprises located in rural areas are less informed and knowledgeable about the development of brand law.

While the obstacles in registering the brand by the business actors of Micro Small and Medium Enterprises that come from internal constraints are:

1. Culture and insufficiency of Understanding of IPR

   The number of Small and Medium Micro Business actors who do not register their trademarks with the Directorate General of Intellectual Property Rights become a culture that is continued by other Small and Medium Micro Business Actors. Small and Medium Micro Business actor has a mindset that does not change from time to time so as to become entrenched among the business actors of Small and Medium Micro Enterprises. Socialization that is less intensive causes not all actors of Micro Small and Medium Enterprises get clear information about the importance of the brand.

2. Insufficiency of Legal Awareness of Small and Medium Micro Enterprises Against the Impact of Unregistered Marks.

   In general, Small and Medium Micro Business actors come from a group of people who have low and inadequate education. In addition to formal education that insufficiency of knowledge, the knowledge about the law was also still low. So that Small and Medium Business actors do not know and understand

the importance of brand registration, and they are not aware of the impact of unregistered brand

3. Cost.

   So far, most small and medium business actors that have not registered their brands with the Directorate General of Intellectual Property Rights know that in registering the brand requires a fee, but basically not the cost on the registration of the brand which is the main reason of the business actors of Micro Small and Medium Enterprises who have not registered its brand.The main reason is the cost of developing the brand they have listed themselves. The registered trademarks must be developed to build their image (brand image) in order to be recognized by the public, in addition they must also create a research and development division of their brands to be able to produce products that are always up to date. For this reason small and medium businesses are more interested in using well-known brands than using their own brands that they have registered, because using a well-known brand brings substantial profits and from facts in the field proves it. From the consumer side also prefer goods and services that already have a brand on the market. So that small and medium business actors prefer to use well-known brand.

4. Long Bureaucracy

   Registration of brands that pass through several processes becomes one of the reasons why the business actors of Micro Small and Medium Enterprises have not registered their brands with the Directorate General of Intellectual Property Rights. Brand registration which takes approximately 12 months from the beginning of registration starting from substantive inspection until the announcement of whether the registered trademark is accepted or not, it is considered too long by the Small and Medium Micro Business actor. In addition, the issue of long time certificate issuance is also the reason. Requirements to be submitted are also deemed by Micro and Small Business Actors too complicated, thus making the registration process longer.The registration process takes long time because the business actors of Micro Small and Medium Enterprisesthemselves do not complete the requirements needed to register the brand. As regulated in Law Number 15 Year 2001 regarding the mark, the registration of the mark shall be started from applying for the registration of the mark to the Director General of IPR by enclosing the terms set forth by the Directorate General of Intellectual Property Rights, and shall be examined by the Director General of IPR concerning the completeness of the registration requirements. If all the requirements are completed then the Directorate General of Intellectual Property gives the date of receipt of the trademark application called filling date. Filling date is the date of commencement of the calculation of protection period for the registered trademark. Furthermore, after examination of administrative completeness of the application of the mark within thirty days from the date of receipt (filling date), the Directorate General of Intellectual Property Rights shall also conduct substantive examination of the request, whether the mark is filed by a good-faithed applicant or the mark fulfilling the requires the brand to be denied registration or the mark can not be registered. The substantive examination is completed within a maximum of nine months. After all inspections have been performed and the application is approved for registration within a maximum of ten days the Director General of IPR shall announce the request in the Official Gazette of Marks. The announcement lasted for three months. During the announcement period, each party may submit a written objection to the Directorate General of Intellectual Property Rights at the expense of which, if there is sufficient reason accompanied by evidence that the mark can not be registered or must be rejected. However, if there is no objection from certain parties, the Director General of HKI shall issue and grant the Mark Certificate to the applicant within thirty days from the date of the end of the announcement period. Bureaucracy that is too long in the registration of the brand becomes one of the reasons why the business actors of Micro Small and Medium Enterprises have not registered its brand.

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Besides, the role of government in educating the business actors of Micro Small and Medium Enterprises to be more knowledgeable in terms of licensing is very necessary, especially for business actors of Micro Small and Medium Enterprises in the countryside so that there is an awareness of the importance of brand registration. With the awareness of self-business actors of Micro Small and Medium Enterprises, it is expected to encourage them to be law-abiding by registering their brands and not using other well-known brands, therefore violation of Article 76 of Law Number 15 Year 2001 regarding this brand can be avoided.

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Empowerment of Micro Small and Medium Enterprises is in accordance with what is mandated in the Decree of the People's Consultative Assembly Number XVI / MPR-RI / 1998 on Political Economy in the framework of Economic Democracy, Micro, Small and Medium Enterprises where Small and Medium Micro Enterprises need to be empowered as an integral part of the economy of the people who have the position, the role, and the strategic potential to realize a more balanced, developing and equitable national economic structure.

Close

The insufficient knowledge in the field of law especially Law Number 15 of 2001 on the brand causes the business actors of Micro Small and Medium Enterprises do not know the importance of brand registration. In producing and marketing their products they use well-known brands. The existence of Article 76 of Law Number 15 Year 2001 regarding brands in Small and Medium Micro Enterprises is a barren law, because this Article can not be fully implemented in practice in the field.

Implementation of Article 76 of Law Number 15 Year 2001 concerning the trademarks conducted on Small and Medium Enterprises in the field has not been fully implemented. Those who are disadvantaged by the Small and Medium Micro Enterprise actors whose brands are used usually only use Article 76 of Law Number 15 Year 2001 as a tool for educating them to be more ethical in running their business activities by not using the famous brand owned by other parties.

The way of settlement done by the aggrieved party is by using alternative of dispute settlement, considering the characteristic of Micro Small Medium Business actors who mostly only come from low educated group. Consequently they do not understand well about law. Therefore the dispute settlement is not done through the court, but it uses a more out-of-court route to get settlement.

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THE CONSUMER PROTECTION AGAINST IMPORT COSMETICS OF FACE MASK "MASK NATURGO" WHICH DOES NOT INCLUDE INDONESIAN LABELS

Hadi Purnomo

Abstract

Cosmetics has become a staple for humanity, especially women who always want to look beautiful. The desire of a woman to always look pretty much exploited by business actors who have no good intend. Currently, many outstanding cosmetics that are not in accordance with the provisions (not include Indonesian language labels), especially in the Bengkok Market,Tanggerang city. The importance of information on goods and services should awaken business actors to respect the rights of consumers by producing quality of goods and / or services, safe to consume or use and follow applicable standards. Imported cosmetics that do not include Indonesian labels are currently traded in the domestic market. Regulations on the inclusion of Indonesian labels on goods are regulated in Article 2 paragraph (1) of Regulation of the Minister of Trade No. 73 / M-DAG / PER / 9/2015 on the Obligation of Labeling Indonesian Language On Goods. This study discusses how the business actors responsibility for the sale of imported cosmetics "Mask Naturgo" which does not include Indonesian language label and legal efforts that can be done by consumers for losses arising from the purchase of imported cosmetics "Mask Naturgo". This research uses empirical research method, that is a research activity by taking the community as an object of research in order to investigate the response or the level of public compliance with the law. The result of the research indicates that the business actor is responsible for the loss suffered by the consumer by compensating for the loss and the act of the business actor who shall be liable to administrative sanction. The consumer's attempt to settle the dispute to the perpetrator of the business is done peacefully or applying the lawsuit to the court pursuant to Article 45 paragraph (1) Law of the Republic of Indonesia Number 8 Year 1999 on Consumer Protection. In fact, there are no cases related to the use of "Mask Naturgo" submitted to BPSK, because the community is not aware that the products used are not in accordance with the provisions (no Indonesian language label).There is an effort that can be done if the consumer loses from the use of the product through institutions above. Relevant Government agencies should supervise products that do not include Indonesian language labels in the market peiodically, and business actors who violate the terms of use of Indonesian language label should be given sanctions that can provide a deterrent effect.

Keywords: consumer protection, imported cosmetics, Indonesian language labels

Introduction

Human desire to look beautiful and perfect, especially women is a natural thing. To achieve its goal, many women spend their money on going to salons, beauty clinics or buying cosmetic supplies. Along the era of free trade, various types of cosmetics in the market both from domestic and abroad with various uses. The desire to always look beautiful and perfect in all opportunities utilized by business actors who are not responsible for profit without regard to consumer rights, one of them by selling imported cosmetics that do not include labels in the Indonesian language.

Cosmetics is a medicine (ingredients) to beautify face, skin, hair, and so on like powder and lip rouge. While cosmetics is a science of beauty, ornamental sciences to beautify the face, skin and hair. Furthermore, according to the Federal Food and Cosmetic In Act (1958), cosmetics is a material or mixture of ingredients to be rubbed, pasted, poured, sprinkled or sprayed on the human body in order to cleanse, nourish, increase attractiveness and alter the appearance. The substance should not interfere with the skin or overall body health. The use of cosmetics should be adjusted to the life rules. For example it must be appropriate to skin type, skin color, climate, weather, usage time, age, and the amount of use so as not to cause undesirable effects.

Cosmetic products are growing from time to time, no longer a desire, but it has become a necessity that ultimately affects the growing cosmetics industry in the world, including in Indonesia. Indonesia is inseparable from the modern lifestyle today. This is evident from the high production of cosmetics in Indonesia, where from year to year sales increased and increased both domestic production cosmetics, as well as imported cosmetics. So many different beauty products that can be seen spread in the market with various packaging, shape, price, and its

usefulness. Various companies in the cosmetics sector stand to compete to meet the needs of women in this one field, so that the cosmetics market becomes a very profitable market to be targeted by the producers. Producers continue to compete to create new products. Not only overseas manufacturers, but also domestic producers who create cosmetics with various brands and types. With the current free market, many imported cosmetics circulating in Indonesia, they do not include Indonesian language label on its products.

The importance of accurate and complete information on goods and or services should awaken the business actor to respect the rights of consumers by producing quality goods and / or services, safe for consumption or use, following applicable standards and at reasonable prices. Imported cosmetics that do not include Indonesian labels are currently traded in the domestic market. Regulations on the inclusion of an Indonesian label on goods are provided for in Article 2 paragraph (1) of Regulation of the Minister of Trade No. 73 / M-DAG / PER / 9/2015 on the Obligation of Labeling Indonesian Language On Goods stating: "Business actors producing or importing goods for trading in the domestic market shall include Label in Indonesian language."

The lack of information on imported cosmetics, in this case is product information in the Indonesian language is one violation of consumer rights. Sufficient information for consumers to give their ability to make the right choice according to the will and the need. Here consumers become the business objectivity of the business actors through advertising, promotion, the way of sale, the application of standard agreements, which can harm consumers, even in extreme cases, consumers are subjected to fraud and attempted business actors (Nugroho,2008: 3). This is due to lack of consumer education and low awareness of rights and obligations (Siahaan, 2005: 14).

The position of consumers in general is still very weak in the field of economy, education, and bargaining power, therefore the law is badly needed to protect the interests of neglected consumers. An imported product to be traded into the territory of Indonesia must include an Indonesian language label in accordance with the established rules, the rule set forth in Article 2 paragraph 1 of Regulation of the Minister of Trade No. 73 / M-DAG / PER / 9/2015 on the Inclusion of Label In Indonesian On Goods. In trading a product business actors often perform various ways to sell products in large quantities, sometimes justifies the various ways that consumers are interested to buy it, although not in accordance with the requirements already set. One of the acts committed by business actors is cheating in trading imported cosmetics that do not include Indonesian language labels or still using a foreign language.

The label is like a window, a conscientious consumer can peek at a product from its label. From the information on the label, consumers can precisely determine the choice before buying and or consuming the product. Without clear information then frauds can occur (Shofie, 2000: 15). The obligation to translate the label into the Indonesian language relates to efforts to fulfill the consumer's right in obtaining clear information about a product. As regulated in Article 4 Sub-Article a of Law of the Republic of Indonesia Number 8 Year 1999 concerning Consumer Protection, that is the Right to comfort and safety in consuming goods and / or services.

Problems

Cosmetic safety is one of the important factors that must be considered in daily consumption. Based on the author's explanation, consumer protection should receive more attention, considering that the current of imported cosmetics has increased and the development of the globalized era in which the Indonesian economy has also been linked to the world economy. The public must be protected from safety and health from unqualified cosmetics and the disadvantages resulting from dishonest trade. In other words, it should be safe and worth consuming. Consumers are entitled to safety, comfort and safety in consuming a product. In this case cosmetics, where a cosmetic product should not be harmful if consumed, so that consumers are not harmed both physically and spiritually.

In the Law of the Republic of Indonesia Number 8 Year 1999 on Consumer Protection has been regulated on the obligation of business actors and distributors to include correct information about the right products circulating in the market. In Article 8 paragraph (1) letter i and letter j of the Law of the Republic of Indonesia Number 8 Year 1999 concerning Consumer Protection about the prohibition for business actor who said:

(1) Business actors shall be prohibited from producing and / or trading goods and / or services that:

i. do not put a label or make an explanation of goods containing the name of the goods, size, weight / net or

net contents, composition, rules of use, date of manufacture, side effects, name and address of business actor and other information for use which must be set ;

j. does not include any information and / or instructions on the use of goods in the Indonesian language in accordance with applicable laws and regulations.

However, these two rules are in fact not working properly. Because, there are still many imported cosmetics that still use foreign language or do not include an Indonesian language label on its products. Based on the above descriptions, the writer will discuss about how the responsibility of business actors to the sale of imported cosmetics "Mask Naturgo" which does not include Indonesian language label?

Discussion

Consumer protection law is one of legal development in Indonesia. Setting the provisions on consumer protection as an integrated concept are new things. In Indonesia, the desire to realize consumer protection measures has been around since the 1980s. However, these efforts can only be realized in 1999 with the issuance of Law of the Republic of Indonesia Number 8 Year 1999 on Consumer Protection, hereinafter referred to as UUPK. The promulgation of the Law of the Republic of Indonesia Number 8 on Consumer Protection, on April 20, 1999 gave a new spirit in consumer empowerment in Indonesia and placed consumer protection into the national legal system.

The Consumer Protection Act provides for general provisions covering basic notions of consumer protection to avoid misinterpretation. In addition, the Consumer Protection Act also explains the rights and obligations of consumers and business actors. Each individual shall be granted his/her respective rights and obligations including the rights and obligations of the user of the goods and / or services. Knowledge of consumer rights is essential so that people can act as critical and self-sustaining consumers.

The main factor that is the weakness of consumers is the level of consumer awareness of the rights which is still low. Consumers sometimes do not realize if their rights have been violated by business actors. This is an advantage for business actors because they are increasingly free to produce food that they want to sell because of the absence of complaints from consumers. Surely they are increasingly unconcerned about the health of consumers who want to consume the food they sell.

The parties concerned in the Law of the Republic of Indonesia Number 8 Year 1999 on Consumer Protection other than the consumer is the business actor. Business actors or producers are often interpreted as entrepreneurs who produce goods and services. Manufacturers are not only interpreted as the manufacturer / factory that produces products only, but also those associated with the delivery or circulation of products to the hands of consumers. Article 1 Sub-Article 3 of Law of the Republic of Indonesia Number 8 Year 1999 concerning Consumer Protection provides the understanding of business actors, as follows:

"Business actor is any individual or business entity, whether in the form of a legal entity or non-legal entity established and domiciled or conducting activities within the jurisdiction of the Republic of Indonesia, either alone or jointly through agreements on the conduct of business activities in various economic fields."

The definition of business actor in Article 1 number 3 of the Law of the Republic of Indonesia Number 8 Year 1999 on Consumer Protection is quite wide because it includes wholesalers, retailers and so forth. Understanding business actors are broad meaningful, will facilitate consumers demand compensation.

In the modern era today many business actors trade imported cosmetics especially facial Mask of Naturgo face masks, thus the public as consumers should be selective in choosing imported cosmetics products. In this regard not all cosmetics manufacturers make their products take into consideration the standards and quality of their products while this is the most important consideration of a product, that is the level of security.

In addition, the problems that arise in the society that is the number of outstanding imported cosmetics products that are not registered in the Food and Drug Supervisory Agency, meaning that the cosmetic products have not passed the inspection stage by the authorized party, the unregistered product may contain hazardous materials which may cause harm to consumers who use it, both the loss of material and psychological.

Responsibility of Business Actor

According to Indonesian dictionary the definition of responsibility is the state which must bear all things. Business actors in running their business activities often forget that cause harm to consumers. Business actors as producers of these products should know about every process of production until the product is ready to be marketed, making it necessary to be burdened with a responsibility for each product they have marketed.

Responsibility means the embodiment of the awareness of duty, that every human being is burdened with responsibility. Business actors who are legally responsible for the sale of imported "Mask Naturgo" cosmetic who do not include Indonesian language labels may be subject to sanctions in accordance with their contrary or contradictory acts. Seeing the number of imported cosmetics circulating in Indonesia, researchers found an imported cosmetics product Mask Naturgo face mask. Japanese facial mask that has been in circulation for many years in the domestic area and widely used by the middle class people to low class. The product is sold at Rp 30.000, - (thirty thousand rupiah), is one of the popular products for its cheap price but has the property to lift dead skin, pimples and blackheads on the face. In just a few minutes the consumer is able to feel the changes to his face.

As Naturgo facial mask is known, there is a lot of demand for the goods. The number of consumers attracts business actors to commit fraud in the product, such as not mentioning the Indonesian language label on the product. So consumers do not get clear information about the product because it still uses a foreign language. In practice, it can be described that the consumer has not received the right, correct, and honest information rights regarding the condition and guarantee of goods and / or services due to the unavailability of adequate information for the consumer in the Indonesian language so that the consumer has difficulties in reading the information contained on the label and could have a false image of the imported cosmetics products. Correct and responsible information is a basic requirement before the consumer takes a decision to purchase and in the case of the importer's information has violated the labeling requirement by not mentioning the Indonesian language label.

The results of the authors' research found evidence of violations on cosmetic products of Naturgo facial mask which does notinclude label in Indonesian language on its products. In the Law of the Republic of Indonesia Number 8 Year 1999 on Consumer Protection, business actors are required to have good intentions in conducting their business activities, while for consumers are required to have good intention in buying goods and / or service transactions. Providing true and understandable information to a product is the responsibility of the business actor. If there are consumers who feel harmed then the consumer has the right to hold accountable from the business actor that harms him. Consumers who suffer losses due to cosmetic products of Naturgo face mask, which is imported cosmetics from Japan, may hold accountable to the importer if the product is imported by an authorized importer, in accordance with the provisions of Article 21 paragraph (1) of the Law of the Republic of Indonesia Number 8 Year 1999 about Consumer Protection that the importer of goods is responsible as a maker of imported goods, if the importation of goods is not done by agents or representatives of foreign producers. So, if in fact the product is causing harm to the consumer, then the consumer may hold accountable to the importer for any losses caused by consuming the product. However, if the importer of the goods is not an authorized agent or importer from the manufacturer in Japan, then the consumer may hold accountable to the business actor who trades or where the consumer purchases the product.

In Article 19 of the Law of the Republic of Indonesia Number 8 Year 1999 concerning Consumer Protection, the responsibility of business actors is to provide compensation to consumers as a result of damage, pollution and / or consume goods or services produced or traded by the business actor concerned. The compensation is not always a payment of money, but may be a replacement of goods and / or services of a similar or equivalent value or in the form of health care and / or compensation in accordance with Article 19 paragraph (2) of the Law of the Republic of Indonesia Number 8 Year 1999 on Consumer Protection. Taking into account the provisions, the responsibility of business actors to provide compensation to consumers can be a refund until health care. The above "can" indicates that there are other forms of compensation that the consumer may bring to the business actor, such as the profits to be gained in the absence of an accident, loss of work or income temporarily or for life due to physical loss suffered. While in the provisions of Article 19 paragraph (2) of Law of the Republic of Indonesia Number 8 Year 1999 on Consumer Protection actually has a weakness that is detrimental to consumers,

especially in the case of consumers suffering from an illness. Under these terms, consumers only get one of the forms of use of losses, namely compensation for the price of goods or only in the form of health care. Though consumers have suffered losses not only losses on the price of goods, but also the losses arising from health care costs. It shall therefore stipulate that the compensation shall be a return of money and / or the replacement of goods or services of equivalent value and / or health care and / or compensation shall be provided at the same time to the consumer. This means, the formula between the words "equivalent value" or "health care" no longer uses the word "or" but "and / or", so if the loss caused the consumer's illness, then in addition to receiving a replacement the price of goods also received health care.

In another part of the Law of the Republic of Indonesia Number 8 Year 1999 on Consumer Protection, it is mentioned that the consumer is entitled to receive compensation up to Rp 200,000,000 (two hundred million rupiahs) through administrative sanction. Sanctions to business actors who violate the provisions of cosmetic products (do not include Indonesian language label), it can be given legal sanctions in the form of administrative sanctions. Administrative sanctions are not aimed at consumers in general, but rather to entrepreneurs, whether producers or distributors of the products. Administrative sanctions relate to licenses granted by the government to such employers / dealers. In the event of a violation, such license may be unilaterally revoked by the Government. The sanction is the same as the responsibility of the business actor to the violation of the traded goods and to indemnify the consumer. Therefore, the violation of business actors against cosmetic label provisions may be subject to administrative sanctions. Administrative sanctions certainly do not provide a deterrent effect to business actors, because the sanctions are very light, consequently business actors can easily repeat the mistake by trading imported cosmetics products that do not include Indonesian language label in the domestic market. Meant on sanctions is a force for consumers to hold accountable for the harm suffered in the effort to provide legal protection to the consumer society.

The results of the interview with the author of the business actors, from 5 (five) business actors who trade Mask Naturgo, only 2 (two) who understand the consequences and are willing to take responsibility for losses suffered by consumers. While 3 (three) other business actors feel irresponsible for consumer loss. Meanwhile, the Office of Industry and Trade of Tanggerang City, BPOM and related government agencies, continues to supervise optimally to reduce the rampant circulation of imported cosmetics that do not include Indonesian language label. Supervision is done by conducting a sudden inspection in a period of 3 (three) months and on holidays. In the event of a sudden inspection of non-compliant and non-qualified but traded goods, the Tanggerang City Office of Industry and Commerce provides a warning to the business actor who trades Mask Naturgo imported cosmetic products and withdraws the product from circulation. Furthermore, if the first warning until the third warning of business actors still trade the product then the Office of Industry and Trade of Tanggerang City in collaboration with the local police to investigate and report the business actor. To protect the consumers of the Office of Industry and Trade of Tangerang City, advise consumers to properly and correctly sort cosmetic products, especially imported cosmetics products to be purchased. First, to note is the product registration code. If, the product registration number is not listed in the product label it is advised to the consumer not to purchase the product. Second, check the marketing authorization. Third, the consumer must check the registration number and product distribution license through the website of POM.

According to the authors, the role of the Office of Industry and Commerce of Tangerang City to consumers to prevent the occurrence of losses due to the purchase of imported cosmetics of Naturgo mask that does not include Indonesian language label, there is less imformation of socialization. However, in its implementation often information on the implementation of sudden inspection has been known by business actors, so that at the time of sudden inspection cosmetics store closed. In addition, the rise of Naturgo face mask trade according to the Food and Drug Supervisory Agency is caused by the number of black ports that do not have supervisory officers, so that the product is very easy to enter the territory of Indonesia and there are also port officers who cooperate to pass the product not complying with the terms.Therefore, the government should be responsible for the guidance and supervision of the implementation of consumer protection, to ensure the acquisition of consumer rights.

In carrying out good governmental functions in protecting consumers, the government should not only make legislation only. but also socialize it so that consumers can better understand about its position. The role of

government as supervisor is an important function to protect the public from the dangers of imported cosmetics that do not include Indonesian language labels. Without good supervision, it is feared that consumers will not be protected from business fraud.

Close

Based on the result and discussion, it can be concluded that the business actor is responsible for the loss suffered by the consumer if the business actor trades the product that does not include the illegally obtained Indonesian language label according to Article 19 paragraph (1) UUPK.

Legal effort that can be done by the consumer in case of loss can be done by 2 (two) ways that is through court (litigation) or outside court (non litigation) according to Article 45 Aayat (1) UUPK.

In order to be monitored regularly from the Food and Drug Supervisory Agency, the Office of Industry and Commerce of Tangerang City and related government agencies, to oversee products that do not include Indonesian language labels in the market. Business actors who violate the terms of use of Indonesian language label should be given sanctions that can provide a deterrent effect. It is also necessary to socialize to the public about imported cosmetics products in accordance with the provisions (mandatory to include Indonesian language labels).

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FIDUCIARY GUARANTEE IN THE PRACTICE OF CREDITING THROUGH BANK AND IMPLEMENTATION FIDUCIARY WARRANTIES RELATED TO THE CREDIT PROCESS

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Abstract

Often with the rate of growth of the community then the government in 1999 issued Law No. 42 of 1999 on Fiduciary. This law is intended to provide convenience in terms of collateral to borrowing and borrowing money, both to the debtor and creditor as well as provide legal certainty.
Guarantee is known to be two types, namely in general and in particular, whereas it can still be further distinguished as material guarantees and guarantees of debt liens. The known material guarantees in First Law, collateral in the form of mortgages regulated in Article 1150-1160 of the Civil Code. Mortgages, in accordance with the definition given in the Civil Code, constitute guarantees in the form of movable material that the implementation is carried out by the transfer of material material (which is pledged) into the power of the creditor. Secondly, is a mortgage regulated in Article 1162-1178 of Civil Code. In mortgages the collateral is a fixed item made with a mortgage act. Third, it is the right of liability as stipulated in Law no. 4 of 1996 which regulates the guarantee of certain land rights and materials that are considered to be attached and allocated for joint use of the land parcels with the rights to land that can be secured by liens. Fourth, fiduciary regulated in Law no. 42 of 1999 on fiduciary guarantee. Before the Law no. 42 Year 1999, fiduciary existence as a guarantee institution is recognized based on jurisprudence.
In accordance with the results of research and normative studies of the author, the fiduciary guarantee system is still experiencing obstacles such as: (a) Problems Around Basic Trust:
The delivery of a trust based on that trust is referred to as fiduciary eigendom overdracht, (b) Presence of a deliberate act unlawful by one party: both the giver and the recipient of the guarantee, especially the bad faith of the recipient of the guarantee not to register, then how the legal certainty in the settlement of the case has not been firm regulated, (c) Associated with Individual Guarantees: The Fiduciary Receiver does not directly possess the object of fiduciary assurances submitted by the Fiduciary Giver, so fiduciary assurance is a guarantee theory.

Keywords : Fiduciary, Credit, Guarantee

A. INTRODUCTION

Under the law of guarantee, two types of guarantees are general guarantees and special guarantees, whereas special collateral can still be differentiated into guaranteed material and guarantee of the person underwriting the debt. General guarantees and debt guarantees do not entirely provide certainty about debt repayment, since the creditor does not have a precedent right so that the creditor's position remains as a concurrent creditor to the other creditors. It is only in material security that the creditor has the right of priority so that he is domiciled as a privileged creditor who can take the first repayment of the guarantee goods without regard to the other creditors.

The enactment of Law Number 42 Year 1999 on Fiduciary Guarantee as of September 30, 1999, is intended as a strong legal basis for the binding of tangible and intangible moving objects and immovable objects which can not be burdened by the Deposit Rights, as guarantee on certain debt repayment. Coverage of the provisions of this law both in terms of materiality and in terms of transactions to be guaranteed is very broad. The goal is to be able to meet the needs of a fast growing and increasingly complex business world.

B. PROBLEMS DEVELOPED IN THIS RESEARCH IS PREAMBLE AS FOLLOWS:

1. What is the implementation of the regulation on fiduciary security in practice, especially regarding the practice of crediting through banks ?.
2. What are the constraints found in the implementation of fiduciary security related to the crediting process ?.

C. ANALYSIS DATA

Analytical techniques are used with normative descriptive approach (finding the right facts) and combined with facts and facts found in the field mainly related to the application of rules in the field of fiduciary assurance in banking practice.

Fiduciary is the right to transfer of property rights as referred to in Article 584 Civil Code. However, the transfer of such rights is solely intended to be granting a guarantee without giving all the legal consequences as it applies to normal transfer of property rights.

D. RESEARCH METHODS

The research method used is normative research method accompanied by field research on fiduciary guarantee in lending. Furthermore, the research method is used in accordance with the formulation of the problem that became the focus of this research, namely the issue of guarantee of fiduciary giving in banking practice. This normative research method opens up opportunities for a juridical analytical approach to the exclusion of justice in the fiduciary guarantee system.

1. Nature of Research: This research is juridical normative with the type of legal research that takes the data library. The normative juridical study, which is the main research in this study, is a literary legal research. In this research the literature is the basic data of research classified as secondary data.
2. Types of Data: This research is juridical normative, therefore using secondary data consisting of:
   a. Primary legal material, ie library materials containing new or updated scientific knowledge or new understanding of known facts or about an idea or idea. This primary legal material includes legislation governing fiduciary security.
   b. Secondary law materials, ie library materials containing information about primary materials, consist of: literature on fiduciary security.
   c. Tertiary legal material, which is a supporting legal material that gives guidance on primary and secondary legal materials or also known by the name of reference or reference law field, among others: Dictionary of Law.

E. RESEARCH AND DISCUSSION

1. Mechanism of Fiduciary Guarantee In Credit Lending Practices Through Bank.

The results of the research in several banks are indeed different from other agreements because the fiduciary agreement is an agreement of the principal agreement of credit agreement. Usually in principal agreements such as loan borrowing, loan replacement, accounts payable, and credit agreements are always followed by a follow-up agreement in the form of a guarantee agreement.

In fiduciary mechanisms and crediting process is simpler compared to banking credit. The mechanism of crediting focuses only on the two loading mechanisms and registration mechanisms, since in principle fiduciary agreements are based solely on trust, so prospective recipients of credit are not overloaded by technical aspects such as general credit agreements such as.

a. The First Phase of Loading In accordance with Articles 5, 6, 7, emphasizing the mechanism of imposition that both parties agree to come to the notary to make a fiduciary agreement. The loading stage is the agreement of both parties to bind themselves in the fiduciary agreement.
b. Second Stage, Determination of Guaranteed Debt, both parties come to the notary, the notary party will see and determine the guaranteed debt as stipulated in the fiduciary legislation no. 42 of 1999.

c. Third Phase, namely the Granting of Fiduciary Guarantee Certificate By granting Fiduciary Guaranty Act, both parties have been bound by the guarantee agreement of fiduciary guarantee. Aspects contained in the agreement in accordance with Article 6 are:
   1) Identification of giver and recipient of fiduciary guarantee.
   2) Data of fiduciary guaranteed principal agreement.
   3) The value of the guarantor; and
   4) The value of the object being the object of fiduciary assurance.

d. Fourth Phase, namely Fiduciary Registration To further reinforce the registration process fiduciary guarantee, the government issued Government Regulation No. 86 of 2000 on the procedure of Fiduciary Guarantee Registration contained in Article 2.
   1) Application for registration of Fiduciary Guarantee shall be submitted to the Minister.
   2) The application for registration as referred to in paragraph (1) shall be submitted in writing in the Indonesian language through the Office by the Fiduciary Receiver, the proxy or his representative by enclosing the registration statement of the Fiduciary Guarantee.
   3) Application for registration of Fiduciary Guarantee as referred to in paragraph (2) shall be subject to a fee whose amount is stipulated by a separate Government Regulation concerning non-tax State revenue.
   4) The application for registration of Fiduciary Security as referred to in paragraph (2) shall be completed with: a.
      a). Copy of notarial deed concerning the imposition of Fiduciary Guarantee.
      b). power of attorney or letter of delegation of authority to conduct registration of Fiduciary Guarantee.
      c). Proof of payment of registration fee of Fiduciary Guarantee as referred to in paragraph (3).
   5) Proof of Goods Ownership.

Proof of ownership of goods is very important, especially the guaranteed goods through fiduciary. Besides, proof of ownership of goods must be submitted and controlled by the bank, it is to avoid the goods are re-guaranteed to other banks. As for the commonly mentioned in the credit agreement agreement other than the issue of collateral goods, among others are:

a). Credit facility, amount of credit.
b). Purpose of credit use and credit period.
c). Interest on credit, credit provision.
d). Costs.
e). Payment of credit.
f). The termination of the agreement
g). Guarantee and Insurance, among others, contain provisions that will be made and signed fiducia agreement separately which is an inseparable part and constitutes a unity with the Credit Agreement; Warranties will be insured with Banker's Clause terms,
h). Borrower's negligence / wanprestasi
i). Etc
j). Domicile
6) Regulation on the Rights and Responsibilities of each Party.
7) Determination of Standard Terms of Credit Agreement.
8) Entry of Preferential Right to Other Creditor.
9) Legal Certainty in Fiduciary Security.

2. Obstacles found in the implementation of fiduciary collateral related to crediting process.

The results of the analysis that the authors do normatively against the fiduciary guarantee system since the enactment of Law No. 42 of 1999, indicate there are some points that become weakness of the Act. The points that become weaknesses of the Fiduciary Guarantee Act are the findings of the authors in this study. These points become an obstacle in the fiduciary guarantee system especially in practice. As for the constraints that is :

a. Problems Around Basic Trust

Fiduciary Guaranty is a material right which has a right that is prior to the other Creditor to take the settlement

of its receivables from the execution of the fiduciary goods, if the Fiduciary or Debtor has defaulted or has an appointment.

1) Legal certainty on the guarantee object if not registered, considering the guarantee goods remain on the debtor.

2) Absence of publicity; with the non-registration of fiduciary fiduciary objects being fiduciary guarantees, it would be detrimental to a third party, since a third party does not know whether the fiduciary security object is being encumbered with a fiduciary security object or not.

3) Recurrence of fiduciary; in the absence of registration of Fiduciary warranties, may result in a re-fiduciary.

b. Unlawful Actions Among the Parties.

Any form of negligence or intent to the imposition of fiduciary fiduciary objects and registration of fiduciary guarantee whether caused by Fiduciary, Fiduciary Receiver or Notary may be deemed to be unlawful. Such negligence or intent may occur, because the Fiduciary Guarantee Act does not specify more details until when the fiduciary guarantee registration must be registered, after the Fiduciary and Fiduciary Receiver sign the deed of Fiduciary Guarantee before the Notary.

c. Associated with Individual Guarantee.

The law of guarantee consists of several principles. Mariam Darus Badrulzaman said that the principles of legal guarantees are as follows: 1. Pancasila as the philosophy / idealist principle, 2. The 1945 Constitution as constitutional principle, 3. TAP MPR as political principle, 4. Act as the operational principle. According to Lawrence M. Friedmann, a legal system consists of three elements, namely structure, substance and legal culture.

d. Underwriting and Intangible Assurance.

In Article 3 expressly stipulates that only mobile goods can be guaranteed by Fiduciary guarantee, while immovable goods can not, as regulated in Article 3 of the Act:

1) Hak Tanggungan yang berkaitan dengan tanah dan bangunan sepanjang peraturan perundang-undangan yang berlaku menentukan jaminan atas benda-benda tersebut wajib didaftar;

2) Hipotek atas kapal yang terdaftar dengan isi kotor berukuran 20 (dua puluh) M3 atau lebih;

3) Hipotek atas pesawat terbang; dan

4) Gadai.

Fiduciary as the legal basis is: 1. Article 5 paragraph 1 of the 1945 Constitution; 2. Article 20 paragraph 1 of the 1945 Constitution, and; 3. Article 33 of the 1945 Constitution; Fiduciary legal basis among others is contained in:

a. Law Number 42 Year 1999 concerning Fiduciary Security.

b. Government Regulation of the Republic of Indonesia Number 86 Year 2000 regarding Procedures for Registration of Fiduciary Guarantee and Fiduciary Guarantee Deed Making Cost.

c. Government Regulation of the Republic of Indonesia Number 87 Year 2000 regarding Amendment to Government Regulation Number 26 Year 1999 regarding Tariff of Non Tax State Revenue Applicable to Department of Justice.

d. Presidential Decree No. 139/2000 on the Establishment of Fiduciary Registration Office in every Provincial Capital of the Territory of the Republic of Indonesia dated September 30, 2000.

e. Decree of the Minister of Justice and Human Rights of the Republic of Indonesia No. M.01.UM.01.06 of 2000 on Form Forms and Procedure for Registration of Fiduciary Guarantee.

f. Decree of the Minister of Justice and Human Rights of the Republic of Indonesia No. M.08.PR.07.01 of 2000 on the Opening of Fiduciary Registration Office.

g. Decree of the Minister of Justice and Human Rights of the Republic of Indonesia No. M.03.PR.07.10 of 2000 on the Opening of Fiduciary Registration Office throughout the Regional Office of the Department of Justice and Human Rights of the Republic of Indonesia.

h. Decree of the Minister of Justice and Human Rights of the Republic of Indonesia No. M.02.PR.07.10 of 2000 on Amendment to Decree of the Minister of Justice and Human Rights of the Republic of Indonesia No. M.03. PR.07.10 of 2000 on the Opening of Fiduciary Registration Office throughout the Regional Office of the

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i. Circular Letter of the Director General of General Law Administration of the Department of Justice and Human Rights of the Republic of Indonesia No. C.UM.01. 10-11 on Counting of Adjustment Period and Fiduciary Agreement Registration.

j. Circular Letter of the Director General of General Law Administration of the Department of Justice and Human Rights of the Republic of Indonesia No. C.UM.01.10-11 concerning the Fiduciary Registration Standard.

1. CONCLUSION

1. The regulation of fiduciary security in crediting practices is somewhat different from other rather complicated underwriting systems. The fiduciary guarantee system is somewhat easy because the guaranteed trust and usually guaranteed items remain and can be enjoyed by the guarantor. In fiduciary mechanisms and crediting process is simpler compared to banking credit. The crediting mechanism focuses only on two mechanisms of loading and enrollment mechanisms, since in principle fiduciary agreements are based solely on trust, so prospective recipients of credit are not overloaded by technical aspects as are general credit agreements such as 5C. That is why it is in addition to easy but risky if one of the parties is not well-tempered.

2. According to the results of research and normative review of the author, it is true that the fiduciary guarantee system is still experiencing obstacles such as: (a) the problem around the base of trust: the surrender of guarantee based on trust is referred to as fiduciare eigendom overdracht. The basis of trust for a good-willed person is certainly not a problem, but what about bad-tempered people, there must be a proper oversight mechanism from the government, (b) a deliberate act unlawful by one party; both the giver and the recipient of the guarantee are in particular the bad faith of the recipient of the guarantee not to register, then the legal certainty in the settlement of the case has not been firmly regulated, (c) related to the personal guarantee: the indirect fiduciary receiver has the object of fiduciary guarantee submitted by the Fiduciary Giver, so fiduciary assurance is a guarantee theory. What if one party is bad-minded, of course must firmly limit the setting of the faith bad with legal certainty.

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A. LEGISLATION

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- Regulation of the Government of the Republic of Indonesia Number 86 of 2000 concerning Procedures for Registration of Fiduciary Guarantee and the Cost of Making Fiduciary Collateral Deed.
- Government Regulation No. 87/2000 on the amendment to Government Regulation No. 26/1999 on tariffs on types of non-tax state revenues applicable to the Department of Justice.
- Presidential Decree No. 139/2000 on the Establishment of Fiduciary Registration Offices in every Provincial Capital of the Territory of the Republic of Indonesia dated September 30, 2000.
- Decree of the Minister of Justice and Human Rights of the Republic of Indonesia No. M.01.UM.01.06 of 2000 on Form Forms and Procedures for Registration of Fiduciary Guarantee.

THE JUDICIAL REVIEW OF ROLES AND RESPONSIBILITY OF INSURANCE AGENTS BY LAW NUMBER 2 OF 1992 CONCERNING INSURANCE

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Abstract

Insurance Agent is a legal entity which is formed in order to meet the needs of the community of a board. It can assist them in buying insurance products and accompanying in the event of a claim, where the insured people do not know much with the conditions and terms of the insurance policy and on the other side the Insurance Company understand them well. The main problem is how the legal relationship of insurance agents to Insurers in the agreement of Insurance, How the roles and responsibilities of insurance agents according to Act No. 2 of 1992 on insurance. The research objective is to know the legal relationship between Insurance Agent and Insurer (Insurance Company) in accordance with the agreement of agency which is agreed between the insurer and the insured so as to be able to see the limits of rights and obligations of the parties, to know the roles and restrictions, obstacles, and efforts of the law that the insurance agent did against the claim filing and the closing of the insured policy. This study using normative research methods or research methods of law literature which is a method or way that is used in legal research conducted by examining existing library materials. In this legal research the author explains objectively on the basis of law as well as the understanding and implementation and responsibility of insurance agents. Secondary law materials through literature data and other literature such as newspapers, law journals related to the writing of this study, the primary legal materials obtained by obtaining legislation include the Book of Civil Law, the Book of Commercial Law, Law-Indonesian Insurance No. 2 of 1992, Government Regulation No. 73 of 1992 on the Implementation of Insurance Business, along with other laws and regulations. Methods of data analysis use qualitative methods which find answers that are accounted for by analyzing the applicable legal principles as well as legislation that regulates insurance laws and agreements. To reduce the agent's actions to the detriment of the company and the policy holder, and in case of default, the insurance agent company should notify the Policy holder and the Public that the agent is not bound by the insurance agent company agreement, and has no control over claims of the insured who is being handled. So the policy holder is not fooled if the agent is doing the activities as an agent. Therefore it does not harm either the Insurance Company or the party from the Policy Holder (Insured). His role as an insurance marketing service includes risk management services, provides a review of the customer's business risk profile and also provides advice on the best insurance conditions for customers.

Keywords: juridical review, responsibility, insurance agent.

Introduction

The basic pattern of National Development lays the foundations for the development of the nation and realize the national development. In the archetype also emphasized that the national development is essentially the development of the whole Indonesian people and the development of all the people of Indonesia.

The development of the Indonesian nation encompasses various fields of life including idiology, politics, economics, socio-culture and defense of security. In today's global era, the field of economy has placed itself in rapid development, along with the development of science and technology. Development progress is done by using progress in the field of science and technology which is shown to improve the welfare of society (Sudarto, 1983: 27-28). Therefore the development forces people either individually or in groups to always compete in relation tobe alive and life, especially in economic activities which are increasingly tight and competitive nowadays.

Human life and activity, in essence contains various things that indicate the essential nature of life itself. The essential nature here is the "impermanent" nature that always accompanies life and activity in general. The impermanent nature always involves and accompanies human beings, either individually, or in groups or within groups of people in carrying out activities (Hartono, 2001: 2).

One's soul and health can be insured for the purposes of the person concerned, either for his life or for the time specified in the agreement. The existence of the fact that every day people are always faced with the risk of falling ill or accident and should be hospitalized. While the cost of medical treatment to the hospital increasingly expensive which is so difficult to reach by people with regular income. So the need for the type of insurance that can cover the risk of financial loss due to the high cost of this treatment becomes increasingly large.

Everyone can insure himself, life insurance and health can even be held for the benefit of third parties. Life and health insurance may be held for life or for a specified period of time stipulated in the agreement. The mutual reciprocal parties are called the insurer and the insured. Insurers by receiving premiums to pay, without mentioning to the person appointed as the connoisseur. This is to avoid or minimize the possibility of unexpected, therefore if they do not delegate the risk to the insurance company it will be much more likely losses suffered in his personal life because of human life from birth to death is always surrounded by a risk which will suffer a variety loss as a result of an unexpected event.

One of the subsystems contained in the Health System is the Health Financing Subsystem, so in order to fully understand the Health System, it is necessary to understand also about the Health Financing Subsystem. The position, meaning and the essence of health is the right for all citizens and investment for the nation for today and the future, therefore of course all citizens are entitled to health, especially for the community. So it needs of a system that regulates the implementation for the efforts of the fulfillment of the right of citizens to stay healthy, with priority on health services for the community (Azrul, 1999: 26).

The Government in viewing the health insurance services mandated in the 1945 Constitution article 28h and Article 34 paragraph (2) and the Law No. 40 of 2004 on National Social Security System has mandated about social security system that aims to provide assurance of the fulfillment of basic needs decent living for each participant and / or family member. Social security is one form of social protection to ensure that all people are satisfied with their basic needs.

Since 2005, the Government of Indonesia has developed the Askeskin program which is then converted into Jamkesmas6 program. This change is intended as an option to organize the health service subsystem in line with the health financing subsystem. This health insurance system will encourage fundamental changes such as standardization of services, tariff standardization, formulary arrangement and rational drug use, which impact on quality control and cost control.

Basically health insurance is a program with risk sharing in the form of premiums with the capitalist system. The health insurance system in Indonesia has not been able to produce output in the past where people are increasingly aware of the rights of information, service transparency and health accountability. This is worsened by the characteristics of health services that tend to experience asymmetric phenomenon of information that is the imbalance of health service information to the needs of the community so that this reality as one of the factors that trigger the increase in the cost of health services.

In addition, in the Indonesian society, the problem that often arises is how an insurance follow up the claims arising from the contracted coverage in the policy between the insurer and the insured, thus raising concerns among the public about the responsibilities of the insurance companies in Indonesia today (Azrul, 1999: 32). That's why the present Insurance Agent to be able to help the community in this case is called the insured in the problem of insurance claims settlement and insurance closure.

Problems

Insurance Agent is a legal entity formed in order to meet the needs of the community of a body that can assist them in buying insurance products and accompanying in the event of a claim, where the insured people are very lay with the conditions and terms of the insurance policy and on the other side the Insurance Company is really understand . So the Government feels the need to establish Insurance Agent through the regulation of Insurance Law no. 2 of 1992, with the aim of protecting the interests of the wider community. Functions and the role of Insurance Agents in other parts of the world have been highly developed and almost all insurance transactions through Insurance Agents. As to what will be discussed in this paper is about how the legal relationship insurance agent against the Insurer in the insurance agreement ?

Discussion

Insurance

Insurance in Dutch is called "Verzekering" or also means coverage. The term assurantie in Indonesiakan becomes insurance. The term insurance is more widely known and used in the practice of everyday corporate coverage. Insurance is the Agreement. Confirmation that the insurance is an agreement made between the party in charge with the insured, regulated in Article 246 Book of Commercial Law (KUHD). (Subekti, 2008: 77)

Juridically, the definition of insurance or coverage under Article 246 of the Commercial Code (KUHD) is: "Insurance or coverage is an agreement by which an insurer binds himself to an insured, accepting a premium, to provide reimbursement to him for a loss , damage or loss of expected profits, which may be suffered for an event that is not certain "(Subekti, 2008: 77)

Insurance is also can be equated with non-bank financial institutions that are expected to support the success of national development. Affirmation of insurance from a legal point of view, that insurance is an agreement made between the party responsible with the insured, regulated in Article 246 Book of Commercial Law (KUHD).

An Insurance Brokerage Company is a company providing intermediary services in insurance coverage and handling the settlement of Insurance compensation by acting for the interests of the insured13. Based on Act No. 2 of 1992 concerning Insurance Business.

Insurers, verzekeraar, asuradur, guarantor are those with a premium, promising to indemnify or pay an agreed amount of money, in the event of unforeseen events, resulting in a loss to the insured, so the Insurer is subject to (opposite of), the insured. And who usually becomes the insurer is a business entity that takes profit and loss in its actions (Pangaribuan, 1980: 8).

An insurance agreement is an agreement on the condition of good faith that is perfect, the intention is that the insurance agreement is an agreement with the state of agreement which can be reached / negotiation with each position which has the same knowledge of the facts, with the appraisal of his review to obtain the same facts, which is free from hidden defects (Subekti, 1963: 4).

Insurance agent

An agent is a person or a company representing the other party (so-called principal) to conduct business activities (eg selling products) for and on behalf of the principal to third parties within a particular marketing area, where in return the agent will earn a commission.

The authority of an agent primarily lies in the authority granted to him by the agency contract. But his power to bind principals transcends this contractual authority. Insurance Agent has 3 (three) authority which is :

1. The express authority stated in the contract with his principal in this case is the insurance company.
2. The implied authority which, by law, the agent obtains the authority which is reasonably considered publicly owned.
3. Outwardly authority is the authority that has been executed by the agent that is silenced by the Company means that the insurance company failed to prohibit the action of the agent.

The actions of an insurance agent within the scope of such authority, implied and outwardly are considered to be the actions of the insurer. The law sees the agent and the insurance company are the same and one. So the insurance company is legally responsible for the actions and statements of its agent while he performs his duties, even if the agent makes a statement unknown or reinforced by the insurance company.

Although the insurance company may restrict the agent's authority and such restrictions are binding on the agent, it is not always the limitations binding on third parties. The Third Party is entitled to trust the normal agency relationship. Therefore, unreasonable restrictions on agency authority are not binding on third parties unless effectively communicated to them.

What the agent knows is known by the insurance company. So, if the insurance agent knows that the health of the insurance applicants is very serious due to excessive use of narcotics, this knowledge is considered to be known by the insurance company even though this information is not submitted by the agent to the insurance company.

Insurance agents are the spearheads of companies in the marketing of insurance products, in general the marketing of insurance is organized through representatives of companies recognized as agents. An insurance agent is anyone who is authorized by an insurance company to seek, create, alter or terminate insurance contracts between an insurance company and the public. An agency relationship can be created between the principal and the agent upon mutual agreement. This agreement is usually through a written agreement known as an insurance contract. Most insurance agency relationships are based on agreements known as insurance contracts.

Based on Law Number 2 of 1992 concerning Insurance Business, Article 1 paragraph (10): "Insurance Agent is a person or legal entity whose activities provide services in marketing insurance services for and on behalf of the coverage".

Insurance Agent has the following scope of work:

a.) Insurance marketing services, including risk management services, providing a review of the customer's business risk profile and also providing advice on the best insurance conditions for customers;
b.) Insurance placement services, selects the insurance companies deemed to have sufficient technical and financial capabilities to ensure the risk of their customers;
c.) Agents may also place the risk of customers to all insurance companies since they are still included in the criteria of Law No. 2 of 1992, especially Article 13;
d.) Intermediate settlement of Agent claims process may also represent the insured to negotiate with the Insurer in the process of settling the Insured's claim;
e.) The Agent shall not be entitled to receive payment of claims on behalf of the insured from the insurer.

Insurance Agreement

The insurance agreement is an aleatable agreement, meaning that this agreement is an agreement, which the insurer's performance must be dependent on an uncertain event, while the insured's achievement is certain. And although the insured has fulfilled his performance perfectly, the insurer is not certain toreally achieve.

An insurance agreement is a conditional agreement, meaning that this agreement is an agreement that the insurer's performance will only be accomplished if the conditions specified in the agreement are met. The insured party on one side does not promise to qualify, but it can not force the insurer to carry out, unless it is fulfilled. An insurance agreement is a personal agreement, meaning that the losses incurred must be individual, private, non-collective loss or loss to the public at large. Personal loss is what will be replaced by the insurer.

An insurance agreement is an agreement attached to the terms of the insurer (adhesion), because in the insurance agreement the nature of the terms and conditions of the agreement is almost entirely determined to be created by the insurer / insurance company itself, and it is not because of a pure agreement or bid. Therefore it can be considered that the condition of the insurance agreement is largely determined unilaterally by the insurer so that the insurer is considered as the compiler of the agreement and should know if there arises an unclear understanding, it should benefit the insured.

An insurance agreement is an agreement on the condition of good faith that is perfect, the intention is that the insurance agreement is an agreement with the state of agreement which can be reached / negotiation with each position which have the same knowledge of facts, with the same assessment of his review to obtain the same facts, which can be free from hidden defects.

Legal Relationships Agents and Insurance Companies Under Agreement

According to H.M.N Purwosutjipto, S.H., the legal relationship between the leadership of the company and the entrepreneur is characteristic (Purwosutjipto, 44-45):

1. Labor relations, namely subordinate relationships between employers and workers, who govern and be governed. Manager binds himself to run the company as well as possible, while employers commit themselves to pay their wages (article 1601 (a) Criminal Code).
2. Relationship of Authority, which is a legal relationship set forth in article 1792 KUHPer. The entrepreneur is the authorizer, while the manager is the holder of the power. The holder of the power binds himself to

carry out the order of the empowerer, while the empowerer binds himself to pay the wages according to the treaty.

Based on the above description it can be concluded that the legal relationship between the insurance agent with the Insured is the Relationship of Authority. The insured is the authorizer, while the agent is the holder of power. The holder of the power binds himself to carry out the order of the empowerer, while the empowerer binds himself to pay the wages according to the treaty. While the legal relationship between the Insured with the insurance company (the insurer) is the Labor Relations, namely the relationship that is subordinated between employers and workers, who govern and be governed. Manager binds himself to run the company as well as possible, while employers commit themselves to pay their wages (article 1601 (a) KUHPER).

Legal relationship of insurance agent company with Insurer and / or Insured in Insurance agreement can be reviewed from Law Number 2 Year 1992 concerning insurance. According to Article 1 paragraph (10): "Insurance Agent is a person or legal entity whose activities provide services in marketing insurance services for and on behalf of the insurer."

Roles and Responsibilities of Insurance Agent in the Relationship of the Insurance Agreement

Based on Law Number 2 of 1992 concerning Insurance Business, Article 1 paragraph (10): "Insurance Agent is a person or entity law whose activities provide services in marketing insurance services for and on behalf of the insurer. "Judging from Law No. 2 of 1992 on insurance can be seen Articles that regulate the roles and responsibilities of insurance companies as follows:

Based on Article 5 letter e: "An Insurance Agent Company may only provide insurance marketing services to an insurance company with a business license from the Minister". In the Article it is clearly explained that the Insurance Agent Company can only do the marketing of insurance products and is not allowed to place insured insurance risk on insurance companies that do not have a business license pursuant to Article 9 of the Insurance Law.

Based on Article 13 paragraph (4): "Insurance Agent is prohibited from acting as an agent of an insurance company that does not have business license as referred to in Article 9." In this article it is explained that the Insurance Agent company places the Insured's insurance risk to an unlicensed insurance company This is done to avoid fraud and embezzlement and tort in insurance business Insurance agent can place risk to any insurance during the insurance company that placed it get the business license from the Ministry of Finance so that the Agency can find the most formal closing conditions officially under the law.

From the provisions of the Law and Decree of the Minister of Finance above, it can be concluded that Insurance Agent has the following scope of work:

a.) Insurance marketing services, including risk management services, providing a review of the customer's business risk profile and also providing advice on the best insurance conditions for customers;
b.) Insurance placement services, selects the insurance companies deemed to have sufficient technical and financial capabilities to ensure the risk of their customers;
c.) Agents may also place the risk of customers to all insurance companies while still included in the criteria of Law No. 2 of 1992, especially Article 13;
d.) Intermediate settlement of claims processing Agent may also represent the insured to negotiate with the Insurer in the process of settling the Insured's claim;

Close

The legal relationship of the insurance agent company with the Insurer is the insurance company, its nature is not fixed and not bound. This legal relationship is only if the agent gets the power of the third party (the Insured) to make a claim against the existing insurance policy on the Insurer. While the legal relationship arising between the agent with the Insured, the nature is not fixed and mixed. As an intermediary of this relationship as well as clients with advocates, namely as a periodical service and empowerment. And the insurance agent is not entitled to receive payment of claims on behalf of the insured from the insurer, the limit of the insurance agent only on the insurance intermediary closing services, Insurance Claims Services, insurance premium payment services from

the Insured to then forwarded to the insurance company (Insurers).

Agent only serves as a pure intermediary, does not become party to the agreement, while the party in the agreement is the authorizer (Insured) and third parties (Insurers). To reduce the actions of agents that harm the company and the policy holder, it is better for the Insurance Company to further improve the supervision of the actions carried out by the agent in performing the obligations that is in the premium care services, insurance closing and the filing of insurance claims on the Client's side of Policy Holder. And In case of default, where the agent is issued and unilaterally terminate the relationship, the insurance agent company should make a notice or advertise through the media or send a notification letter to the Policy Holder (Proxy) and the Public that the agent is not bound in the agreement of the insurance agent company and has no power over the claim of the insured that is being handled. So the policy holder is not fooled if the agent is doing the activities as an agent. So as not to harm either the Insurance Company or the party from the Policy Holder (Insured).

In the agreement and the authorization there should be a guarantee from the agent that is given as collateral if the agent happens tort/wanprestsasi, in fact the insurance agent only makes a warranty and power of attorney which is usual that is a warranty under the form that has been provided by the insurance agent company, where it is only signed by agents and insurance companies. According to the author the guarantee letter and the power letter whih is made is not effective because the guarantee letter and the power of attorney are just statements made and signed by the agent and the insurance agent. So if there is a tort resulting in material loss and image of the company name or the insured, the company or the insured can not demand more.

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THE LEGAL PROTECTION OF CONSUMERS IN TRADING OF GOODS THROUGH TRANSACTIONS ELECTRONIC (E-COMMERCE)

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Abstract

Electronic transactions (e-commerce) that do not bring business actors directly with consumers, and the absence of opportunities for consumers to see directly ordered goods potentially lead to default. Trading of goods through electronic transactions (e commerce), in case of consumer default. do not get legal protection, because there is no rule of law governing e-commerce transactions in case of default, such as the rights of the harmed party to prosecute the party who did default. to provide change of loss, therefore by law, it is expected that no party is harmed because of the default.

Keywords: e-commerce, trading of goods, default, protection.

A. Introduction

The development of information and communication technology has brought changes in various fields of life and plays an important role in national development. Information and communication technology has changed the behavior of society and human civilization globally that has resulted in the world to become infinite and cause the social changes significantly faster. Implementation of trading activities in today's society has been growing very rapidly. This is because influenced by technological developments through the internet which is also called or known by the name of e-commerce. This situation on the one hand is very beneficial to the consumer, because it has more choice in getting goods and services, so that not only have a view of where he lives, but on the other hand violations of rights as consumers are very risky because of the type of this e-commerce trade. So it is important to have that legal protection of consumers in the e-commerce transactions.

E-commerce is a dynamic set of technologies, applications and business processes that connect companies, consumers and communities through electronic transactions and trade in goods, services and information which are held electronically (Iman Sjahputra, 2010: 2).

Currently almost all goods can become an object of commerce through the internet (e-commerce), it is because the Internet is the most effective medium today to make transactions and purchase. But there are limitations that only movable objects that can be traded through the internet media today, such as buying and selling goods such as clothes, shoes, household appliances, and many others.

Consumers today are more pampered with the facilities offered by the internet media where for any purposes just view through the internet, even now it can pass through communication tools such as mobile phones. Due to the fact that electronic transactions that do not bring business actors directly with consumers, and the absence of opportunities for consumers to see directly ordered goods potentially cause problems that harm consumers, including: mismatch type and quality of goods promised, inaccurate delivery time, ranging from payments using ATM cards, other people's credit cards (piracy), illegal access to the information system (hacking), website destruction to theft of data. Further payment by charging credit card numbers in an internet public network also cause big risk, because it opens opportunities for cheating or break-ins.

The issue shows that transactions through e-commerce do have considerable risks because the payment

contains the risk of loss to the consumer, where the consumer is usually required to make payments first, while he can not see the quality of goods ordered and there is no guarantee of certainty that the goods the order will be sent according to the agreement. In addition, from the perspective of civil law also raises the problem of legal certainty, especially regarding the validity of business transactions. For example, if nthey are done by an incompetent person, digital signature or electronic signature, data message, data authenticity, document confidentiality, tax liability, designated law in case of breach of contract or agreement, legal jurisdiction, and problems which law should be applied in the event of a dispute.

A contract or agreement must meet the legal requirements that must be met in accordance with the provisions of Article 1320 of the Civil Code and regarding the sale and purchase specified in Article 1457 KUH Perdata. So that in a trading activity, producers often have power over consumers, consumers often feel cheated and harmed in terms of pricing with the products they receive which are not in accordance with the products they ordered, the specification of goods, and others, it gives impression that consumers are harmed in price decision.

B. Problems

The problems that arise with the electronic transaction is How is the legal protection of the consumer when the sale and purchase agreement is done electronically (e-commerce)?

C. Discussion

The advancement of telecommunication and information technology has expanded the transaction flow of trade transactions through on line which now allows consumers to get the goods they want, but the convenience has ignored the protection of consumers as users result in harm to consumers such as goods received are not in accordance with ordered or delayed receipt of goods from a predetermined period of time. In this case the interests of consumers are not protected and also in the transaction of buying and selling goods electronically, usually the seller warns that the goods that have been purchased can not be returned. This is not the fulfillment of consumer protection as prescribed in Article 1 Sub-Article 1 of Law No. 8 of 1999 on Consumer Protection, that: "Consumer protection is any effort that ensures the legal certainty to provide consumer with protection".

In this case the merchant or seller shall still be liable for such negligence or guilt. However, the legal rules concerning e-commerce transactions in case of default, are not specifically regulated in Law No. 7 of 2014 on Trade, Law Number 11 Year of 2008 regarding Information and Electronic Transactions, as well as Law Number 8 Year 1999 on Protection Consumer (Law number 8 of year 1999 on the protection of the consumer, article 1 point 1)

Considering that the absence of provisions concerning e-commerce transactions is the homework of the Government to make e-commerce provisions in handling disputes suffered by consumers, to provide effective consumer protection, and with easy access to fair and prompt remedies without the imposition of fees charged to consumers. Responsibility of the seller of goods trade and investment business is a mistake / negligence. Responsibility of the seller / producer for the first consumer loss is seen from the principle of liability based on negligence / error. Responsible based on negligence is a principle of responsibility that is subjective, that is a responsibility that is determined by the behavior of producers. Producer negligence resulting in the emergence of consumer losses which is a determining factor of the right of consumers to file a claim for compensation to the producer.

Principles of responsibility under the breach of warranty. The responsibility known as default is contractual liability. Thus, when a product is damaged and results in a loss, the consumer usually:

First looks at the contents of the contract or agreement or guarantee that is part of the contract. The advantage to consumers in the lawsuit based on this theory is the application of a strict obligation, an obligation that is not based on the efforts that the seller has made to fulfill his promise. It means that if the seller / producer has attempted to fulfill his promise, but the consumer still suffers a loss, then the seller / producer remains charged with the responsibility to compensate.

Second is the principle of liability based on the breach of warranty. The responsibility known as default is contractual liability. Thus, when a product is damaged and results in a loss, the consumer usually first looks at

the contents of the contract or agreement or guarantee that is part of the contract. The advantage to consumers in the lawsuit based on this theory is the application of a strict obligation, an obligation that is not based on the efforts that the seller has made to fulfill his promise. it means that if the seller / producer has attempted to fulfill his promise, but the consumer still suffers a loss, then the seller / producer remains charged with the responsibility to compensate.

D. Conclusions

Trading of goods through electronic transactions (e-commerce) can not protect consumers in case of default due to the absence of legal rules governing e-commerce transactions in case of default, such as the rights of the harmed party to prosecute the defaulter to provide compensation, so that by law it is expected that none of the parties will be harmed by the default.

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SECURITY SEIZURE IN BANKCRUPTY CASE

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Abstract

Security seizure in bankruptcy cases are intended to protect the interests of the creditors from the fraudulent practices of debtors. Article 10 of Law no. 37 of 2004 on Amendment to the Law concerning Bankruptcy stipulates that the creditor during the application for bankruptcy statement has not been set can apply to the court, to: 1) Put the confiscation of some or all of the debtor's wealth; or 2) To designate a temporary curator to oversee the management of the debtor's business and payments to the creditor, transfer or collateral of the debtor's assets in the course of bankruptcy. In practice, however, provisions intended to protect the interests of creditors, since the commercial court was established and established on August 20, 1998) up to August 2006, such provisions have never been applied. Therefore, in the Act
Future bankruptcy, the regulation of the legal institutions of protection for creditors and bankruptcy should be further explained and regulated in detail and detail and promptly drafted its implementation rules so that these provisions can effectively apply in the community. The research method used to solve the above problems is the normative juridical research method by examining the library materials or secondary data as the basic material to be investigated by conducting a search on the rules and the literature related to the problems studied.

Keywords: Creditors, Debtors, Receivers, Supervisory Judges, Security seizure, Commercial Courts,

A. Introduction

In bankruptcy proceedings, it is necessary to note that the law should seek to overcome the reluctance of debtors to fulfill its obligations, by determining the level of creditors and the priority of payments to its receivables, by taking measures to prevent debtors from removing their assets and by arranging or to the rehabilitation of the debtor. Therefore, there must also be a guarantee for the debtor to be treated unintentionally.

To provide legal protection for creditors, in bankruptcy law set forth in Article 10 of Law no. Law No. 37/2004 concerning Bankruptcy and Postponement of Debt Payment Obligations (hereinafter referred to as Law No. 37/2004) which in principle contains permit to apply for confiscation of creditor's claims or to appoint a temporary curator to manage part or all of the debtor's assets as a preventive security measure and temporary, ie to prevent the possibility for the debtor to take action against his wealth so as to harm the interests of creditors in the framework of debt repayment. Furthermore, in the provision of Article 10 paragraph (3) of Law no. 37/2004 is also governed, should the request for such a security settlement be granted, the Commercial Court may require that the creditor provide a reasonable amount of security in order to maintain a balance between the interests of the debtor and the creditor.

B. Research Methods

This paper is a method of research using normative juridical method of legal research conducted by examining library materials or secondary data as a basic material to be investigated by conducting a search on the rules and the literature related to the problems studied.

C. Problem Formulation

Based on the background of the above problems can be drawn a problem as follows:

1. How to Legal Protection Before Decision of Bankruptcy Declaration Dropped?
2. How is the Implementation Practice of Security seizure As Creditor's Legal Protection in Bankruptcy?

D. Discussion

1. Legal Protection Before Decision of Bankruptcy Declaration Declared

Understanding Bankruptcy affirmed in Law no. 37/2004 as "the common seizure of all the debtor's assets". Previously in PERPU No. 1 of 1998 jo Law no. 4 of 1998, the notion of bankruptcy relates to bankruptcy requirements and there is no definitional definition. So bankruptcy is a mass execution stipulated by a judge's decision, which is in effect immediately. By public confiscation of any property of the declared bankrupt, whether existing at the time of the bankruptcy statement, or obtained during the bankruptcy, for the benefit of all creditors, is exercised with the supervision of the competent authorities, so in fact the bankruptcy is intended to: a) Prevent seizure and executions demanded by individual creditors; b) Aimed only to the debtor's property, not his personality. Thus, the debtor remains competent to perform legal acts outside the law of wealth.

Based on the provisions of Article 10 of Law no. 37/2004 there shall be 3 (three) matters that the judge should consider to provide the protection of the creditor's law by using the confiscation institution in bankruptcy, namely: 1) Such application may only be granted if the problem is necessary to protect the interests of the creditor; 2) It is a safeguard effort that is a preventive and temporary measure, and prevents the possibility of the debtor taking action against his / her property, so that it may harm the interest of the creditor in the framework of debt repayment; 3) If the request is granted, the court may establish a condition to allow the creditor of the applicant to provide a guarantee of the amount of money deemed fair by the court.

The principle that in the case of bankruptcy should be done or settled fairly, in the sense of paying attention to the interests of the debtor or the interests of creditors in a balanced manner has become jurisprudence namely the Supreme Court decision No.42 PK / N / 1999 dated 4 November 1999 in the case of PT. Citra Jombaran Indah Hotel against Sangyong Engineering & Construction Co. Ltd. The legal considerations of the decision of the Supreme Court, among others, mention that the implementation of bankruptcy should be done / resolved fairly in the sense of paying attention to the interests of the company as a debtor or the interests of creditors in a balanced manner. The potential and prospects of the debtor's business should be well taken into account. Also the debtor still has potential and prospects, so it is the buds that can still develop. Should still be given the opportunity to live and grow. Therefore the collapse of bankruptcy is ultimum remedium.

Based on the legal considerations it is clear that the definition of legal protection in bankruptcy cases should be done proportionally with regard to the interests of creditors, including other creditors who do not participate in wanting bankruptcy cases and debtors in a balanced manner. As is known, since the passing of the bankruptcy verdict, then since then the debtor loses the right to do the management and control of his property (persona stand in indicio). The handling and control of the property will be transferred to the curator (Heritage Hall - BHP). The bankrupt is only allowed to do legal deeds in the field of property as long as it benefits the bankrupt property.

Based on this, it certainly raises fears how it is that if the debtor before declared bankrupt, has done the actions that can harm the creditors. Taking into account the formulation of Article 10 of Law no. 37/2004 mentioned above, security arrangements have been arranged when the naughty debitor by removing and / or hiding his or her property. Furthermore, in the explanatory section, it is explained that the safeguards referred to in the provisions are preventive and temporary, and are intended to prevent the possibility for the debtor to take action against his property so as to harm the interests of the creditor in the framework of debt repayment.

However, to maintain a balance between the interests of the debtor and the creditor, the Court may require that the creditor provide reasonable amount of guarantees if such safeguards are granted. In establishing the requirements for such guarantees, the Court must, among other things, consider whether there is a guarantee of the overall wealth of the debtor, the type of debtor's wealth and the amount of collateral to be provided against the likelihood of loss suffered by the debtor if the applicant of the bankruptcy declaration is rejected by the Court.

2. Implementation Practice Security seizure As Creditor's Legal Protection in Bankruptcy

Until August 2008 in all commercial courts, no provision of Article 10 of Law no. 37/2004 referred to. In fact, in the request for bankruptcy statements, usually always also included a confiscation application in case of bankruptcy petition. Even in practice so far, the application of confiscation, usually not specifically considered in the decision bankruptcy declaration, because with the passing of the verdict bankruptcy then by law the property

the bankruptcy becomes common confiscation.

In essence, the constraints found can be divided into 3 (three) major classes, which include aspects of structure, culture (culture) and substance (material) provisions. The first is the structural obstacles, including: 1) Commercial court, as a special court in the general judicial environment, there is no clarity on the structure, authority or guidance of its apparatus; 2) Procedures for determining the existence of confiscation, the appointment of a temporary curator, and the determination of the reasonable amount of the security deposit are unclear and there are no implementing regulations; 3) Time for the implementation of confiscation in the legal safeguard of the creditor is relatively short; 4) The provision of payment of the security deposit is too heavy; 5) The trade court service to such matters has not been satisfactory; 6) Inspection of debtor assets to be confiscated and or taken into account to determine the deposit, takes a long time.

The second barrier is cultural obstacles such as: 1) Business actors (creditors and debtors) still do not understand the intent and purpose of bankruptcy, so still afraid to use the legal institution; 2) Various social factors become obstacles to imposition of warranty, temporary curator appointment and or to determine a security deposit; 3) The process of legal service and performance of apparatus in the court of niga is still considered slow and has not grown the belief that commercial court will prosecute transparently, efficiently and effectively according to justice of law and truth.

The third is the substance obstacles, including: 1) The provisions governing the confiscation agency, the appointment of the curator and the determination of the amount of money as a reasonable guarantee is still unclear, even there is no implementing regulations; 2) It is difficult to prove by simple proof that the debtor has taken actions that could harm the interests of creditors. Based on data of opinion of practitioners and users of bankruptcy law institutions, it can be concluded that the provisions of the guarantee of legal protection before the bankruptcy decision was dropped as regulated in Article 10 of Law no. Law No. 37 Year 2004 still has many obstacles, mainly due to the limited (minimum) time available, and also the provision is considered too vague, and the absence of regulation implementation further result in difficulties and obstacles. In addition, the provision that the requirement to provide a reasonable amount of guarantee by creditors is considered an obstacle because it is unclear how to determine it, for curators as temporary curator of the arrangement is not clear and detailed is very difficult for them, let alone they should be responsible personally if there is a mismanagement that causes the value of assets to be reduced due to negligence.

The legal practitioners (commercial judges, legal advisers, and curators) are of the opinion that the creditor legal protection institution as stipulated in Article 10 of Law no. 37/2004 is still required in bankruptcy cases. Even some of them argued that it is also necessary to open a legal institution that can provide the possibility that during the bankruptcy process can also be done sealing actions or assets of the debtor or made hostage to the debtor who is proven to keep doing the actions that are feared can embezzle his property, so it can harm creditor.

The need for creditors to be guaranteed immediately upon the payment of their receivables, and the concern that debtors will in any way dispose of their assets is the reason for the need for legal institutions that can provide legal protection for creditors. Taking into account the deadline for settlement of cases in the commercial courts specified in Article 8 paragraph (5) of Law no. 37/2004 whereas the decision on the request for bankruptcy declaration shall be determined within a period of no more than 60 (sixty) days from the date of the request for bankruptcy statement to be registered. This provision, resulting in the implementation of legal protection for creditors as provided in Article 10 of Law no. 37/2004 is very difficult to implement. This is due, even though the provision of Article 10 of Law no. 37 of 2004 determines that such application can only be granted, if it is necessary to protect the interests of creditors, but the judge must be wise and wise to grant such request, as he shall observe a balance between the creditor and debtor's legal obligations proportionally during the examination process bankruptcy takes place.

E. Conclusions

1. In Article 10 of Law no. 37 of 2004 on Amendment to the Law concerning Bankruptcy stipulates that the creditor during the application for bankruptcy statement has not been set can apply to the court, to: 1) Put the confiscation of some or all of the debtor's wealth; or 2) To designate a temporary curator to oversee the

management of the debtor's business and payments to the creditor, transfer or collateral of the debtor's assets in the course of bankruptcy. In practice law enforcement proved to be a provision intended to protect the interests of creditors, since the commercial court was established and established on August 20, 1998) up to August 2006, the provision has never been applied. Among legal practitioners such as commercial judges, legal advisers and curators, there is a view that the provision is very difficult to implement due to limited time of examination in the commercial court. In addition, the provisions governing such legal safeguards are not detailed and clear (biased), and the costs required during the bankruptcy process are relatively large and there is no predictable standard.

2. Legal practitioners argue that the security institution aims to protect the interests of creditors during the bankruptcy process is still required. The government should immediately issue a government regulation governing the existence, scope and jurisdiction of the commercial court as a court within the general court, examining and adjudicating special cases in the commercial field, so as not to cause bias in interpreting the duties and jurisdiction of the commercial court . Therefore, in the upcoming Bankruptcy Act, the regulation of the legal institutions of protection for creditors and bankruptcies should be further explained and regulated in detail and in detail as well as the immediate implementation of regulations. Against cases which are continuation of the process of bankruptcy, and or cases related to bankruptcy cases should be examined and prosecuted by a commercial court, not in a district court, in order to achieve a fair, prompt, open and effective dispute resolution.

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SETTLEMENT OF DISPUTE TERMINATION RELATIONSHIP BETWEEN EMPLOYER WITH OUTSOURCING COMPANY AND SETTLEMENT OF DISPUTE BETWEEN EMPLOYER AND WORKER
(CASE STUDY OF COURT RULING NUMBER 232K / PDT.SUS-PHI / 2014)

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Abstract

The concept of outsourcing is the delegation of operations and day-to-day management of a business process to outside parties (outsourcing service providers). Through delegation, the management is no longer done by the company, but delegated to the outsourcing service company. Observing the "enterprise" as a symbol of the dominant economic system, becomes inherently clear, its structure and function are anti-theses for the protection of labor law, both conflicting, there is always a gap between das sollen (necessity) and sas (reality) and there is always a discrepancy between law in the books and law in action. Due to the existence of an outsoucing company that is supposed to exist to help companies users / employers (Users / Employers) not infrequently cause many problems.

The approach method used in this research is the normative juridical approach method, this approach method uses the concept of legit positivis, namely that the law is identical with the written norms created and enacted by the authorized institution or official. The case example of outsoucing system is Nordin case with CV. Ramatio Mitra Selaras where Nordin was formerly a former employee of CV. Ramatio Mitra Selaras brought to Dinsosnaker of Pangkalpinang City to the Industrial Relations Court of Pangkalpinang and appeal to the Supreme Court which will be discussed in this paper.

A. Introduction

Economic conditions in Indonesia as a developing country (Developing Countries) can be said to progress from previous years. Therefore, the ease of conducting all economic transactions is necessary, especially for companies that become one of the spearheads of the economy in Indonesia, one of which the ease in corporate law is the availability of outsourcing companies / outsourcing companies as providers who provide a service for the company users or employers (Employers / Users) and which we will discuss in this research is a provider of security services. Observing the "enterprise" as a symbol of the dominant economic system, becomes inherently clear, its structure and function are anti-theses for the protection of labor law, both conflicting, there is always a gap between das sollen (necessity) and sas (reality) and there is always a discrepancy between law in the books and law in action. The author says so, because the existence of outsoucing company that should exist to help companies users / employers (Users / Employers) not infrequently cause many problems.

The rejection of the outsourcing system is based on the idea that this system is a feature of modern capitalism that will bring misery to the workers, and provide the widest opportunity for entrepreneurs to dominate industrial relations with capitalist treatments which Karl Marx says exploit workers. Demands for the elimination of outsourcing systems arise from various parties, but in reality their existence is still recognized in Indonesia despite the protests from various parties with the reason "outsourcing system is less humane because of exploiting workers".

B. Research Methods

1. Approach Method

   This research will be compiled using normative juridical research type, that is research which focused to

study the application of positive law principles. Normative juridical is an approach that uses positivist legit conception. This research uses approach of legislation and case approach.

2. Research Specification
   The specification used is descriptive research specification that is a research that aims to provide a concrete description or explanation of the object or problem under study without taking conclusions in general.
3. Data Source
   In this study it is generally distinguished between data obtained directly from the public and library materials. Obtained directly from the community is called primary data (or baseline data), whereas those obtained from library materials are commonly called secondary data.
4. Data Collection Method
   The results are presented in the form of descriptions arranged systematically, meaning that the secondary data obtained will be linked with each other tailored to the problems studied, so as a whole is a unified whole in accordance with the needs of research.
5. Data Analysis Method
   To analyze the data obtained, will be used normative analysis method, is a way of interpreting and discussing the research material based on the definition of law, legal norms, legal theories, and doctrine related to the subject matter.

C. Problem Formulation

a. What is the legal relationship between an employer, an outsourcing company and a worker in outsourcing practice?

b. How does the dispute resolution of outsourcing employment relationship between a service provider company and its non-legal entity provide a unilateral layoff to a security worker?

D. Discussion

1. Legal Relationships between Employers, Power Outsourcing Companies and Workers / Workers in Outsoursing Practices

The concept of outsourcing is the delegation of operations and day-to-day management of a business process to outside parties (outsourcing service providers). Through delegation, the management is no longer done by the company, but delegated to the outsourcing service company. The working relationship that occurs in outsourcing practice is different from the employment relationship in general, because in outsourcing there is a triangular working relationship, it is said to have a triangle because there are 3 (three) parties involved in the outsourcing work relationship, ie the employer company, services / recipients of work and the last is the Workers / laborers. Since it is triangle, the working relationship between the three is the Employment Relationship between the Procuring Entity and the Outsourcing Company and the working relationship between the Outsourcing Company and the worker / laborer.

The legal basis for outsourcing practices is Law no. 13 of 2003 on Manpower and Decree of Minister of Manpower and Transmigration No. 101 / Men / VI / 2004 concerning Procedure of Licensing of Worker / Worker Service Provider and Kepmenakertrans Number 220 / Men / X / 2004 which has been revoked and replaced by Ministerial Regulation no. 19 of 2012 on Terms of Submission of Some Implementation of Work to Other Companies. According to Sehat Damanik, from the business vision, through the study of management experts conducted since 1991, including a survey conducted on more than 1200 companies, Outsourcing Institute collected a number of reasons companies outsource:

1. Improve the company's focus;
2. Utilizing world-class capabilities;
3. Accelerate the benefits of reengineering;
4. Divide risks;
5. The resources themselves can be used for other needs;

6. Allows the availability of capital funds;
7. Creating fresh funds;
8. Reduce and control operating costs;
9. Obtaining resources that are not owned by themselves;
10. Solve problems that are difficult to control or manage.

The practice of outsourcing is not much different from the exploitation by the capitalists on the workers, as it relates to the expression of the process of buying and selling labor. Harry Braverman, argues that the concept of "working class" does not describe a specific group of people or jobs, but rather an expression of the labor-buying process.In modern capitalism, almost no one has the means of production, thus many people, in the white-collar services sector, were forced to sell their work to some of the people who used it.

2. Dispute Resolution Outsourcing Relationships Between Unlicensed Service Providers Security Security Phk Unilaterally At Workers / Security Workers

a. Employer Company (Employer)
   Employer company (Employer) is a company that entered into an agreement with another company in this case a service provider company for a provision of services required by the employer company. Based on Article 65 of Law Number 13 Year 2003 on Manpower. Provision of Workers / Labor Services
b. Worker or Laborer
   The concept of workers / laborers is a definition as set forth in the provisions of Article 1 number 3 of Law Number 13 Year 2003 concerning Manpower, which states:
   "Worker / laborer is any person who works by receiving wages or other forms of remuneration."

Position Case

Nordin who is an Employee CV. Ramatio Mitra Selaras authorizes Wahidjon. JSK., As the Plaintiff Applicant first to fight Justin Sihombing who is the Director of CV. Ramantio Mitra Selaras as the Defendant Cassation Defendant first; The Supreme Court;

Considering that from the letters it turns out that now the Cassation Appellant formerly as Plaintiff has filed a lawsuit against the Defendant Cassation formerly as Defendant before the trial of the Industrial Relations Court at the Pangkal Pinang District Court, principally as follows:

That the Plaintiff is a Defendant Company Employee CV. Ramatio Mitra Selaras and has been working since 1 May 2007 assigned as security / security guard at the company appointed by Defendant. The Plaintiff reaches 5 years and 5 months and receives a monthly fee of Rp1,511,000.00, starting on 31 October 2012 having terminated unilaterally on the grounds that the employment relationship is terminated because the period of working period agreed in the Working Agreement of Certain Time (PKWT) has been ends.

Whereas the Particular Working Agreement agreed upon by the Plaintiff and the Defendant is null and void because it is contradictory to Article 59 paragraph 7 of Act Number 13 of 2003 concerning Manpower. The Working Agreement of a certain Time (PKWT) does not meet the provisions of Article 59 paragraph 7 of Law Number 13 Year 2003, the Work Agreement made by the Plaintiff and the Defendant becomes a Working Agreement of Uncertain Time (PKWTT). That the Defendant has unilaterally dismissed the Plaintiff without being negotiated in accordance with Article 151 paragraph 2 of Law Number 13 Year 2003 regarding Manpower.

Whereas because the layoffs committed by the Defendant are null and void in accordance with the provisions of Article 151 paragraph 3 of Law Number 13 Year 2003 which reads Entrepreneur may only terminate the Employment Relationship after obtaining the determination of the Industrial Relations Dispute Settlement Institution. The Defendant has dismissed the Plaintiff, the Plaintiff felt that the Plaintiff had sued in accordance with Article 156 paragraph 2, 3 and 4 of the Act 13 of 2003 concerning Manpower juncto Article 27 of Kepmenakertrans Number 150 Year 2000.

Whereas in Particular Working Agreement made by both parties and signed together, the Plaintiff in performing its duties in accordance with the Agreement Article 6 point A working time in performing the duty as security of the Plaintiff has an excess of 6 hours working hours per week and has never been paid, it is in accordance with the prevailing laws and regulations Plaintiffs demand to be paid by the Defendant in accordance with Article

96 Act Number 13 Year 2003 concerning Manpower, 2 Years (104 weeks X 6 hours X 1/173 X Rp1.511.000,00 = Rp5.450.080,00);

Settlement of dispute between Nordin as worker / laborer (hereinafter called Plaintiff) security with CV. Ramatio Mitra Selaras as an outsourcing company providing security services (hereinafter referred to as the Defendant) has been held mediation negotiations by mediator Dinsosnaker Kota Pangkalpinang did not get an agreement between the Defendant and Plaintiff and each party insisted on the establishment of each. On the basis of the two parties between the Plaintiff and the Defendant insisting on their respective stance so that this case can be resolved in accordance with prevailing laws and regulations, Dinsosnakertrans Kota Pangkalpinang issued a letter of recommendation No. 567/068 / Dinsosnaker / II / 2013 dated February 19, 2013.

The written advice of the mediator he / she is rejected by either party, then the parties or one of the parties may continue the dispute settlement to the Industrial Relations Court at the local District Court. This is confirmed in Article 14 paragraph (1) of Law No. 2 of 2004. If Article 14 paragraph (1) is related to Article 24 paragraph (1), it will be concluded that the settlement of industrial relations disputes through the Industrial Relations Court, in this case the claimant applying to the Industrial Relations Penagadila.

In the lawsuit filed to be the basis of the lawsuit is sufficiently correct that is:

1) The Plaintiff's term of office shall be 5 years and 5 months causing the Certain Working Agreement agreed upon by the Plaintiff and the Defendant to be void by law as opposed to Article 59 paragraph (7) of Law Number 13 Year 2003 concerning Manpower.

2) Whereas because the Working Agreement of a certain Time (PKWT) does not meet the provision of Article 59 paragraph (7) of Law Number 13 Year 2003, the Work Agreement made by the Plaintiff and Defendant becomes a Working Agreement of Uncertainty Time (PKWTT).

3) Whereas the Defendant has unilaterally disqualified the Plaintiff without being negotiated in accordance with Article 151 paragraph (2) of Law Number 13 Year 2003 regarding Manpower.

4) Whereas the Defendants' layoffs are null and void in accordance with the provisions of Article 151 paragraph (3) of Law Number 13 Year 2003 stating that the Entrepreneur may only terminate the Employment Relationship after obtaining the determination of the Industrial Dispute Settlement Institution.

However, it should be remembered that for the company of the provider of worker / laborer, the operational legality besides having to be legal entity also have to get operational permit from the agency responsible in the field of manpower. The purpose of such authorization, in addition to supervision of the fulfillment of the conditions specified, as well as to meet the orderly administration / pendataa enterprise service provider workers / labor.

The company / business entity that has the status as a corporation is a Limited Liability Company (PT), Foundation and Cooperative only, while for an Individual Company, Firma and CV are not institutionally legally incorporated, therefore they do not have the authority and ability according to law to act as a legal subject in the outsourcing business. Because an individual company, CV, and Firm have no authority and ability and do not have the right to engage in an outsourcing relationship, an outsourcing contract involving a non-legal entity is null and void for violating the objective requirements of an agreement. Because the agreement is null and void, all legal consequences arising out of the agreement include the fulfillment of the rights of the outsourced worker / laborer to the responsibility of the company who submits the work (Employer), this is stated in Article 65 paragraph (8). Consequences is what must be borne by businessman PT. BFI Finance Indonesia Tbk. Branch Pangkalpinang who have established working relationship with the CV. Ramatio Mitra Selaras which legally is not recognized as the subject of outsourcing law.

Outsourcing contracts are an agreement between the Procuring Entity and the outsourced outsourcing company, resulting in rights and obligations in outsourcing practices. The outsourcing business undertaken by the Procuring Entity and the outsourcing company is no longer merely a series of words containing promises or abilities spoken verbally, but it is a concrete intention made in writing which creates rights and obligations to the parties, including their obligations in fulfilling the rights of outsourced workers / laborers.

In the outsourcing contract, the provisions of Article 1320 of the Civil Code, which states that a contract is valid if it meets the following requirements:

a. There is agreement between both parties;
b. The existence of legal skills to engage / make engagement / agreements;
c. The existence of a thing or object that is agreed upon; and
d. The existence of a cause which permits and / or does not conflict with the laws, public order and sulawesi.

The first requirement and the second condition are referred to as subjective requirements, because it concerns "person" or the parties, while the third and fourth terms are referred to as objective conditions because they involve the object of the agreement.

The non-fulfillment of the subjective terms resulted in the cancellation of an agreement by either party. This means that even if the agreement has been signed, one of the parties who objected to the treaty process may file the cancellation of the agreement to the Court.

Whereas if the objective conditions are not met then the agreement is null and void, meaning that the contents of the agreement does not bring any effect on both parties because the law of the treaty is considered never existed.

Since the employment contract also applies subjective requirements and objective requirements, the Procuring Entity and the outsourcing company shall pay attention to and fulfill the outsourcing requirements as set forth in the provisions of Article 64, Article 65 of Law Number 13 Year 2003 on Manpower and Decree of the Minister of Manpower Number: Kep-220 / Men / X / 2004 which has been revoked and replaced by Non-Ministerial of 19 Year 2012. The working relationship between the outsourcing company and the workers / laborers shall be stipulated in the written employment agreement, whether in the form of PKWT or PKWTT.

Should be in the process of resolving this dispute should the Plaintiff present and demand PT. BFI Finance Tbk. Cab. Pangkal Pinang in every process of the settlement.

E. Conclusions

1. The legal relationship between the Procuring Entity, the outsourcing company, and the workers / laborers in the outsourcing practice has been clearly regulated in the prevailing laws and regulations of Indonesia.
2. Settlement of labor dispute outsourcing labor should be the mediator between Nordin with CV. Romantio Mitra Selaras, invites PT. BFI Finance Tbk. Cab Pangkalpinang due to agreement between Nordin with CV. Romantio Mitra Selaras was void by law and switched right of obligation between Nordi and PT. BFI Finance Tbk. Branch of Pangkalpinang.

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THE APPLICATION OF REGULATION AND SETTLEMENT OF GROUNDWATER MANAGEMENT IN GOVERNMENT OF DKI JAKARTA PROVINCE

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Abstract

Groundwater is God's created natural resources dedicated to the survival of mankind. Increased development and community activities, as well as population growth in the area of DKI Jakarta Province resulted in the expansion of land / land cover. So that rain water is not absorbed in the soil but flows directly into the ditch and increase the volume of water in the gutter or cause the puddle. The rapid increase of Jakarta's population has caused the water catchment area to drastically decrease due to switching function into residential and industrial areas. Open land is replaced by houses and buildings, and the remaining ones are covered by asphalt road or parking lot so it can not absorb water. Unsaturated rain water turns into a flow of surface that flows into the river, which then flowed into the sea according to the capacity of rivers in the water to contain it. Based on the description then formulated the problem as follows: How is the application of legislation related to Water Resources especially Underground in DKI Jakarta? One important factor in water governance in Jakarta is the changing seasons and rainfall patterns that occur due to climate change. When rainfall in Jakarta is high, floods occur, but in the dry season the opposite happens, water becomes scarce and the water level in the rivers decreases dratis. Fluctuations in rainfall are part of changing climate patterns and variability that is one of the impacts of climate change that is happening around the world including in Indonesia. Another impact of climate change is the rise in sea and air temperature.

Keywords: Regulation, Arrangement, Management, Underground Water

I. INTRODUCTION

A. Background

In the 1945 Constitution of the Republic of Indonesia (UUD RI 1945) Article 33 paragraph (3) regulates the Earth and the water and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people, Law Number 7 of 2004 on Water Resources, Government Regulation No. 43 of 2008 on Ground Water Governor Regulation No. 21 of 2006 on Guidance on Providing Technical Advice on Drilling and / or Groundwater Utilization Permit (based on Soil Water Conservation Map of Jakarta), Regional Regulation of DKI Jakarta Number 17 of 2010 on Ground Water Tax, and Regulation of Governor of DKI Jakarta Province Number 37 Year 2009 concerning the value of acquisition as the basis for the imposition of tax on the taking and utilization of Underground Water, is an effort to control the exploitation of Underground Water in DKI Jakarta through tax mechanism and permit restriction of taking ground water and tax mechanisms. The decline in land surface that continues to occur almost in most areas of Jakarta, one of which is suspected by the activities of underground exploitation.

Good governance as the goal of the utilization of State apparatus. An environmentally sound natural resource policy is acknowledged that, at the same time, it should pay attention to the sustainable natural carrying capacity. Community demands in an atmosphere of reform euphoria, democratization, decentralization, regional autonomy and human rights enforcement, including the anticipation of the advancement of science and technology (Science and Technology). Therefore, the improvement of the quality of life supported by the sustainable natural carrying capacity is a matter of concern for every policy. The gap between the needs of the community for clean water and the supply of clean water is a problem that requires serious attention for the sustainable availability of clean water. At this time it has become imperative considering the tendency of public expectation towards the improvement of

service of necessity of life like availability of Clean Water is something that can not be ignored.

B. Problem Formulation :

From the background mentioned above, can be formulated the main problem in this study, it is:

How is the application of laws and regulations related to Water Resources, especially the Underground in DKI Jakarta?

II. Theoretical Framework

According to Law No. 7 of 2004, groundwater is water contained in soil layers or rocks beneath the soil surface. The definition becomes a reference to other laws, such as Government Regulation No. 43 of 2008 on Ground Water (Government Regulation No. 43 of 2008).

Governor Regulation No. 37 of 2009 states a slightly different definition, namely underground water is water in the bowels of the earth, including springs that appear naturally above the soil surface. Other definitions related to ground water are described in Government Regulation No. 43 of 2008, namely: (a) the aquifer is a layer of saturated ground water that can store and pass the ground water in sufficient and economical quantities; (b) Groundwater basins are an area bounded by a hydrogeological boundary, in which all hydrogeological events such as the groundwater drainage, drainage and discharge process take place; (c) the groundwater supply area is the catchment area.

The objective of underground water management is to realize the sustainable utilization of water resources with environmental insight. Utilization of underground water is an alternative if other water sources are not possible to be taken.

Any person or Legal Entity conducting exploration and drilling activities including excavation, plastering and retrieval of underground water for various purposes may only be carried out after obtaining permission from the Mayor. The type of underground water management permit consists of a business license for underground drilling company, drill permit, underground water drilling permit, underground water permit permit, and underground exploration license.

Mayor conducts guidance, supervision and control of underground water retention. In doing so the Mayor or appointed Officer conducts the necessary inspection and gathering of information.

Any permit holder who commits a violation of this Regional Regulation may be subject to administrative sanction in the form of revocation of underground water drilling company permit, sealing equipment and water retrieval point, revocation of underground water retention permit, and closure of borehole or water pouring plant. And whoever violates any of the provisions referred to in this law may be subject to criminal penalties. Certain civil servant officials within the local government are given special powers as investigators to conduct criminal investigations in the field of Underground Water Management.

III. DISCUSSION

Currently, the fulfillment of clean water needs in DKI Jakarta is fulfilled from[1] PDAM (PAM Jaya) and the rest utilizes Underground Water Based on Strategic Review and Strategic Planning of Water Resilience of DKI Jakarta Province, fulfillment of piped water requirement which is the responsibility from PDAM Jakarta, the coverage of its services reaches only 44% and the quality and quantity of piped water that is still to be improved, encouraging excessive underground water exploitation by many businesses and businesses, as well as taking Shallow Ground Water by community for basic needs of household in DKI Jakarta.

The impacts resulting from the taking and utilization of underground water that lack of control in terms of environment, potential and ability, can cause the absence of environmental balance, so that in areas where the taking and utilization of underground water is not in accordance with environmental balance, the impact of environmental damage . This can be seen in the dry season is prone to clean water and also decrease the quality of Underground Water and in the rainy season flooded.

1 *Leaf Leat Konservasi Air Bawah Tanah Dinas Perindustrian dan Energi Prov. DKI Jkt. Kebijakan Pengelolaan Air Bawah Tanah oleh Dinas Perindustrian dan Energi Prov. DKI Jkt.*

The environmental degradation occurs from the groundwater recharge area in the form of a decrease in water absorption and groundwater contamination, to the groundwater discharge area mainly due to excessive underground water retention and reduced function land as an area of underground aquifers. Such a condition often occurs as a result of underground water utilization efforts that are not based on data and information on the availability of underground water in an area, resulting in underground water taking that exceeds the safe limits of underground water retention.

In Jakarta underground conservation activities are the effort to protect and maintain the existence, condition and environment of groundwater in order to maintain the continuity and continuity of availability in quality and quantity which is sufficient, for the sake of continuity of function and its usefulness to meet the needs of living things, both present and in the future generation.[2]

In Governor Regulation No. 21 of 2006 on Guidelines for Provision of Technical Advice on Drilling Permits and / or Take / Underwater Utilization (based on the Jakarta Underground Watershed Map), the administration of regional governments, namely, centralistic power, has become decentralized by providing the widest possible autonomy the extent as regulated by Law Number 22 Year 1999 regarding Regional Government, then replaced with Law Number 32 Year 2004. The change of local government regulation policy[3] is harmonized with the policy changes to the utilization of Subterranean Water which was originally used for Underground Water meet the needs after using the water supplied by Jakarta Water Supply Company (PDAM Jaya) now Underground Water may only be used as a reserve of the Provincial Governor's Decree No. 88/1999 on the Implementation and Implementation Guidance Manual an Underground Water and Surface Water in the Special Capital District of Jakarta Article 11 paragraph (2) letter f.).

Based on the Decision Letter of the Provincial Governor of DKI Jakarta Number 57 Year 2002 regarding Organization and Working Procedures of Mining Provincial of DKI Jakarta Province, Article 3: Mining Agency has the duty to conduct activities in the field of mining including Licensing, Planning, Guidance, Research, Development, Marketing, Controlling, and Controlling of Mining Business and Potential of Underground Water. It Is one of the issues that attract the attention of central and local governments. There have been many management systems and community services[4] developed and implemented by the central and regional governments so that the clean water services needed by the community can be allocated equally, affordably, quality can be accounted for and continuous examples of the construction of several tools that can change the water quality from turbid, brackish water and smelling into clean water RO (Reverse Osmosis).

In controlling the flood, the basic principle used by the Government of DKI Jakarta is to drain river water into Jakarta through the edge of the city and directly to the sea. The aim is that the water coming from upstream areas above Jakarta does not enter the central areas of Jakarta, but flows directly to the sea through the West Canal Flood and Cengkareng Drain in the West and in the East through the East Canal Flood and Cakung Drain.

Meanwhile, South Jakarta area with relatively high soil surface made drainage that will channel the water naturally by utilizing the force of gravity. In the lower areas, where water puddles can not flow anywhere, a polder system is used, a system that will pump out the water that swims low areas and drains these low areas from waterlogging. Polder system is a way of handling flood with physical building consisting of drainage system, retention pond (holder), embankment that surrounds low area, and pump and or water gate as one unity of water management that can not be separated. Rainwater that falls within this area is flowed by drains and reservoirs and from this water reservoir is pumped into the sea.

Water from puddles will be collected in reservoirs and dikes and pumped into control channels, then flowed into the West Canal Flood or East Canal Flood that flows into the sea. DKI Jakarta Provincial Government also conserves the reservoir to become a temporary water reservoir.

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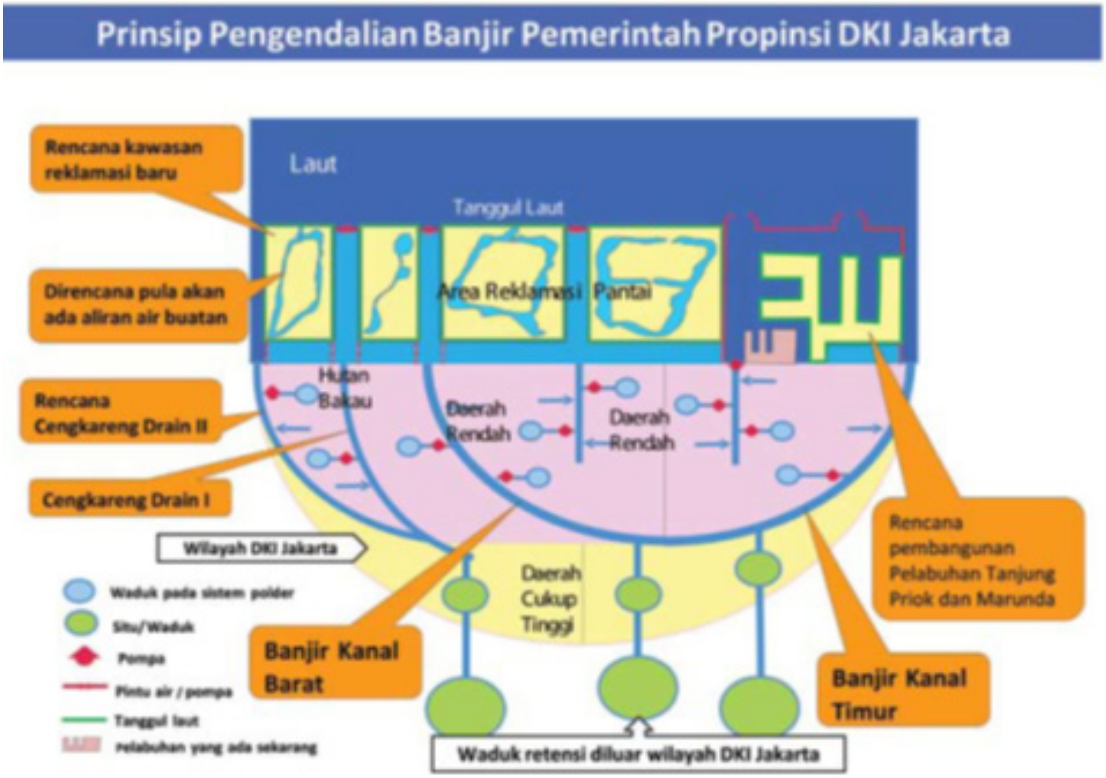
2 *Danar yanto, H.dkk, Konservasi Air Bawah Tanah Jakarta 2005.*

3 *Undang-Undang Nomor 7 Tentang Sumber Daya Air PP No. 43 Tahun 2008 tentang Air Bawah Tanah Kepgub No. 88 Thn 1999 ttg Petunjuk Pelaksanaan Penyelenggaraan Pemungutan Pajak Air Bawah Tanah dan Air Permukaan.*

4 *Kep.Gub.Prov. DKI Jkt No. 57/2002 Tentang Organisasi Tata kerja Dinas Pertambangan DKI Jkt Konservasi Air Bawah Tanah Program Kerja Dinas Pertambangan dan Energi DKI Jkt. Th. 2011*



Flood Control Principles of DKI Jakarta Provincial Government

Information of Picture below:

Rencana kawasan reklamasi baru = New reclamation area plan

Direncana pula akan ada aliran air buatan = Planned also there will be artificial water flow

Rencana Cengkareng Drain II = Plan of Cengkareng Drain II

Cengkareng Drain I = Cengkareng Drain I

Banjir Kanal Barat = West Canal Flood

Banjir Kanal Timur = East Canal Flood

Rencana Pembangunan Pelabuhan Tanjung Priuk dan Marunda = Development Plan of Tanjung Priok and Marunda Port

Tanggul Laut = Sea dike

Area Reklamasi Pantai = Beach Reclamation Area

Hutan Bakau = Mangrove forest

Daerah Rendah = Low Area

Waduk Pada Sistem Polder = Reservoir On Polder System

Situ/Waduk = Reservoir

Pompa = Pump

Pintu air/Pompa = Sluice

Tanggul Laut = Sea dike

Pelabuhan yang Ada sekarang = The Current Port

Daerah Cukup Tinggi = High Enough Areas

Waduk Retensi Di luar Wilayah DKI Jakarta = Retention Reservoir Outside DKI Jakarta

Efforts to control floods can be differentiated into two types: Physical or structural measures and non-physical or non-structural measures.

Structural methods are flood mitigation activities that include river improvement and flood embankment mitigation to reduce the risk of flooding in rivers, floodways for partial or full flow of water, and regulation of

drainage systems to reduce flood peak discharge, with buildings such as dams , and retention ponds.

Non-structural method is a method of flood control by not using flood control building. Non-building handling activities include river basin management to reduce rainwater runoff, vegetation planting to reduce surface runoff rates in watersheds, control over development in puddle areas, for example by land use regulations, early warning systems, prohibitions waste generation in the river, and community participation.

With the high population density conditions of DKI Jakarta and the living pattern of people who are less conscious of the environment make the existence of good groundwater or worth consumed becomes scarce. This groundwater damage can not be seen, but it has an important and very difficult impact on recovery. Therefore, Jakarta Environmental Monitoring Agency which has the main duty and function in underground water control invites citizen and society of DKI Jakarta to participate in the development of environmentally sound DKI Jakarta, especially in the case of ground water conservation in DKI Jakarta.

The constituonal baseline of water resources management based on the preservation of environmental capability is contained in Article 33 paragraph 3 of the 1945 Constitution which reads: "The earth and the water and the natural resources contained therein are controlled by the State and used for the greatest prosperity of the people".

In the broad outline of the National Guidelines it is stipulated that the implementation of the development of Indonesia's natural resources should be used rationally, that the extracting of natural resources should be sought in such a way as to not undermine the interdependence of human life and be carried out with a thorough policy and attention to the needs of future generations. Thorough discretion in the management of natural resources is also required in relation to the nature of renewable natural resources.

In this connection, the utilization of natural resources that have the ability to renew themselves requires a proper way of management, and as far as possible eliminating the effects of environmental pollution, so that the sustainability of these resources can take place. This principle of sustainability can mean that the currently unused resources need to be kept from being damaged. The nature of this sustainability will only be maintained if the utilization which is done wisely. The existence of wisdom in the management of natural resources must also take into account the aspects of regional development. Thus the utilization of resources directed to further encourage the development and growth of each region by sticking with the goal to foster the country's homeland as a unified socio-Aeconomic unity.

IV. Conclusions

In the Province of DKI Jakarta, water management, in particular underground water, is regulated in Regional Regulation No. 10/1998 on the Implementation and Taxation of Groundwater and Water Utilization of each underground water taking for drinking water, household, industry, animal husbandry, irrigation, mining, urban business in watering, and for other purposes, can only be implemented after obtaining permission from the Governor of the Region. Such permits include underground water drilling permits and underwater utilization permits. Underground water drilling permits may be issued after receiving binding technical advice from the DKI Jakarta Provincial Environmental Management Agency and DKI Jakarta Provincial Office of Industry and Energy.

Implementation of laws and regulations relating to Water Resources, especially Subterranean Water in DKI Jakarta.

Groundwater management arrangements are directed to realize a balance between conservation and utilization of ground water. The implementation of such activities technically needs to be adapted to the groundwater behavior that includes the availability, distribution, potential of including the quantity and quality of ground water and the groundwater environment. However, due to its presence in rocks that are closely related to geological processes, so in the processing of ground water required arrangements based on geological and hydrogeological rules.

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Peraturan Daerah Daerah Khusus Ibukota Jakarta Nomor 11 Tahun 1998 tentang Ketertiban Umum dalam Wilayah Daerah Khusus Ibukota Jakarta.

SYNDICATED LOANS OF MEGA PROJECT BUMN AS CONSORTIUM BANKING IN THE DEVELOPMENT OF GENERAL INFRASTRUCTURE IN INDONESIA.

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Abstract

Loan syndication is a consortium of banks in realizing the equitable distribution of infrastructure development in Indonesia. A syndicated loan is a loan granted by two banks / more than two banks (may be a group of banks) on separate terms to a third party by appointing a manager / group of comanagers of related banks. Writing this thesis aims to see how important syndicated loan is understood, because syndicated loan is one aspect in Indonesian Banking Law. In addition, syndicated loans can be viewed from various perspectives, both from the perspective of Indonesian banking law, even can be seen from the perspective of economic development law in Indonesia. The Syndication Loan for State-Owned Enterprises Megaprojects is very important because syndicated loans exist and aim to help finance the BUMN mega-project mega-projects in order to fulfill the public interest and create equitable public welfare, for example the benefits of syndicated loans can be used to finance general infrastructure development projects such as: toll roads, port development, construction or repair of airports, electric transmission or commonly referred to as an electric toll, ground breaking NPP, ect.
However, it is not uncommon for syndicated loans with problems such as bad debts caused by several things, this thesis also tries to discuss loan restructuring with equity participation, and maximize the role of bank agent. This thesis has 3 (three) problem formulation. First, how the mechanism of doing syndicated loan. Second, how to solve the problem syndicated loan. Third, any syndicated loans ever undertaken by the Indonesian government in the construction of a state-owned mega-project in the development of public infrastructure. The research method used to solve the above problems is the normative research method (literature study) conducted by studying and reading scientific books, newspapers, seminar results papers, laws and regulations related to the issues discussed. Hopefully this thesis is useful for the progress of infrastructure development in Indonesia.

Keywords: Loan syndication, Consortium, Mega Project BUMN, Public Infrastructure.

A. Introduction

Indonesia as a developing country, is doing massive development, therefore, the ease in doing the distribution of development is necessary for the creation of adequate public facilities and can be felt by all circles of society without exception, because the general infrastructure is a very aspect important in everyday life. Discussing the equitable distribution of public infrastructure development, the development of toll road construction projects, port development, construction or repair of airports, electricity transmission or commonly called electric tolls, ground breaking of nuclear power plants to be the focal point that will be discussed in this thesis.

The amount of funds required by the government or in this case a state-owned company must be one of the obstacles in implementing a development, because the loaning by banks must not exceed the Legal Lending Limit as set forth in the provisions of Article 11 of Law Number 10 Year 1998 regarding the amendment to Law Number 7 of 1992 concerning Banking, therefore syndicated loan or commonly referred to as Loan syndication is the solution to avoid it, it is mentioned that:

"A syndicated loan is a loan made by two or more lending institutions, on similar terms and conditions, using common documentation and administered by a common agent."

Loans given by two banks / more than two banks (may be a group of banks) on separate terms to a third party by appointing a manager / group of comanagers of related banks to be one of the most appropriate solutions.

The definition above includes all the essential elements of a syndicated loan, which are:

1. First, syndicated loans involve more than one financing institution in a syndicated facility;
2. Secondly, syndicated loans are loans granted based on the same terms and conditions for each syndicated

participant;

3. Third, the definition affirms that there is only one loan documentation, because it is this documentation that holds all the participating banks syndicated jointly;
4. Fourth, the syndicate is administrated by one same agent for all syndicated bank participants. If this is not the case then there should be a series of bilateral facilities that remain the same independent, between each participating bank with the customer.

Syndicated loans also have functions, including:

1. Functions for syndicated loan participant banks;
   a. Allows syndicated bank participants to resolve Boundary issues
   b. Maximum Lending (LLL) or Legal Lending Limit;
   c. Allows banks to make a spread of the risk in the grant
   d. Loan.
2. Functions for borrower customers;
   a. Obtained a loan with a large amount, which usually can not be met from one loanor only;
   b. Allows customers to get large amounts of loan without having to waste time with multiple banks;
   c. Increase the credibility of customers, especially when the participants of these banks are well-known banks.
3. Functions for the community;
   a. Accelerate development sectors related to public facilities because funding constraints can be overcome.

After knowing a little background picture about the writing of the syndicated loan thesis of BUMN mega-projects as a banking consortium in realizing the equitable distribution of infrastructure development in Indonesia, it is hoped that this thesis writing can contribute to the banking world in Indonesia in order to create progress in the field of infrastructure development of the government, especially in the development and other advances in all areas of Indonesia in particular.

B. Research Methods

The research method used is normative research method (literature study) conducted by studying and reading scientific books, newspapers, papers seminar result, related legislation.

C. Problem Formulation

Based on the description above, it can be formulated problem as follows:

1. What is the mechanism of performing syndicated loans ?;
2. How to resolve syndicated loans with problems ?;
3. What syndicated loans have been made by the Indonesian government in the execution and completion of the mega project BUMN in the development of public infrastructure?

D. Discussion

1. Syndicated Loan Mechanism

Broadly speaking the syndicated loan mechanism starts from establishing a managing group and appointing a lead manager. In practice, in Indonesia generally the lead manager is the main bank (main bank) of the prospective borrower. Furthermore, the lead manager will form a group of banks called managing group or bidding group to jointly be the arrangers who will form the expected loan syndication. Managing group is not just forming a loan syndicate, but it is also expected to provide underwriting commitment that is principally approval to provide part or all of fund required by borrower.

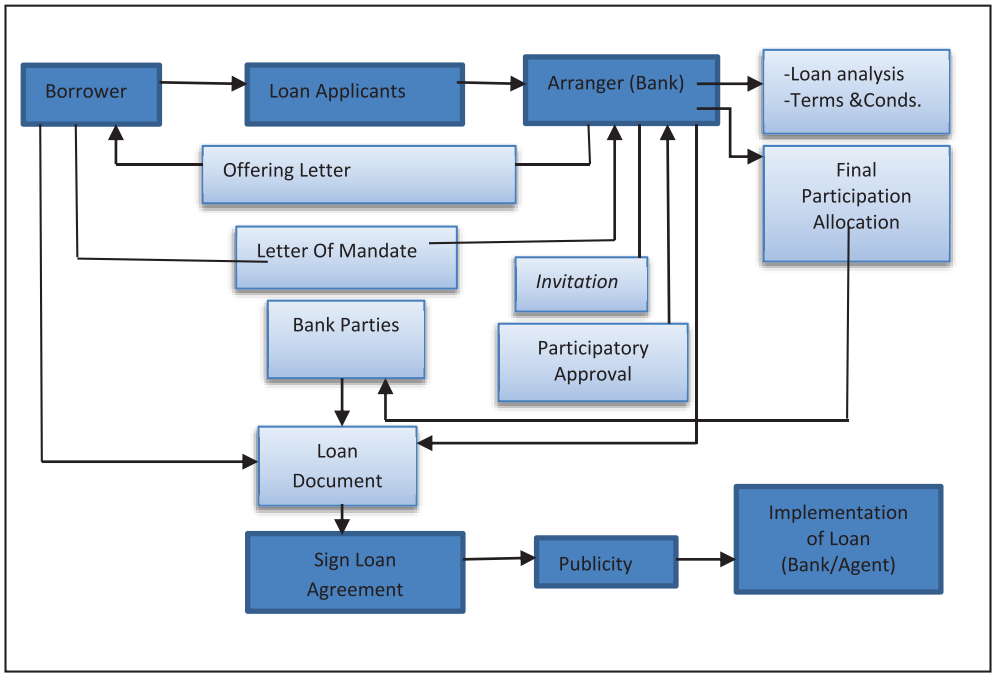
After the syndicated loan agreement is signed, the provision of funds will take place through a process of syndicated banks transferring the amount of funds already approved to the loan recipient into an escrow account administered by a bank assigned as the facility agent. After that, the facility agent will transfer the funds to the

borrower account. The role of the facility agent will last until the end of the loan term. Facility agent performs administrative work including monitoring the use of loan for and on behalf of the syndication. The move is called a disclosure or publicity. Not all syndicated loans are notified to the public. However, the large amount of syndicated loans needs to be informed to the public. The syndicated loan mechanism can be illustrated, as follows:

Syndicated Loan Mechanism:

Syndication Formation Steps:

Day	Activities
1	Provision of mandate by borrower (terms and conditions agreed upon)
	The syndication strategy is agreed upon
	Appointment of lawyer
	Preparation for making information memorandum
10	Draft initial loan agreement
	Final agreement infoemation memorandum with borrower
11	The establishment of syndicism in general begins
11-15	Presentation to potential banks become syndicated members
11-26	The establishment of syndication is complete. Documentation sent kebank
26	Allocation of loan commitments
33	Documentation agreed-signing syndication agreement



Syndication Formation Steps:

38-40	The funds are ready to be disbursed

Source: From BPS and other related Departments (processed)

The syndicated loan involves a series of sequences of activities, and at each stage of the activity there are several parties that play various functions. There are several steps in preparing syndicated loan, ie facility analysis, offer letter, mandate, invitation, allocation of final inclusion, syndication documentation, signing, publicity, loan implementation, and syndicated loan administration.

The first stage in a syndicated loan transaction is formulating the offer or formulating a bid. This offer may be

intended for general purposes or for specific projects or activities. Offers can be submitted in a variety of forms, namely indicative terms, best endeavor, or underwritten. On the preparation of certain syndicated loan facilities, there is the possibility that one form of bid is made before the borrower receives a condition. In other cases, the borrower may propose to follow the stages of the three types of offer.

After the offer formulation, the next step is to formulate terms and conditions in an offer. The terms and conditions in an offer consist of the following components:

a. Elements of Pricing or pricing elements that include margin and fees and fee structure or cost and cost structure components;
b. Maturity or maturity;
c. Payment schedule ;
d. Expired date;
e. Material Adverse Change; and
f. Clear Market Clause.

2. How to Overcome Problem Syndicated Loan

Ways or attempts to resolve syndicated loans with problems, among others:

a. Rescheduling

Namely the effort made by the bank to handle the problem loans by making the rescheduling, the way it can be done to the debtor who has good faith but will not have the ability to pay the principal or interest on schedule that has been agreed. The rescheduling is done by the bank in the hope that the debtor can repay its obligations. Several alternative rescheduling can be given by banks such as by extending loan terms, for example the loan period of 2 (two) years is extended to 5 (five) years, so the total monthly installment becomes lower. Another way is the monthly installment schedule is changed to quarterly, the change of schedule will give customers the opportunity to raise funds to repay in quarterly, this is usually adjusted for sales receipts.

b. Reconditioning

Namely the bank's efforts in saving the loan by altering all or part of the agreement that has been done by the bank with the customer. Changes to these conditions and requirements should be adjusted to the problems faced by the debtor in conducting his business. With the amendment of these terms, it is expected that the debtor may settle his obligations until paid off. Some reconditioning alternatives can be done by: Firstly, interest rate reductions aimed at lowering the interest cost to be paid by customers, so that the total installment becomes lower. Secondly, with partial or complete interest overdue, the customer in the next period only pays the principal and interest. Third, the capitalization of interest, the interest arrears are made into one with the principal of the loan, as well as the delay of payment of debt ie loan payment by the customer is charged as the principal repayment up to a certain period, then the interest payment is made when the customer is able. It needs to be calculated quickly cash flow company.

c. Restructuring

Namely the efforts made by banks in rescuing problem loans by changing the financing structure that underlies the provision of loan. Some ways that can be done by the bank in the restructuring include: First, the Bank may provide additional loan, the addition of loan will certainly increase the burden of interest to the debtor, but without any additional loan then the debtor is unable to run its operational activities. The bank will recalculate the funds needed to support the smooth operation of the company. Second, by providing additional funds come from the debtor. The bank asks customers to increase their capital so that the company can run smoothly. This is difficult because most of the customers with problem loans have no funds, so they can not increase their capital and additional capital from the bank is needed to smooth the debtor's business. Third, The combination of banks and customers. The bank will recalculate the total funds required by the debtor then after that will be taken into account the capital requirement, then the capital comes from the bank in the form of additional loan and customer's capital, that is by finding new applications or from old capital owners. This combination is the best

way, because the bank considers that the debtor is serious in solving his loan by participating in additional capital.

d. Combination

The troubled debt settlement efforts performed by the bank in a combination manner include: First, Rescheduling and Restructuring: A combined effort by extending loan time and increasing the amount of loan. Second, Rescheduling and Reconditioning: A combined effort made by extending the time period and lightening the interest. Third, Restructuring Fourth, Rescheduling: A joint effort by banks by increasing loan followed by interest rate relief or imposition of interest rates will be able to encourage the growth of the customer's business. Fourth, Rescheduling, Restructuring and Reconditioning: Namely joint bank efforts are made by maximizing the extension period of loan, plus loan, then interest arrears are charged. Fifth, Excecution: Is the last alternative that can be done by bank to save krdit problem by way of sale of collateral owned by bank.

In addition to preventing and resolving non-performing loans, it is also necessary that a guarantee right, purpose and objective of the Collateral Right is generally regulated in Article 1131 of the Civil Code, all assets of a debtor, whether in the form of moving objects or fixed objects, existing or new there shall be in the future, a guarantee to all of its debt obligations, so that by itself or by law there shall be a guarantee by a debtor to each of its loanors over all the assets of this debtor.

Among the reasons referred to in Article 1132 of the Civil Code, provided by Article 1133 of the Civil Code, pursuant to Article 1133 of the Civil Code, the right to give priority to certain loanors to other loanors arises from privileges, mortgages and mortgages. The procurement of the rights of guarantees by law, such as mortgages and mortgages, is to provide a position for a particular loanor to take precedence over other loanors. That is also the purpose of the existence of mortgages that are governed by UUHT (Insurance Rights Act).

3. Examples of application of syndicated loan in the construction and completion of BUMN mega-projects in general infrastructure development are seen in several projects, including the following:

a. Development of multipurpose terminl project of harbor cape port in Batu Bara Regency, North Sumatra. The Port of Kuala Tanjung will be developed into a Port Port port that integrates ports and industrial estates. Then, in the second stage of industrial development in Kuala Tanjung port area of 3000 Ha (2016-1018), and third stage of development of Dedicated Terminal / Hub Port (2017-2019), and fourth stage is the development of integrated industrial area (2021-2023). The purpose of the terminal construction is that the facility will be used as a 500 meter long loading and unloading dock, 500m quarrathed bulk dock, 600.00 Teus container yard, and a 14-18 LWS pool depth. The financing of public infrastructure projects in the field of transportation is financed by syndicated banks, including independent banks, BNI banks, BRI banks acting jointly as Joined Mandated Lead Arranger which provides syndicated loans of 2.1 Trillion to PT. Prima Multi Terminal (PMT).
b. State-owned companies such as Bulog, Pelindo, PT. Antam, PT. Timah, the Airport railway project, and Pertamina obtained a syndicated loan of 15 Trillion for the development of each project being handled in relation to public infrastructure.
c. The Cisumdawu Toll Road construction is divided into 6 (six) sections namely the Cileunyi-Tanjung Sari Section 14, 70 km, Section II Tanjung Sari-Sumedang 19.2km, Section III Sumedang-Cimalakama 3.15 km, Section IV Cimalaka- Legok 8.20 km, section V Legok-Ujung Jaya, section VI Ujung Jaya-Dawuan along 4.23km.
d. PT. Elnusa Tbk, a petroleum and natural gas services company, obtained US $ 113 million from a banking syndicate that will be used to improve oil and gas services facilities. The proceeds will be used for refinancing (new debt to pay off old debts).

E. Conclusion

Based on the results of research paper related to Syndication Loans Megaproyek BUMN As a Banking

Consortium in Realizing Equitable Infrastructure Development in Indonesia, the authors conclude 3 (three) principal things, including as follows:

1. A syndicated loan mechanism can be described briefly in accordance with the following chart:
2. The way to deal with problematic syndicated loans basically has a similar way to the handling of normal loan, usually because the syndicated loans are large loans. Then how to solve the problematic loan problems can be done through:
   a. Rescheduling;
   b. Reconditioning;
   c. Restructuring;
   Restructuring includes: Banks may provide additional loan, Additional funds come from debtors, Combinations between banks and customers, Combination, Rescheduling and Restructuring, Rescheduling and Reconditioning, Restructuring Rescheduling, Rescheduling, Restructuring and Reconditioning, and Execution.
3. Examples of application of syndicated loan in the construction and completion of BUMN mega-projects in general infrastructure development are seen in several projects, including the following:
   a. Construction of multipurpose terminal project of harbor cape port in Batu Bara Regency, North Sumatra. The Port of Kuala Tanjung will be developed into a Port Port port that integrates ports and industrial estates. Then, in the second stage of industrial development in Kuala Tanjung port area of 3000 Ha (2016-1018), and third stage of development of Dedicated Terminal / Hub Port (2017-2019), and fourth stage is the development of integrated industrial area (2021-2023). The purpose of the terminal construction is that the facility will be used as a 500 meter long loading and unloading dock, 500m quarrathed bulk dock, 600.00 Teus container yard, and a 14-18 LWS pool depth. The financing of public infrastructure projects in the field of transportation is financed by syndicated banks, including independent banks, BNI banks, BRI banks acting jointly as Joined Mandated Lead Arranger which provides syndicated loans of 2.1 Trillion to PT. Prima Multi Terminal (PMT).
   b. State-owned companies such as Bulog, Pelindo, PT. Antam, PT. Timah, the Airport railway project, and Pertamina obtained a syndicated loan of 15 Trillion for the development of each project being handled in relation to public infrastructure.
   c. Construction of Cisumdawu Toll Road divided into 6 (six) sections namely Cileunyi-Tanjung Sari Section 14, 70 km, Section II Tanjung Sari-Sumedang 19.2km, Section III Sumedang-Cimalakama 3.15 km, Section IV Cimalaka-Legok 8.20 km, section V Legok-Ujung Jaya, section VI Ujung Jaya-Dawuan along 4.23km.
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THE SETTLEMENT OF DISPUTES IN CAPITAL INVESTMENT

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Abstract

Since the opening of the Capital Investment in Indonesia, Foreign Capital and Capital Home Affairs, quite a lot of interested parties and have to invest in Indonesia. It is inevitable with the arrival of the investor, the people of Indonesia a lot of progress both in terms of income, the transfer of technology, as well as with the availability of jobs for the people of Indonesia.
Your existence Investments, especially regarding foreign direct investment, of course, requires arrangements, so that between investors with the Government of Indonesia both get security for the rights and obligations. In terms of setting up of the capital, the Government of Indonesia has issued a regulation of the legislation, which is the legal for Investment Capital by Act Number 1 in 1967 to set Investment Capital Foreign (foreign) and by Act Number 25 in 2007 to Investment Capital In. It turns out that both the Act is not enough to overcome problems arising, and there are many issues, such as an agreement that would not be followed up, the division and the capital is not implemented, corporate management and system work will be used and others, particularly the contract are denied, that in anticipation of the settlement of the problems, the Government of Indonesia through Act Number 5 in 1968 to ratify the ICSID (International of the Convention on the Settle of Investment Disputes) convention, with the intention that in the event of legal problems in terms of Investment Capital aquo, investors and the Government of Indonesia, have the legal basis and as a guideline for the Government of Indonesia and guidelines also for the investors are invested capital it when a dispute the law. In addition to the dispute settlement, as well as to convince investors that in Indonesia is no guarantee the rule of law to try. In ICSID convention, determined that if a dispute between the investors with the Government of the investment, then such disputes will be resolved through refereeing or arbitration the ICSID. With the convention, then the Government of Indonesia legally be tied to the contents of the provisions contained in convention, so that the settlement of disputes of foreign capital will be carried out according to the procedures and procedures that have been arranged according to the provisions contained in the ICSID.

The Government as the country has ratified convention the ICSID wasn't supposed to have a reason not to carry out the contents of Convention, however, there is a contradiction between the provisions applicable in Indonesia with Convention the ICSID. The Supreme Court through The Rules of the Supreme Court Number 1 in 1990, has issued, which in essence said that The Arbitration The alien cannot be imposed except by appointment and the Agreement of the Supreme Court of the Republic of Indonesia that was called with Fiat Exequatur. In practice was not easy to get Fiat Exequatur, even with the reason for the Order of the Exequatur can be rejected. However, Settlement of disputes Investment Capital foreign, through arbitration the ICSID is still needed, while The Rules of the Supreme Court Number 1 in 1990 is expected that as control and not as a barrier in the implementation of the execution of decisions the arbitration in the ICSID.

A. PRELIMINARY

The definition of Foreign Capital Investment in this case is Capital Investment carried out by the Foreign direct rather than with portfolio but with real, physical to in Indonesia . Act Number 1 in 1967 of Article 1 states have given the limits of Planting Foreign capital is as follows:

The definition of Investment Capital Foreign in this Act only covers foreign direct investment in directly held by or under the provisions of this Act and are used to run companies in Indonesia, in the sense that the owners of capital directly to the risk of investment.

From these provisions can be interpreted that for the Government of Indonesia in Investments is the Investments that are real and run his business by the owner of the capital. In terms of Investment, especially on Foreign Capital in a State, there are several theories about Capital Investments, among other is:

1. The states rejected capital investment from outside parties, as if a country receiving investment from

outside parties, will continue to capitalis

2. The theory that is Nationalism and populism, the theory of the view that in the presence of one State will result in differences in the profits that are not balanced, where the foreigners who invested more will make a profit, so that the State of the investors tend to limit investment in the State.
3. The theory that sees foreign direct investment in economic, traditional, which is that foreign direct investment can bring the influence of progress towards the modernization .

From the three types of the Investment, it seems the Government of Indonesia elaborate between the theory of the second and third. It is we can see from article 1 of Act Number 1 in 1967 which states that the definition of foreign capital in this Act only covers foreign direct investment in directly held by or under the provisions of this legislation and are used to run the company in Indonesia, in the sense that the owners of capital directly to the risk of investment.

From the meaning of these provisions can be concluded that capital investment for the Law is of purely by foreign parties, however, in daily practice quite often found the merger of foreign capital with a capital national (Joint venture) and until now the Government of Indonesia working so actively to the investor to invest in Indonesia, even a few times The government has issued a package's economic policies on regulations in such a way is made easier, so that the investor can invest in Indonesia.

B. PROBLEM

With the foreigners who invested in Indonesia, there is a change some sector, among others, economic political and legal, the point raised in this article is legal issues due to the Investment Capital Foreigners in Indonesia in direct investment, then it is possible the impact of the law between the Government of Indonesia as the recipient of the investment with investors put invested, that investors in question here is that investors and Investor the legal entities, in terms of the foreign capital with a capital of the National (a joint venture), is also very possible problems in such cooperation, among others, is about the capital, trading, Management in the company, the system work and the legal system that is used, as well as problems the payroll etc. Usually in such cooperation was made an agreement that governs the rights and obligations, also relating to the things that are considered to be important in such cooperation. However not all can be regulated in detail in the agreement, and because it is not stipulated, then there are differences of opinion, then that's what causes the onset of the dispute in the planting of capital in question. The settlement of disputes are discussed in this writing is the settlement of disputes capital investment that has elements of alien, like the Government of Indonesia received capital investment of the private foreigner's, or private Foreigners, in cooperation with the Private the country in putting capital.

C. DISCUSSION

It is inevitable, that with the number of those who do the Investments in Indonesia, has resulted in some legal issues, and to anticipate the possibility of, the Government through Act Number. 5 in 1968, has ratified the International Convention on the Settle of Investment Disputes (ICSID) in a bid that so that every dispute between the Government with the citizens of the alien who invested or with the private sector, be resolved through refereeing or arbitration .

In the development of investment in the people of Indonesia today, in addition to between private parties familiar with the government, quite a lot of the business activities involving cooperation between foreign private with the private sector. In the interaction between the Investors Capital Foreign with Indonesia, both government or private there is dispute among the parties. the Government of Indonesia as the parties concerned to bring capital Foreign, enough to realize that in terms of the Capital Foreign, or to resolve the problems that will arise, it is required of Justice was adequate. The need to resolve any dispute over investments involving foreign in Indonesia through arbitration cannot be avoided. So almost every contract made by foreign parties with the Government or private treaty said that in the agreement if there is a dispute will be resolved through arbitration .

If the parties have agreed with the choice of law, then a dispute settlement should be done through

arbitration. However, according to the provisions of Article 25 paragraph (3) the ICSID said that in a problem that is posed to arbitration, we still need to have the approval of the Government of the capital, in Article 25 paragraph (1) the ICSID said that Centre new has jurisdiction if both sides of the foreign investors with the Government of the capital approved it.

With these provisions, seems not easy to resolve disputes about Investment Capital that has foreign elements. In Indonesia, the institution that will take care of is BKPM (Investment Coordination Board Chief), which is one of the Non-Department, which served to formulate the policy of the Government in the Investment Capital of Interior and from abroad.

With the requirements as mentioned in article 25, paragraph (1) and paragraph (3), then any dispute over Foreign Capital Investment in Indonesia, both involving government or private Foreigners before it proposed settlement of the dispute to arbitration International/ICSID has traveled a long road, even have to go through court, in this case is civil court and state administration court. The relationship of state administration court in this case is in terms of if the Government of Indonesia was involved with dispute of Foreign Capital Investment, for example, the Government of Indonesia as defendant it is believed to be the Government in this Capital Investment Coordination Board Chief will not just giving its approval as it referred to in Article 25 paragraph (1), because of course, the Government in this Capital Investment Coordination Board Chief will have resistance and Capital Investment Coordination Board Chief, don't get the agreement, then did not rule out the alien will do The lawsuit against the Government through the state administration court and civil court with the intention that the approval was obtained. In other than that if there's the arbitration relating to the Government of Indonesia, with the release of The Rules of the Supreme Court Number 1 in19 90 required the intervention of the Supreme Court and I with how to apply for a Fiat Exequatur.

The definition of Fiat Exequatur is some sort of approval from the Supreme Court R.I. and to get a Fiat Exequatur, should be first to Application for through the Central Jakarta District Court. The arbitration alien can only be executed if previously been excluded in the Central Jakarta District Court. Article 4 paragraph (2) The Rules of the Supreme Court Number 1 in 1990 states that Exequatur will not be given if the arbitration deal clearly contrary to the joints of the Rights of the entire system of Justice and the people of Indonesia (General Order) In other words that it would have been very difficult to get Fiat Exequatur, in accordance with article 54, paragraph (1) the ICSID said that the participants Convention, have to admit Decision Covention as decisions binding and a verdict late .

Not all decisions The arbitration in The alien could be admitted to executedin Indonesia, to be recognized and asked to be executed should meet certain requirements. According to Article 66 Act Number 30 in 1999 a verdict the arbitration in alien to be done to meet the requirement that:

1. The ruling handed down by Arbiter or the arbitration in the middle of it is with the State of Indonesia are bound to the agreement both in bilateral and multilateral, on recognition and implementation of The International Arbitration
2. It is limited only on the Law of Commerce
3. The ruling in question can only be implemented in Indonesia is limited to decisions that do not conflict with public order.
4. The Arbitration International to be carried out in Indonesia after acquiring eksekuator of the Supreme Court through the submission of the first to the Chairman of the country here.

With regard to the aforementioned, can be seen that it was in Indonesia, it's not easy to resolve disputes Investment through the arbitration , although according to the theory that the Settlement of disputes through arbitration more easy and simple, but it wasn't like that.

D. CONCLUSION

Indonesia is one of the countries to ratify Convention the ICSID and with the Convention, should the rest of the provisions and decisions made by the institution is obliged to followed. However, the fact that for the sake of other on the grounds of public order, then the decision of convention to in steered, maybe even cannot be implemented.

The Supreme Court with The Rules of the Supreme Court Number 1 in 1990, has made conditions very strict in terms of the implementation of The Arbitration Foreigners in Indonesia, with the Holy Order General, the Supreme Court may refuse the Application for the implementation of the Execute The Arbitration Alien. That was shown The Rules of the Supreme Court, does not mean the decision arbitration foreigners in Indonesia, but it is very selective. Under the terms of The Rules of the Supreme Court there are some requirements to Decision of Arbitration foreign to be carried out in Indonesia, among others, is the cutting off the arbitration, must have good relationship on both sides with Indonesia regarding the settlement of disputes of Arbitration international, It was a question of legal trade, does not conflict with law of Indonesia and had to obtain permission approval of the Supreme Court.

In theory, the law about the settlement of disputes, resolve the dispute through None of litigation in general, faster and simpler than in the settlement of disputes through litigation, but it is not the case with the Settlement of disputes Foreign Capital Investment in Indonesia, although the resolution through the institution of arbitration which are considered more easy and simple, but not so in its implementation. There are several reasons for the cause is not that simple the Settlement of disputes Investment Capital, among others, is that according to ICSID, before the dispute brought to trial by Arbitration in the ICSID, it turns out that the parties first be required to determine and select the law where that will be used by the parties that will be used by Arbiter to settle the dispute in question. Can be imagined that to get the deal is not easy and wearing a long time.

As you know that the arbitration ICSID is an institution of dispute the Foreign Capital Investment, is private, because the agency is the private institute. then the agency does not have the hustler to carry out the verdict, not owned a hustler on the arbitration ICSID, it is very difficult to execute decisions.

In connection with the difficulty to execute decisions of the arbitration, then in the implementation of the Arbitration, it takes the public through the District Court, so even though a dispute has been decided upon by the arbitration, it turns out the verdict, still need other institutions.

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THERAPEUTIC TRANSACTION IN HOSPITAL ON INDONESIA

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Abstract

Therapeutic transactions are legal relations that give rights and obligations to both parties. The object of the agreement in therapeutic transaction is not the same as the object of treaty in general, because the object in therapeutic transactions is an attempt by the doctor to cure the patient's illness. Therapeutic transactions may occur in doctor's private practice or in health care facilities such as hospitals. Hospital is an organization that provides complete health services to the community. Hospital is an organization with business and social objectives.

The discussion here first focuses on the process of therapeutic transactions in the Hospital, where in running Hospital business in it's implementation must still be in line with the ethics of the medical profession and ethics of other health care professional. The second one looks at how to develop Hospital business through its service products based on therapeutic transactions, which is by doing better health services in order to be an option for customers to get treatment efforts. In addition Hospital business is developed through medical support which is a fundamental part of money from therapeutic transactions.

Key Words: Hospital business, products of medical services

A. INTRODUCTION

The doctor's relationship with the patient starts to occur when the patient comes for treatment, this relationship is in addition to trust, also includes the contract, usually known as therapeutic or therapeutic transactions. Therapeutic transactions are legal relations that give rights and obligations to both parties. The object of the agreement in therapeutic transaction is not the same as the object of treaty in general, because the object in therapeutic transactions is an attempt by the doctor to cure the patient's illness. In the patient's treatment effort, the physician performs his or her job according to his or her competence and based on professional standards, and other relevant rules.

Therapeutic transactions may occur in doctor's private practice or in health care facilities such as Clinic, Puskesmas, or Hospital. For doctors who make efforts to cure patients on health facilities such as hospitals, in addition referring to professional standards and rules established by the state, doctors must also be based on rules made by the Hospital which is usually in the form of Standard Operating Procedures.

Hospital is an organization that provides complete health services to the community. The hospital is an organization with a business and social purpose so it is a complex and unique organization. Complex because there is a very complicated problem. Unique because in the hospital there is a process that produces lodging services as well as medical services and treatments in the form of services to patients who are inpatient even outpatient. The people facing the hospital are emotional and emotionally unstable because they are ill. Therefore, hospital services are much more complex than lodging/hotels. The purpose of the Hospital is to produce products, services or health services that really need them and hope from various aspects, including medical and non medical.

As an organization that has one of the purpose is business, of course Hospital also has a goal to seek the maximum profits for the organization to grow. However, if it is associated with a service product in the form of healing efforts performed by a doctor on the basis of therapeutic transactions without promising tangible results, then it will be difficult to achieve these goals. Hospital business must run on the basis of business ethics and medical ethics, because in therapeutic transactions that make the agreement/contract is a doctor with a sick person who needs help for treatment. For that ethics is needed in running Hospital business, so that services can run well and can grow.

B. PROBLEMS

By looking at the wrong product of medical service in the Hospital is the effort of treating the patient's disease based on the agreement / contract therapeutic, it is necessary to know:

1. How is therapeutic transaction process in hospital?
2. How can hospitals develop if the product of its services is based on therapeutic transactions?

C. THEORITICAL BASIS

The relationship between physicians and patients in medical science generally takes place as a active-passive biomedical relationship[1] called medical relations. In this relationship the superiority of the doctor to the patient is clearly visible, where the doctor performs the activity while the patient is only passive and obedient to the doctor's orders. The basis of the relationship between physician and patient is on the basis of the patient's trust in the physician's ability to do his utmost to cure the illness.[2] The basic pattern of relationship between physician and patient is primarily based on socio-cultural circumstances and the patient illnesses that can be distinguished into patterns of relationships :[3]

1. Active-passive, the pattern of relationship between parent-child which is a classic relationship pattern since the medical profession began to recognize the code of ethics.
2. Guidance-cooperation, the relationship in the form of guiding cooperation as well as parents with adolescents.
3. Mutual Participation, this pattern is based on the idea that every human being has the same dignity and rights.

The legal relationship between the doctor and the patient is the relationship due to the agreement or contract, and the relationship is due to the law. As the age of physician and patient relationship is no longer a paternalistic relationship but a relationship based on a balanced partnership position, the relationship becomes a contractual relationship known as a therapeutic transaction.

Therapeutic transactions are agreements between physicians and patients who authorize the physician to perform activities to provide health services to patients based on the skills and expertise possessed by the doctor. From the legal relationship in the therapeutic transaction, the rights and obligations of each party arise, the patient has the rights and obligations, and vice versa with the doctor.

Definition of therapeutic transactions there are several definitions of scholars, ie:

1. Hermien Hadiati Koeswadji : Therapeutic transactions are agreements (Verbintenis) to seek or determine the most appropriate therapy for patients by doctors.[4]
2. Veronica Komalawati : Therapeutic transactions are legal relationships between physicians and patients in professional medical services, based on competence in accordance with certain skills and expertise in the field of medicine.[5]

Every legal relationship between physicians and patients within a hospital setting is an attachment (Verbintenis) that creates rights on the one hand and obligations on the other. The doctrine of engagement aims to achieve a result or achievement and endeavor (Inspanning) or professional effort to the maximum extent possible. While the agreement is part of an engagement that contains agreement of two or more parties to bind each other in a legal relationship. That's where the therapeutic relationship between doctor and patient becomes important. Then the validity of the agreement must meet the requirements as specified in Article 1320 of the Civil Code namely there is agreement, skills, certain objects and legitimate cause. Each agreement contains freedom (Article 1338 KUHPerdata) in which contains:

1. Legally-made Agreement is binding as a law to the author.
2. Run in good faith.

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1 Danny Wiradharma, Hukum Kedokteran, Binarupa Akasara, Jakarta, 1996, hal.42

2 Wila Chandra Supriadi, Hukum Kedoktera, Mandar Maju, Bandung, 2001, hal.27

3 Safitri Haryani, Sengketa Medik, Diadit Media, Jakarta, 2002, hal.10

4 Hermien Hadiati Koeswadji, Hukum Kedokteran (Studi Tentang Hubungan dalam Mana Dokter Sebagai Salah Satu Pihak), PT. Citra Aditya Bakti, Bandung, 1998, hal. 132.

5 Veronica Komalawati, Peranan Informed Consent dalam Transaksi Terapeutik, PT. Citra Aditya Bakti, Bandung, 1999, hal. 1.

3. Can not be decided without the consent of the other parties.

Therapeutic relationships give rise to rights and obligations of the parties. Other consequences and therapeutic relationships often lead to alleged violations commonly termed as medical malpractice. Alleged violation can be:

1. Violations of ethics issued by the Ikatan Dokter Indonesia (IDI) and the Majelis Kode Etik Kedokteran (MKEK), with objective punishment or temporary dismissal that still feel embarrassed.
2. Violations of discipline handled by the Majelis Kehormatan Disiplin Kedokteran Indonesia (MKDKI) with disciplinary sanctions that are ethics of professional conduct such as warning, revocation of practice license, revocation of registration letter, re-schooling, imprisonment and fine; whereas if any alleged malpractice violation will be handled by the Indonesian Medical Council.
3. Violation of law handled by civil or criminal public court, with penal sanction or material compensation.
4. Constitution (Undang–undang Republik Indonesia No. 29 tahun 2004) on Medical Practice states that disciplinary abuse does not rule out the possibility of prosecution by court.

Hospital as one form of health facilities where professionals such as doctors one of them perform profession activities. Thus the hospital should be given a legal entity.[6] With the existence hospital's legal relationship with the patient due to therapeutic transactions, it can be said that the hospital is an organ that has the independence to conduct legal relations with full responsibility. Since hospitals are legal entities, then hospitals also have legal rights and obligations.

According to Constitution (Undang–undang Republik Indonesia no. 44 tahun 2007) on Hospital and According to the Decree of the Minister of Health of the Republic of Indonesia No. 340 / MENKES / PER / III / 2010 on Hospital Classification, "The hospital is a health service institution that provides full range of personal health services providing inpatient, outpatient and emergency care services". While the definition of hospital according to Regulation of the Minister of Health of the Republic of Indonesia No. 1204 / Menkes / SK / X / 2004 on Hospital Health Requirements, stated that: "The hospital is a means of health services, a gathering place for the sick and healthy people, or can be a place of disease transmission and allow the occurrence of environmental pollution and health problems".

There are several types of hospitals that are basically grouped into 3 principal categories:[7]

1. Based on the principle of ownership (ownership)
2. Based on the principle of length of stay (length of stay)
3. Based on the principle of the type of service provided (type of service provided).

The long history of hospital development, starting from places of worship that provide help to the sick as a social tool until now become a business oriented organization so that the management system also experienced the development and management becomes harder. The Hospital serves as a workplace for the people who hold onto the pronounciation of the Hippocrates vow and are bound by their ideal and functioning socially. At the beginning of its history, the hospital was nothing more than an institution that received generous donations, so its role was to provide only food and bedding for patients requiring hospitalization. The situation changed with the presence of many doctors who helped the patients, so the role of the hospital also increased as providing medical equipment, medicines and professionals to improve the function and role of health services. Not quite there, each hospital is racing to develop itself into an institution with total and comprehensive service. The consequence is not only to showcase the quality of medical services and other general support, but to bring more corporate liability and vicarious liability due to the mistakes made by the doctors who work in it. Basically Hospital is an autonomous organization because it is where the work of the professionals (doctors and other health workers). In carrying out its work professionals are carrying the ethical principles of autonomy, beneficence, confidentiality, and justice.

The organization's hospital ethics is undergoing major changes. The old form of hospital organization ethics relies heavily on physician and patient relationships in the context of doctor's oath. However, the current organization's ethics deals with the norms referred to in the day-to-day management of the hospital. These norms reflect how the hospital business will be run so that in the end the hospital can gain the trust of the community.

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6 Hermin Hadiati Koeswadji, Hukum untuk Perumahsakitan, PT Citra Aditya Bakti, Bandung, 2002, hal. 89.

7 Ibid, hal. 42

The ethics of hospital in Indonesia is decided as Etika Rumah Sakit Indonesia (ERSI) is formulated and nurtured by Perhimpunan Rumah Sakit Seluruh Indonesia (PERSI) and has also been approved by the Minister of Health by Decree No. 924 / MENKES / SK / XII / 1986. Tahun 1999 ERSI developed into a Kode Etik Rumah sakit di Indonesia (KODERSI).

In addition to ethics and morals must be put forward in running the hospital business, the legal rules that covered should not be ignored to make the state of Indonesia a country that is clean from the threat of corruption, so that health care business through the hospital became the target of investors. Tool to dispel this corruption has been prepared through TAP MPR RI. XI / MPR / 1998 on the Implementation of a Clean and Corrupt-Free Country, Collusion and Nepotism, as well as through Constitution (Undang – undang Republik Indonesia No. 28 tahun 1999) on the Administration of a State Free of Corruption, Collusion and Nepotism (KKN), Constitution (Undang – undang) no. 20 tahun 2001 on amendment to Constitution (Undang – undang) no. 31 tahun 1999, Constitution (Undang–undang Republik Indonesia No. 30 tahun 2001) on Corruption Eradication Commission, and Presidential Decree no. 11 tahun 2005 on Corruption Eradication Coordination Team.[8]

D. METHODOLOGY

The research methodology here is empirical normative research, where the data used is secondary data from various libraries and information from Government Hospital and Private Hospital.

E. DISCUSSION

In Indonesia there are generally three categories of Hospitals whose criteria are based on the purpose of establishment, ie General Hospital, Social Hospital, and Private Hospital.[9] All types of Hospital is a social organization, but for the sustainability and development of the organization certainly that requires not so small quantities of financial support, so the organization in the form of this legal entity is not a few who become a place to run a business.

In running the business, the Hospital should still be done in line with the ethics of the medical profession and other health workers. As the organization of legal entities, the Hospital has a legal responsibility (Hospital Liability) in the form:

1. Contractual liability, that is not the implementation of physician's obligation as an achievement due to contractual relationship. In therapeutic relationships, obligations or achievements are not judged by results but efforts. Hospital Liability occurs if medical efforts do not meet medical standards.
2. Liability in tort, namely the act of unlawful nature that is not a liability but concerning decency or contrary to the thoroughness of the doctor. For example: revealing medical secrets, carelessness resulting in disability or death.
3. Strict Liability, ie responsibility not because of making a mistake, but the resulting result. For example: hospital waste makes people around sick.
4. Vicarius liability, ie responsibility due to errors made by employees. In association with the hospital, if the doctor as an employee made a mistake then the hospital is responsible.

To maintain and develop Hospital business, there are still many opportunities that can be done in its management. In the process of therapeutic transactions, there are some necessary support such as diagnostic support, medication support, even inpatient support. These medical supports can be used as business opportunity for hospitals. The implementation of medical support in hospitals uses a lot of sophisticated tools that are very expensive. If the hospital has a lot of customers, then many investors are willing to do Kerja Sama Opersional (KSO), this is an opportunity to gain profit also for the Hospital.

Good customer service is still a priority for hospitals to benefit, because with satisfactory service and therapeutic transactions are run in accordance with professional ethics, medical service standards, operational procedures standards, and hospital ethics then the Hospital can be a good choice by patients individually or other

8 *Faisal Santiago, Bunga Rampai Catatan Hukum, Cintya Press, Jakarta, 2016, hal. 10.*

9 *Hermien Hadiati Koeswadji, Op.Cit, hal.44.*

business organizations in health care. In addition, in the management of the Hospital must always be based on the relevant legal rules, including the rule of law on corruption.

F. CONCLUSION

Based on the above description can be concluded :

1. The process of therapeutic transactions within the Hospital which is the relationship of physician with the patient in the healing effort must be kept in accordance with the ethics of the medical profession and the professional ethics of other health personnel, in addition to the hospital-based health services, hospital management must be in accordance with the Kode Etik Rumah Sakit Seluruh Indonesia and in accordance with applicable rules of law.
2. Hospital development can still be obtained even though its service products based on therapeutic transactions that is through improvement in the service so that becomes the hospital of choice. In addition, through the sale of tools to support therapeutic transactions such as laboratories, radiology, pharmacy, and inpatient care facilities still provide opportunities for profit.

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TRANSPARENCY AND MINING ACCOUNTABILITY IN THE PROVINCE OF BANGKA BELITUNG ISLANDS IN ACCORDANCE WITH APPLICABLE RULES FOR PEOPLE WELFARE

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A. Background

Mining is an effort to explore the potential of natural resources contained in the earth's surface as well as in the bowels of the earth that has economic value. The economic basis of a State including the State of the Republic of Indonesia is defined in the Constitution. Article 33 of the Constitution of the Republic of Indonesia (the 1945 Constitution) regulates the Indonesian economic system to read :

1. The economy is structured as a joint effort based on the principle of kinship.
2. Production branches that are important to the State and control over the life of the people are controlled by the State.
3. Earth, water and natural resources contained therein are controlled by the State and used for the greatest prosperity of the people.

Article 2 of Law Number 22 Year 2001 regarding Oil and Natural Gas has clearly defined the legal principles in the operation of oil and gas mining. These principles include people's economy, integrity, benefits, justice, equity, equity, prosperity, togetherness and common people's welfare, security, safety, and legal certainty and social insight.

The existence of oil and gas mining in a region has a very strategic meaning because with the mining business it will add new jobs. Most of the people residing in mining areas will be recruited by companies to work with mining companies. This recruitment will prevent conflicts between communities and companies. If some of them have been accommodated in the company, the company will be safe in conducting exploration and exploitation business.

The Province of Bangka Belitung Islands was originally part of South Sumatra Province. Bangka Belitung Islands Province officially stands alone as the 31st province in the year 2000 with the provincial capital of Pangkal Pinang and set on February 9, 2001. Bangka Belitung Islands Province consists of two islands of Bangka Island and Belitung Island.

According to data from the Central Bureau of Statistics Pangkalpinang (2003) geographically Pangkal Pinang city has an area of 89.4 km^2 consisting of 5 districts of Tamansari, Pangkalbalam, Rangkui, Bukit Intan and Gerunggang, the total population is 125,342 people. Pangkal Pinang City functioned as a center of development of the province of Bangka Belitung Islands as the center of government, the center of political activity, and also became the center of trade and industry. In addition Pangkal Pinang city as well as a social service center that includes education, health, and so on .

Bangka Belitung Islands Province is rich in aluminum content of tin ore and sand mining materials. According Sutedjo (2007) Bangka Island, Singkep, and Belitung is the island with the largest tin producer in Indonesia. Statistics from the United States Bureau of Mines (USBM) noted that Malaysia, which has tin ore reserves number 1 (one) and followed by Indonesia which has tin reserves of about 800,000 tons, has the potential to increase foreign exchange for national economic development in Indonesia. Tin mining in Indonesia itself has a very long management history can be said is still on a small scale, starting since the year 1709 which was first discovered on the island of Bangka . Foreigners began to invest in the 1970s with the opportunity given by the government to invest and conduct activities in the field of foreign mining is Tambang Karya (TK) in addition to the PN. Timah (now PT Timah, Tbk) is a state-owned company that manages tin mining.

B. DISCUSSION

Law is a system, meaning that one legal provision relates to another law. Likewise, mining law has relationships with others, such as agrarian law, environmental law, forestry law, and tax law .

The principle of benefit in the mining arrangement must refer to the objectives of the State as contained in the Preamble of the 1945 Indonesian Constitution, in which the State wishes to promote the general welfare in order to bring about social justice for all Indonesian people. In other words, the results of mining should in such a way make a real contribution to economic growth, not just enjoyed by business actors and officials related to mining.

Principle of alignment to the interests of the nation, in relation to Article 33 Paragraph (2) of the 1945 Constitution of the Republic of Indonesia which in essence regulates the production branches which control the livelihood of the people is controlled by the State and is used as great as for the welfare of the people. The word folk here must be interpreted in such a way as the subject of the Indonesian nation. The task of the State to maintain the integrity of the nation and ensure the survival of society both in terms of material and spiritual.

The principle of participative, transparent and accountable, relates to the parties related to mining management, namely the government that has the authority to regulate, issue policies and licenses, business actors in this case business entities, cooperatives, and individuals. The participative principle here requires a balance of roles between the parties in the management of mining actively and in balance.

Transparent principle is an open management related to mining management information that can be accessed in general so that state institutions and community members such as non-governmental organizations can monitor and provide effective supervision. The principle of accountability relates to the accountability of both the Government issuing licenses and from business actors implementing mining management, since the main target of mining management must contribute significantly to economic growth in order to achieve the welfare of the Indonesian people.

The principle of sustainable and environmentally sound. This principle deals with the survival and preservation of the environment today and in the future. On the one hand, mining management is intended to extract natural resources for economic value-added, on the other hand, mining management whose objects can not be renewed and can damage the environment that ultimately destroys the ecosystem. While all creatures including humans can only live in an environment with a good and decent ecosystem. Therefore, in the planning of mining management integrate the economic, environmental and socio-cultural dimension.

Mining Indonesia is a non-renewable natural wealth as a gift of God Almighty who has an important role in fulfilling the livelihood of many people. Therefore, the management must be controlled by the State to provide real added value to the national economy in an effort to achieve prosperity and prosperity of the people in justice; provide significant added value in the national economic growth and sustainable regional development, it is necessary to reform the mining arrangements independently, reliably, the trajectory to ensure sustainable national development .

Mining is a series of activities in the context of searching, mining(excavation), processing, utilization and sale of minerals (minerals, coal, geothermal, oil and gas). The new paradigm of mining industry activity is referring to the concept of Mining which is environmentally sound and sustainable, which includes:

1.) General Investigation (prospecting).
2.) Exploration: preliminary exploration, detailed exploration.
3.) Feasibility study: engineering, economics, environment (including EIA study).
4.) Production preparation (development, construction).
5.) Mining (Dismantling, Loading, Transportation, Stockpiling).
6.) Reclamation and Environmental Management.
7.) Processing (mineral dressing).
8.) Purification / metallurgical extraction.
9.) Marketing.
10.) Corporate Social Responsibility (CSR).
11.) Termination of Mine.

Based on data obtained from the Mining and Energy Agency that the Bangka Belitung Islands land in general has an average acid pH or acid reaction below 5, but has a very high aluminum content. It contains many tin ore minerals and quarry materials like sand, quartz, granite, kaolin, clay and others.

The geological condition in the province of Bangka Belitung Islands is quite potential for the development area. Almost in all regions. Tin material (tin), Kaolin, Quartz (quartz), and bilitonite (known as "satam"). Kaolin is a raw material for paper making, ceramics, detergents, glue, cosmetics and materials for the chemical industry. Quartz sand compared to ordinary sand is whiter and smaller grains.

This material is used for glass making. Satam is widely used for ornaments / ornaments of rings, brooches, and other jewelry. Land use in the province of Bangka Belitung Islands is dominated by state forests, plantations, moor and settlements. However, based on numerical data obtained from BPS, it is also seen that the unused land is also large enough (scrub) to reach 112,019 Ha. Of the total land area 69% has been used for legal agriculture / gardens / fields / ponds, ponds, ponds / ponds, fields for timber plants, state / private plantations, and paddy fields. While the rest are buildings, yards, pastures and land that temporarily not cultivated.

Transparency and accountability of mining in the Province of Bangka Belitung Islands for the realization of a good governance is the hope of all parties, especially in the islands of Bangka Belitung. Bahwasannya in an effort to realize good governance has been set forth in various laws and regulations, such as TAP MPR Number XI Year 1998 on the Implementation of a Clean and Free State of KKN, Law Number 28 Year 1999 on the Implementation of a Clean and Free State of KKN, Presidential Instruction Number 7 of 1999 on Performance Accountability of Government Agencies (AKIP), and Presidential Instruction No. 5 Year 2004 on Acceleration of Corruption Eradication.

The spirit of reform has encouraged the BPK to reposition and redefine its tasks, functions and roles in the field of financial and development supervision in order to support the realization of community demands for the Government to pay serious attention in tackling corruption, collusion and nepotism (KKN) as mandated by MPR Decree Number XI / MPR / 1998 on the Implementation of Clean and KKN in the Country (Coruption and Koalisi Coruption)

This shows that the implementation of financial and development monitoring is an opportunity as well as a challenge that must be addressed in a systematic and sustainable way. On the other hand, good governance and performance accountability of government agencies is a manifestation of government responsiveness and sensitivity to the demands and aspirations of the people in achieving the goals and ideals of the nation and the state.

In relation thereto, the importance of transparent mining management and accountability in the Bangka Belitung Islands Province, it is preferable for internal control of the local government, especially in the Bangka Belitung Islands Province to be more assertive in carrying out such supervision where the supervision is carried out by the Representative of the Financial and Development Supervisory Board (BPKP) Province of Bangka Belitung Islands.

Representative of BPKP of Bangka Belitung Islands Province to focus its activities in encouraging the implementation of regional autonomy, performance accountability of government institutions in order to realize good governance and good corporate governance, optimize state / regional revenue, and take an active role in eradicating KKN. Of course also must be supported with the ability of human resources owned, Representative of BPKP Province of Bangka Belitung Islands trying to help accelerate the improvement of local government management.

It can be concluded that, given the transparency and accountability of mining in the Bangka Belitung Islands Province when viewed from a business standpoint, the transparency of the report will provide equal information to all parties. Transparency also creates better trust between community, government and industry organizations.

C. CONCLUSION

It can be concluded that the importance of transparency and accountability of mining in the Bangka

Belitung Islands Province can be run in accordance with the regulations applicable to the welfare of the people, the hope can contribute significantly to economic growth, not just enjoyed by business actors and officials related to mining.

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CRIMINAL ELEMENTS IN SELLING PAWN AS REGULATED IN ARTICLE 10 PRP. NO. 56 YEAR 1960 ABOUT DETERMINATION OF AREA OF AGRICULTURAL LAND

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Abstract

In fulfilling the necessities of life, many people, especially those in the countryside, have no other way, except by mortgaging their possessions, including selling their farms temporarily. It is said to be a temporary sale, because the people actually do not actually sell their farms but only mortgage the land for urgent (financial), and someday when it has earned money, then the agricultural land that has been handed over to someone is taken back by redeeming it. So basically the cause of land lien in the community is because someone needs money, one of which makes the land as collateral. Usually people mortgage the land only when it really is in a very urgent situation. If not in urgent need, then usually people prefer to rent the land.

This research uses normative juridical method, using secondary data data which then analyzed by using qualitative analysis technique.

Arrangement arrangements in Indonesian civil law provisions are governed in Articles 1150-1160. The element of the mortgage penalty stipulated in the Perpu. No. 56 Year 1960 About Stipulation of Land Area Agriculture is related to the control of agricultural land by the pawn shop that has exceeded 7 years or more does not return the pawn land to its owner within a month after the existing plant is harvested. This criminal offense is a violation. Criminal sanctions in the sale of pawn arranged in the Perpu. No. 56 Year 1960 About Determination of Area of Agriculture Land especially concerning the provisions of Article 7 Perpu. No. 56 Year 1960 is as stipulated in Article 10 with imprisonment for a duration of 3 months and / or a maximum fine of Rp. 10,000.

The problem that arises is that, sometimes the people who are in trouble, have not been able to get some money to redeem their mortgaged land, so that the condition can last long, up to tens of years.

Keywords: Rent, Law, Land

Background

The alternative chosen to get the money commonly done by the village community since long ago is simply by pawning the ground, because there is no treasure that can be used to meet the existing needs, and usually very urgent. By pledging the community land in the village to meet the necessary needs. In addition to land pledge is commonly used since the first community also chose to make land pledge because the land is not easy, not complicated, and there is no set time for redemption, and people prefer the land pledge as an alternative to get money because land pledge does not recognize any monthly interest that must be paid and to be burdened by the pledge lender to the mortgagee as long as the mortgage goes unlike the usual guarantee institutions.

The problem that arises is that, sometimes the people who are in trouble, have not been able to get some money to redeem their mortgaged land, so that the condition can last long, up to tens of years. On the one hand, people have not been able to redeem their land, on the other hand, the community becomes unemployed, because in the countryside the agricultural land is usually the only activity that can be done by the village community. Conducted in writing also to keep watch if in the future there is a dispute due to the agreement.[1]

1 *Dalimunthe, Chadidjah. Pelaksanaan Land Reform di Indonesia dan Permasalahannya. USU-Press, Medan, 1998, hlm. 5-8.*

Pawn land is one of the land transactions according to customary law called the sale of mortgage. Pawn of the land as it is part of the land transactions then the rules are subject to the rules of sale and sale which is regulated in customary law. Pawn land is a relationship between a person with the land belonging to someone else who has money owed him. As long as the debt has not been paid off, the land remains in the possession of the money lender (pawnbroker). During that time the total land yield becomes the right of the mortgage holder, which is thus the interest of the debt.[2]

To enter into a mortgage agreement or to add a mortgage using a written agreement because with a written agreement the strength of proof is stronger than the oral agreement. On one of the problems that occur when making a pawn lien agreement the pawnbroker makes a pawn arrangement where the content of the agreement is to sell laburu (selling off) which should not necessarily be followed by selling laburu (selling off) because added pawn or pawnshop deepening has the different contexts of selling laburu (selling loose) and the mortgageeer should be in the pawn lending agreement or the deepening of the mortgage must give the time period in the agreement when the lender can return his mortgage money to the mortgage receiver does not necessarily make the pai added agreement to sell laburu (sell free)[3]

In connection with the legal act that caused the liens in the customary law is called "selling pawn". The sale of a pledge is a legal act of cash and light, in the form of the surrender of a piece of land by the owner to another party who gives money to him then with the agreement that the land will return to the owner after it is returned the full money (ransom).[4]

According to Article 7 paragraph 1 Prp. No. 56 Year 1960, whoever controls agricultural land with a lien which at the time of the entry into force of this regulation has lasted 7 years or more is obliged to return the land to its owner within a month after the existing crops have finished harvesting, with no right to demand payment of ransom . The sale of this farming livestock raises a lien based on conversion and sale of mortgage. This lien if not regulated in the provisions of agrarian law will be able to cause negative impacts, especially the emergence of indications of criminal acts from the consequences of the sale of land loot farm.

Based on the above background explanation, it can be drawn a formulation of the problem as follows: What is the arrangement of pledge in the provisions of the civil law of Indonesia ?, What are the elements of the criminal penalty stipulated in the Perpu. No. 56 Year 1960 About Stipulation of Land Area of Agriculture? and How is the criminal sanction in the sale of pawn arranged in Perpu. No. 56 Year 1960 About Stipulation of Land Area of Agriculture?

Discussion

Arrangement of pledge in the provisions of the civil law of Indonesia

The term civil law was first introduced by Djojodiguno as the weakest of burgerlijkrecht during the Japanese occupation. Besides the term, the synonyms of civil law are civielrecht and privatrecht. Experts impose restrictions on civil law, such as Van Dunne's interpretation of civil law, especially in the nineteenth century, is: "A regulation that regulates the essentials of individual freedom, such as persons and families, property rights and engagement. While public law provides a minimum guarantee for personal life ". Another argument, Vollmar, defines civil law as: "The rules or norms that impose restrictions and thereby provide protection to the interests of the individual in a precise comparison between the interests of one with the other interests of the people in a particular society, which concerns family relations and traffic relationships "

From these two opinions, it can be said that the definition of civil law presented by the experts above, the main study on the regulation of protection between people with each other, but in the science of law, legal subjects not only people, but legal entities also included the subject of law, so for a more complete understanding of the whole rules of law (both written and unwritten) governing the relationship between legal subjects with each other in familial relations and in social intercourse. Humans are the same as people because humans have subjective rights and jurisdiction while the legal entity is a collection of people who have certain goals, assets, and rights and

2 *2 Lilik Istiqomah. Hak Gadai Atas Tanah : Sesudah Berlakunya Hukum Agraria Nasional. Usaha Nasional. Surabaya. 1982.hlm. 85.*

3 *A.Suriyaman Mustari Pide. Hukum Adat Dulu, Kini dan Akan Datang.Makassar. Pelita Pustaka. Jakarta, 2009. Hlm. 4-8.*

4 *4 Ibid, hlm. 10*

obligations.

Substances set forth in civil law include family relationships, which in family relationships will give rise to laws concerning people and family law and social intercourse, where in social relationships will bring about the law of property, the law of engagement, and the law of inheritance.

In the civil law there are 2 (two) rules, namely

1. A written rule.
   The rules of civil law written are the rules of civil law contained in legislation, treaties, and jurisprudence.
2. Unwritten rules
   Unwritten civil law rules are the rules of civil law that arise, grow, and develop in the practice of community life (custom).

From various explanations about civil law above, can be found the elements are:

There is a rule of law

1. Regulate the relationship between legal subjects with each other.
2. he areas of law regulated in civil law include person law, family law, object law, inheritance law, law of engagement, and law of expiration and expiration.

The civil law prevailing in Indonesi is diverse, meaning that the prevailing civil law consists of various legal provisions, in which each resident is subject to his own law, subject to customary law, Islamic law, and western civil law. As for the cause of legal pluralism in Indonesia is the division of the class of Indonesian inhabitants of the Dutch colonial heritage and the absence of the provisions of civil law applicable nationally.

Basically the source of law can be divided into 2 (two) kinds

1. The source of material law.

The material legal source is the place from which the legal material is taken. For example, social relations, political power, scientific research results, international developments, and georafis.

2. Formal legal sources.

The source of formal law is a place of obtaining legal power. This relates to the form or manner in which the formal law rules apply

Volamar divides the source of civil law into four kinds. That is KUHperdata, traktat, yaurisprudensi, and habit. Of the four sources are subdivided into two kinds, namely the source of civil law written and unwritten. Sources of civil law written where the discovery of the rules of civil law derived from written sources. Generally written rules of civil law are contained in legislation, treaties, and jurisprudence. An unlawful source of civic law is a place of invention of civil law law derived from an unwritten source. As in customary law. While the source of such written civilization.[5]

1. AB (algemene bepalingen van Wetgeving) general provisions of the Dutch East Indies government.
2. Civil Code (BW).
3. KUH Dagang.
4. Law No. 1 Year 1974 concerning marriage
5. Law No. 5 of 1960 on Agrarian Affairs.

A treaty is an agreement made between two or more States in the field of civility. Jurisprudence or judgment is a judicial product, containing legal rules or regulations that bind the litigants of the litigants, especially in civil cases. The verdict was made by the judges in Indonesia in deciding the dispute over the law.

With regard to the provision of pledge, As already mentioned in the previous discussion, that it can not be separated from the existence of material rights, where in civil law known there are 2 kinds, namely:[6]

1. The material rights that give pleasure, for example bezit and property rights. According to 529 BW, bezits are translated by a position of dominion, ie the position of a person who transcends a material, either by oneself or by the intercession of others, and who retains or enjoys it as the person possessing the material. Subekti mentions bezit is a state of birth, in which a person controls an object as if it belongs to itself,

5 *Ibid, hlm. 9-10*

6 *3 R. Subekti. Kitab Undang-Undang Hukum Perdata. Pradnya Paramita. Jakarta, 1996. Hlm. 164.*

which the law is protected by not questioning the property right on the object is actually in whom.

2. Guaranteed material rights, such as liens
   In the provisions of Article 1131 of the Civil Code stipulates: "All material possessions of the indebted, immovable and immovable both existing and new will become liabilities for all individual engagements." Under Article 1131 the Civil Code only regulates two types of guarantees , which is a guarantee against a moving object called a mortgage and a fixed immovable property called a mortgage. The arrangement of pledge in the Civil Code is governed by Articles 1150-1160.

The understanding of pledge under Article 1150 of the Criminal Code is:[7]

1. "A right earned by a debtor of a moving good, delivered to him by a debtor or by another on his behalf, and who authorizes the debtor to take the repayment of the goods in advance of other indebted persons, with the exception is the cost of auctioning the item and the cost incurred to save it after it is mortgaged, which expenses should take precedence. " From the definition of the mortgage can be concluded that the pawn has the characteristics include:
   a. Guarantee of pledge of moving objects.
   b. Has the nature of precedence.
   c. Having the nature of droit de suite is always follow the object wherever or in the hands of those objects are located.
2. Giving direct power to the collateral and can be maintained against anyone.
3. There is a transfer of power from nemda which is used as collateral (unsure inbezitstglling) from the giver of the pawn to the holder.
4. Pawn is an accessoir agreement that is an additional agreement that depends on the principal agreement.
5. Pawn can not be divided. This inbezitstelling element is stated in Article 1152 paragraph (2) of the Civil Code which states: "Unlawful is the liens of all things left to remain in this power of the debtor or the lender, or returning to the will of the debtor." The very important element in the case of this pledge is as provided for in Article 1160 of the Civil Code that: "Mortgage is indivisible, even though the debt among the heirs of the owed or among the inheritors of the debtor may be distributed."

Conclusion

Arrangement arrangements in Indonesian civil law provisions are governed in Articles 1150-1160. The element of the mortgage penalty stipulated in the Perpu. No. 56 Year 1960 About Stipulation of Land Area Agriculture is related to the control of agricultural land by the pawn shop that has exceeded 7 years or more does not return the pawn land to its owner within a month after the existing plant is harvested.

7 *Ibid, hlm. 297-300.*

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BPJS,
Indonesia's healthcare reform.

Bahtiar Husain
Mahasiswa Program S3 Universitas Borubudur 2018

INTRODUCTION

The Indonesian government is committed to introducing universal health coverage (UHC) by 2019 to cover a projected population of 257.5 million. Indonesia is one of several low- and middle-income countries aiming to improve their health financing systems and implement universal health coverage so that all people can access quality health services without the risk of financial hardship.. Healthcare reform by Universal health coverage as a challenge for many countries worldwide because half of the world's population lacks access to essential health services. Achieving UHC is also one of the sustainable development goals (SDGs), which stipulates for good health and well-being.

The existence of the BPJS is stipulated in Law No. 40/2004 law on national social security reform, Sistim Jaminan Sosial Nasional (SJSN) and Law the Social Security Agency, Badan Penyelenggara Jaminan Sosial Kesehatan (Healthcare BPJS) No. 24/2011. All Indonesian residents, including expats who have been living in the country for 6 months or more, have the obligation to obtain Healthcare BPJS. This BPJS type in Indonesia is independently processed by individuals. Challenges to UHC in Indonesia include a fragmented health financing system, decentralisation, demographic transition, high out- of-pocket spending and low levels of government spending on health. Impact BPJS may caused reductions in service to match less fiscal capacity.

Why do Health Systems Reform?

There are many reason why state do health systems reform. The reason it, health is understood not only as a human right, but also as synonymous with develop- ment and as a market force that boosts investment, educational performance, and economic growth. Major health system reforms are typically contentious and accordingly governments are most likely to tackle them when there is either an obvious crisis in the health sector (such as health worker strikes, or protests about the quality of health care), a perception of performance problems in the health sector that need to be investigated, or a change in the environment that creates a window of opportunity. For example, a change in the political regime may frequently trigger interest in health reform as was the case with Affordable Care Act in the US, Seguro Popular in Mexico and universal coverage in Thailand and so too may economic recession, as has been argued to be the case in Indonesia, Thailand and Turkey.

History of the BPJS

The BPJS largely owes its existence to the labor movement. Before the BPJS, workers were protected by Jamsostek, which was often criticized as it only covered workers in the private sector and only a small fraction at that. Civil servants and the military were protected under their own healthcare scheme, state-owned health insurance company Askes, while pensions for civil servants were covered by Taspen and military personnel were covered by Asabri.

The idea raised to merge these agencies after political reform 1998. The existence of the BPJS is stipulated in Law No. 40/2004 law on national social security reform (SJSN) and Law the Social Security Agency (BPJS) No. 24/2011, stipulates that BPJS Kesehatan should implement the health care insurance program. The Road Map outlines the processes and activities needed to implement UHC. The two foundational steps in the Road Map are: (1) creation of the organising body responsible for the management and implementation of UHC-BPJS (Badan Penyelenggara Jaminan Sosial), which is to be operational by 1 January 2014, BPJS Ketenagakerjaan should

implement the workers' social security program from July 1, 2015 and (2) establishment of full population coverage with social health insurance by 2019, a system to be known as INA-Medicare (Jaminan Kesehatan Nasional).

Right and obligation Partisipants

Participants Rights

- To receive card as participants identity in order to obtain health services.
- To obtain benefits and information regarding rights and obligations as well as health service procedures inaccordance with the applicable terms and conditions.
- To obtain health service in partnered health facilities of BPJS for Health, and.
- To express complaints/grievances, critiques and suggestions verbally or in writing to BPJS for Health.

Participants Obligations:

- To register themselves and their family members as BPJS for Health participants.
- To pay BPJS for Health premium.
- To submit complete and accurate individual and family member data.
- To report changes to the individual and family member data, such as: changes in class, rank or amount of salary,marriage, divorce, death, birth, address and first level health facility.
- To prevent participant card from getting damaged, lost or unauthorized use.
- To comply with all the terms and conditions and the health facility procedures.

BPJS, Healthcare and Social Security Agency

The World Health Organization (WHO) has called to step up their efforts in achieving universal health coverage to provide their people with quality healthcare services without having to suffer financial difficulties. Paying out-of-pocket for medicines is the leading cause of financial hardship from health care.

Healthcare BPJS is Indonesia's health coverage program to responsible in achieving UHC. The government has targeted that all Indonesians will have BPJS membership by 2019. Every Indonesian citizen is required to have BPJS Kesehatan. There is no exception, despite the fact that one may already have another medical insurance of his/her own. In addition to every Indonesian, foreigners who have been working in the country for at least six months are also eligible to join the program.

The participants of BPJS Kesehatan, be classified into two categories, namely Penerima Bantuan Iuran (PBI) Jaminan Kesehatan and Non-PBI Jaminan Kesehatan. The first category is entitled for those who are less fortunate (from low social class) and those with total disabilities. Indonesians who belong to the latter category include employees, employers, retirees, investors, and among others. Every one who has been registered is covered by the progam, including their family members, namely wife/husband and children (but no more than five persons in total). Furthermore, every participant of BPJS Kesehatan program should know that not every medical service is covered by the scheme.

BPJS gives the holders some healthcare protections, including:

1. Basic Healthcare Provider. Under this services, you can choose a doctor or clinic in case you need a basic healthcare services to check you whenever you are ill. You can also choose your preferred dentist. You can contact your doctor or clinic at any time.
2. Advanced Healthcare Service. In case your clinic cannot give you further medical treatment, they will sign a reference letter for you to get special treatments with specialist doctors or bigger hospitals.
3. Hospitalization Service. If further action needs to be done, which require you to be hospitalized, you can use this service.

Given its wide coverage, mostly among the lower middle class, BPJS has faced several hiccups in its operation. From continual deficits to discrimination faced by patients under the BPJS scheme. Until now, Indonesia struggles to provide health care for all in 2019 by UHC.

HOW DOES THE INDONESIAN HEALTHCARE SYSTEM WORK?

The healthcare system in Indonesia can different with others country. Many Indonesians would have no idea on how the healthcare system work because make complicated. Patient should he or she go directly to a hospital for treatment or start with a local doctor in PUSKESMAS, Pusat kesehatan masyarakat. All depends on the case or patient condition. Each patient's medical case may be different from another patient's case, so its may require different medicaltreatment. For instance, if you believe that your condition is not serious, it is a good idea to consult with a local general practitioner in PUSKESMAS or perform a medical checkup before going to a big hospital for treatment. However, if one is involved in a serious accident or under emergency cases, he or she should immediately seek urgent attention at a hospital that provide emergency services.

The differences between a large hospital and a clinic or PUSKESMAS, a local clinic can provide you with basic healthcare services and hospital usually caters more complex cases that require more advanced care. In fact, the healthcare system is consisted of multiple layers of primary, secondary and tertiary healthcare providers. Primary healthcare refers to a healthcare branch that caters the needs for basic medical attention it. In cases of basic medical issues or accidents that do not require special attention, patients would normally go to primary healthcare.

The primary healthcare system aims is to provide inclusive medical services at affordable cost. Medical staff of the primary healthcare include general practicioners and paramedics. Among the providers that belong to this layer of the healthcare system include general practitioner clinics, puskesmas (local polyclinics), puskesmas keliling (mobile polyclinics), and ambulatory services. On the other hand, secondary healthcare providers offer more specialized medical services compared to those in primary healthcare. These providers provide both outpatient and inpatient services. Usually, the patients who need such healthcare services include those who require more specialized treatment, where basic medical treatment is not sufficient. Hospitals that are part of the secondary healthcare system include type C and D hospitals. Hospitals in type C provides services by specialist doctors, which may include the fields of internal medicine, children health, surgical services, as well as obstetrics and gynecology services. Type D hospitals are generally similar to those under type C, except that they are still in the transition phase of becoming type C hospitals.

The third layer consists of the tertiary healthcare providers, which cater patients in need of consultation or treatment by sub-specialist clinicians that may not be available in secondary or primary healthcare providers. Tertiary healtchare system, which consists of type A and B hospitals, also provides outpatient and inpatient services. Among the well-known type A hospitals are RS Jantung Harapan Kita (a heart center in Jakarta) and RSU Fatmawati in Jakarta. The RS Kanker Dharmais, a cancer center in Jakarta, falls under the type B hospital category, alongside RSU Tarakan that is also located in Jakarta.

Indonesian reimbursement system

Every Indonesian is required to join the national health coverage scheme provided by healthcare BPJS, an authorized body established to provide medical coverage program. If you are covered under the program, you would need to bring along a BPJS membership card to a registered puskesmas that is the closest to your place of residence. After consulting with a doctor at the puskesmas, you will be given a referral letter to a hospital that cooperates with BPJS if it is necessary. However, if the puskesmas can handle your condition, you will not be given a referral letter.

If you need to go to a hospital, remember to prepare these documents alongside their copies: referral letter, BPJS card, family card, as well as a valid ID card or Kartu Tanda Penduduk (KTP). Wait until your documents have been approved by the hospital. The hospital will then claim your medical treatment cost to BPJS, and if eligible, you will be covered under the reimbursement scheme.

Comparison Medical reimbursement in other country

Medical reimbursemet program can different for each country. The UK reimbursement program is called the National Health Service (NHS), provides a wide range of health care services include appointments with doctors or general practitioners, hospital treatment and dental care. The program has been providing for quite a long time since 1948. All British citizens are eligible to the provided medical services. Funding for the NHS comes

from taxes. The NHS is free for British citizens, but not free for everyone. You may be required to pay for your healthcare if you receive medical or hospital treatment while in the UK or if you do not reside in the country on a lawful basis.

Rather similar to UK's NHS program is Singapore. They have national health care program is called the Medisave scheme. Funding comes from citizen salary. Every Singapore citizen and permanent resident have to spare some amount of their monthly salary into their Medisave account as a national savings scheme. The account can be used in case of future medical expenses, such as surgery, hospitalization and certain outpatient expenses at all public healthcare institutions as well as approved private institutions. Allocation rates for Medisave Account may vary depending on age. Besides the Medisave account holder, the scheme covers immediate family members.

At the same time, Malaysia adopts a universal healthcare system for all its legal residents. The public healthcare is funded by the government, of which the funding comes directly from taxation. The Malaysian government attempts to provide low-cost and comprehensive medical services in public hospitals to the people through the universal healthcare. Unfortunately for expatriates, they are not entitled to join such program. Expatriates who reside in Malaysia are required to purchase their own medical insurance.

American Health Insurance System

Although there are several different types of coverage and states often have their own health insurance regulations, there are some aspects of the system that are similar throughout the U.S. Hospitals, clinics, doctors' offices and other health care facilities are owned by a variety of private and public entities. Health insurance providers are generally separate companies from these and deal with a wide range of different healthcare providers.

Patients pay monthly health insurance fees to ensure that they will be covered when they need to go to the doctor, clinic or hospital. Insurance providers cover thousands of patients, so they are able to negotiate with health care providers for reduced fees and then pay for services. The Medicare or Medicaid insurance works the same way but on a bigger scale. Because they need to be able to negotiate, insurance providers generally have a network of doctors that they have agreements with, and patients are covered for visits to doctors within that network but may not be covered, or fully covered, for visits to doctors out of their network. Insurance providers will usually cover services considered necessary by doctors, but often will not cover services which are considered "elective." Insurance companies aim to keep their costs down while still covering necessary health care.

The Affordable Care Act

The Patient Protection and Affordable Care Act, commonly referred to as "Obamacare," was voted into law in 2010. Since insurance companies are private, for-profit companies, many Americans had been left uninsured because they could not afford or did not want insurance, or because they were rejected because of pre-existing conditions. The Obama administration attempted to address some of these issues with the Patient Protection and Affordable Care Act. These are some of the major provisions of the law:

1. Insurers are not allowed to refuse coverage because of pre-existing conditions
2. Minimum standards for health insurance policies were established
3. Medicaid eligibility expanded
4. Medicare underwent reforms aimed at greater efficiency
5. Individuals without employer-provided insurance are required to purchase health insurance
6. Health Exchanges were set up to offer consumers a good way to find suitable health insurance and to provide subsidies for those who need it.

11 million more Americans are insured by the Patient Protection and Affordable Care Act.

But this legislation has come under fire from Republicans despite the fact that it was passed by both houses of Congress. It means the Obama care will be declared invalid.

Costing UHC

Indonesia's total health expenditure is estimated at 2.5 per cent of GDP. It has risen slowly, from 1.9 per cent of GDP in 1996 to 2.2 per cent by 2006. The government expects this proportion to increase to 4 per cent of GDP after the national social security system becomes operational in 2014, and it notes the experiences of other countries in funding UHC, where state expenditure for health is typically 6 to 11 per cent of GDP, with tax ratios of over 20 per cent.

Currently, around 63 per cent of the population, or 151.5 million people, are covered by some form of health insurance. A national system to be called INA- Medicare will integrate existing schemes, combining contributions from the formal and informal workforce with the government's contributions for the poor into a single pooled fund. Regional government schemes will also be progressively integrated. The results indicate that the overall design and institutional arrangements for the health financing aspects of the program are largely consistent with global UHC recommendations. However, limitations are identified.

A partial analysis was undertaken specific to the calculation of the amount of government contributions to cover costs of the poor. Subsequently the government agreed in the Road Map that these contributions would range between Indonesian Rp22,000 and Rp27,000 (A$2.20-2.70) per person per month. This was based on a study of contribution adequacy undertaken by the National Social Security Council (DJSN), University of Indonesia, together with other universities, the World Bank, a team from PT Askes and JPK Jamsostek and the National Team for Poverty Reduction Acceleration. However, following the release of the Road Map, protracted inter-ministerial negotiations on the government contributions ensued, a revised contribution level of Rp15,500 per person per month being subsequently agreed upon (Sutriyanto 2013; Wicaksano 2013).

Potential Impacts of UHC

Several issues relating to the potential impact of UHC on other aspects of health system performance. Key issues are the absence of a calculation of fiscal capacity and the potential shortfall in government contributions; the lack of planning to address expansion of the contributor base to include the informal sector; and the lack of focus on addressing inefficiencies. The design is also less complete and clear on the impacts of UHC on other aspects of the health system, particularly equity (both the availability and capacity of facilities) and ensuring access for the poor. While Indonesia's UHC can be considered a work in progress, in the absence of a clear commitment to equity, there is a risk of reductions in service (coverage or benefit package) to match fiscal capacity.

The government needs to focus greater attention on these issues and strengthen engagement with local government, civil society and other stakeholders to better support public trust in, and the sustainability of, the system. The others impact, UHC need along time like ; examples given range from 26 years for South Korea to 118 years for Belgium, although the pace of implementation has advanced in recent times. Indonesia just taken 5 years since 2014 to 2019, its very short time if compare with the other country. Doctor in doing his profession has to free from some influence to treat patient with hight quality but by UHC target without increase fiscal capacity doctor in dilemma, patient first or budget as determine doctor decision.

Mismatch health financing BPJS

There is no enough fiscal study to anticipate health expenditure increase. The fiscal analysis reveals problems with the cost of UHC because the program consist with global UHC recommendations. Mismatch health financing had happened. Since its establishment in 2014, BPJS Kesehatan has suffered from serious deficits: Rp 3.3 trillion in 2014, Rp 6 trillion in 2015, Rp 9.7 trillion in 2016 and Rp 9 trillion in 2017. The deficit is mainly caused by trouble with collecting premium payments, both from the government and members. For instance, the premium paid by the government for 92.4 million low-income participants is Rp 25,500 each. Independent workers pay RP 25,500 for third class facilities, Rp 51,000 for second class facilities and Rp 80,000 for first class facilities in hospitals. Meanwhile, people often neglect their responsibility to pay the premium, only paying when they need to use the health service.

The BPJS's deficit has always been covered by state funding, given that Law No. 24/2011 stipulates that the agency's income must come from insurance premiums and government assistance. The government has disbursed

Rp 18.84 trillion between 2013 and 2016 to support the agency. In the 2017 state budget, the government allocated Rp 106.7 trillion to health, the equivalent of 5 percent of the total state budget. In the regional provinces, as much as 10 percent of the total regional budget is allocated to health, or Rp 105.3 trillion out of Rp 1.05 quadrillion.

CONCLUSION

Indonesia's healthcare reform start on January 2014 to implement universal health coverage to give access all people to get health services without the risk of financial hardship. The existence of the BPJS is stipulated in Law No. 40/2004 law on national social security reform (SJSN) and Law the Social Security Agency (BPJS) No. 24/2011.

The design and institutional arrangements for health financing aspects of Indonesia's UHC program are largely consistent with UHC recommendations namely by 2019 to cover all Indonesia population. The Road Map offers to provide protection for the poor and combine government and public contributions is in line with the principle of kegotong-royongan. This principle is base of BPJS.

A change in the political regime or a crisis may frequently trigger interest in health reform. Key issues identified with the design of health financing are: the absence of a calculation of fiscal capacity and the potential shortfall in government contributions. Each year BPJS Kesehatan has suffered from serious deficits to pay clinic or hospital. On other aspects on the impacts of BPJS in health system, particularly equity of service delivery (the availability and capacity of facilities). There is a risk of reductions in service (coverage or benefit package) to match fiscal capacity.

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Legal Protection in Implementation of Cooperation Agreement Between Hospital and Social Health Insurance Provider (BPJS Healthcare) In National Health Insurance Programme (Case Study of Cooperation Agreement Between Rawamangun Special Surgical Hospital with BPJS Healthcare Branch of East Jakarta)

Desi Sutejo

Abstract

This study aims to find out how the implementation of cooperation agreements between the hospital with BPJS Healthcare, what constraints faced by the hospital and BPJS Healthcare and what efforts can be done in the hospital and BPJS Healthcare to overcome various things that potential disputes in running National Health Insurance program. How the law protects the rights and obligations of both parties in its engagement. This research includes descriptive research using empirical juridical approach. The study was conducted at Rawamangun Special Surgical Hospital. Data is sourced from primary data and secondary data. Technical data analysis using qualitative analysis. The result of the research shows that the cooperation agreement between the hospital and BPJS Healthcare is an example of freedom of contract principle. Some obstacles faced by the hospital and BPJS Healthcare, are (1) the regulation of health ministers are retroactive; (2) differences in interpretation of diagnostic codes between hospital code officers and (3) INA CBGS rates are too cheap. Some of the efforts of the hospital and BPJS Healthcare to overcome the potential of dispute between the two parties are: (1) filed an objection to the Ministry of Health related to dynamic and retroactive regulatory issues; (2) concerning problems between hospitals and BPJS Healthcare that potentially disputes both parties may seek by way of deliberation to reach consensus and if not get agreement can be continued with the implementation of Monitoring and Evaluation and Handling of Grievance which done gradually from city level to minister level health, and in the implementation of national health insurance various parties conduct monitoring and evaluation in accordance with their respective authorities. The parties to monitoring and evaluation are the Financial Services Authority (OJK), the National Social Security Council (DJSN), the Ministry of Health, the National Planning Agency (BAPENAS) and the Social Security Administering Body (BPJS-Kes)

Keywords: engagement, cooperation, agreement, guarantee, BPJS

Introduction and Problem Statement

Health problems are a very complex problem, which is interconnected with other issues out of health. For Indonesian citizens living in the poor category or not too poor category, the health problem always becomes a burden because health costs are quite expensive, especially for disease cases like heart, cancer, kidney failure, stroke, thalassemia, cirrhosis of the liver, leukemia, hemophilia or disease that fall into the category of severe illness.

Basically the state is obliged to guarantee the health of its citizens, this is affirmed in the Constitution of the Republic of Indonesia Year 1945 Article 34 paragraph 2 and 3 as follows:

(2) The state develops a social security system for all citizens and empowering a weak society according to human dignity

(3) The state is responsible for the provision of appropriate health care facilities and public service facilities.

The mandate of this law was first responded by President Megawati Soekarno Putri with endorsing law No. 40/2004[1] about National Social Security System (SJSN) on October 19, 2004 . The National Social Security System (SJSN) is run by a social insurance provider formed by the law. The organizing body appointed for its executor is the Indonesian Health Insurance Company (ASKES)[2]

In 2011 the government enacted Act No. 24 of 2011 on the Social Security Administering Body (BPJS) and

1 *https://bpjs-kesehatan.go.id/bpjs/index.php/pages/detail/2013/4 accessed on July 09, 2018*

2 *Law of the Republic of Indonesia no. 40/2004 on the National Social Security System (SJSN) paragraph (4).*

appointed PT ASKES (Persero) as the organizer of the social security program in the health sector, so PT ASKES (Persero) changed its name to BPJS Kesehatan.

In order to succeed the National Health Insurance (JKN) program, the government issued Presidential Regulation No. 12 of 2013 which was then revised by Presidential Regulation No. 19 of 2016 on the Second Amendment on Presidential Regulation No. 12 of 2013 on Health Insurance[3] which required all Indonesian citizens to participate in health insurance and requires all government hospitals to cooperate with BPJS Healthcare. Meanwhile, for private hospitals that meet the requirements can establish cooperation with BPJS Healthcare.[4]

In the case of Rawamangun Special Surgical Hospital with this presidential regulation, the patient's previous composition consists of insurance patients (30%), corporate guarantee (10%) and general patients (70%) changed into insurance (20%) company guarantees (3%) of general patients (10%) and patients with BPJS Health insurance (67%). [5]

Due to the condition, Rawamangun Special Surgical Hospital as one of private type C hospitals in East Jakarta, to anticipate the decrease of patient, because the change of general patient become a patient BPJS Healthcare, do health service cooperation contract with BPJS Healthcare of East Jakarta in 2014.

In the implementation of the national health insurance program up to this writing is still a lot of problems. The problem of health insurance programs in view from the corner of the hospital are:

1. Regulation of the director of BPJS Services which is retroactive
2. Differences in interpretation of applicable regulations
3. The INA CBG'S tariff system is too cheap for private hospitals
4. Differences in perceptions of coding between hospital code officers and BPJS Healthcare code officers
5. Digital file verification process that does not want to see the real condition in the hospital
6. Health services through multi-level referral systems have not gone well
7. Referral health care system is not in accordance with the condition of First Level Health Facilities that are not ready at any time
8. The quality control and cost control program at hospital is not working
9. Clinical Pathway is not running and is not obeyed by the practicing physician.
10. Withdrawal of claims from BPJS Health is not timely

Meanwhile, from the side of BPJS Healthcare, see there are many problems caused by the hospital written in the Regulation of the Minister of Health of the Republic of Indonesia Number 36 Year 2015 About Fraud Prevention In the Implementation of Health Insurance Program in National Social Security System, article 5 paragraph (3) are:

1. Writing a code of excessive diagnosis / upcoding
2. Plagiarize claims from other patients / cloning
3. False claims / phantom billing
4. Inflation of medication bills and alkes / inflated bills;
5. Solving service episode / services unbundling or fragmentation;
6. Self-referrals;
7. Repeat billing charges;
8. Prolonged length of stay / prolonged length of stay;
9. Manipulate the treatment class / type of room charge;
10. Cancel the required action / cancelled services;
11. Carry out unnecessary actions / no medical value;
12. Deviations from service standards / standards of care;
13. Undertake unnecessary treatment / unnecessary treatment;
14. Increase length of ventilator usage time;
15. No proper visitation / phantom visit;

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3 *Presidential Regulation Number 12 Year 2013 regarding Health Insurance Article 6 paragraph (1)*

4 *Presidential Regulation Number 12 Year 2013 regarding Health Insurance Article 36 paragraph (1) and (3)*

5 *Data of patient visit 2011 and data of patient visit of 2014 Rumah Sakit Khusus Bedah Rawamangun*

16. Not performing proper procedures / phantom procedures;
17. Recurrent / readmission retrieval;
18. Conduct patient referrals that are not suitable for the purpose of obtaining certain benefits;
19. Ask for cost sharing not in accordance with the provisions of legislation

Related to some of the problems mentioned above, the author is interested in conducting legal research under the title: "Legal Protection for Implementation of Cooperation Contract between Hospital With BPJS Healthcare In National Health Insurance Program (Case Study of Cooperation Agreement between Rawamangun Special Surgical Hospital with BPJS Healthcare Branch of East Jakarta " with emphasis on the analysis of the implementation rules and laws.

Formulation of the problem

Based on the background of problems that have been described above, the authors formulate the problem in this study as follows:

1. How is the implementation of the cooperation agreement between the hospital and BPJS Healthcare?
2. What are the efforts of both parties in overcoming differences of opinion in interpreting the rules of implementation of the National Health Insurance.

Research methods

This research was conducted by using the descriptive research method. According Sugiono (2009) is meant by descriptive research method is a method that serves to describe or give an idea of the object under study through the data or samples that have been collected as is without doing analysis and make conclusions that apply to the public.

The approach in this research is done by empirical juridical approach. The purpose of empirical juridical research is that in analyzing the problem is done by combining legal materials (which is secondary data) with primary data obtained in the field that is about implementation rules issued by BPJS Health of East Jakarta branch.

Discussion

1. Basic Legal Engagement between Rawamangun Special Surgery Hospital With BPJS Healthcare

An important part of civil law is the law of engagement. The law of engagement is defined by jurists as a legal relationship between two persons or two parties, on the basis of which one party is entitled to claim something from the other and the other is obliged to fulfill the claim. Thus an engagement may be unilateral or unilateral in which the rights of the other party are the obligations of the other, may be bilateral or reciprocity in which case each party has rights and obligations to the other party.

The source of the engagement of the mutually bound parties may stem from the provisions of law or agreement. Agreement becomes the source of engagement because the agreement is valid as a law for those who make it. The basic thing that distinguishes the engagement that is born from the law and the contract that is born of the agreement is the element of the will of the parties. For the existence of engagement between parties based on the law does not require the element of will, but vice versa for the engagement between the parties based on the agreement need the will of the parties to bind themselves. It can be concluded that Article 1332 of the Civil Code states that the engagement is based on laws and agreements.

The definition of the agreement can be seen in the provisions of Article 1313 of the Civil Code is "A covenant is an act by which one or more persons commit themselves to one or more persons". According to M Yahya Harahap[6] agreement is a legal relationship of wealth or property between two or more persons, which gives the power of right on one side to gain achievements and simultaneously oblige the other party to accomplish the achievement.

The legal basis for the engagement between Rawamangun Special Surgical Hospital

with BPJS Healthcare is Presidential Regulation No. 12 of 2013 on Health Insurance, Article 36 which reads:

1.) "The providers of health services include all health facilities that cooperate with BPJS Healthcare.

6 *M. Yahya Harahap (1986), Legal aspect of the Treaty. Bandung. Alumni Publisher.*

2.) Health Facilities owned by the Government and Regional Government fulfilling the requirements shall cooperate with BPJS Healthcare.
3.) A privately-qualified private health facility may cooperate with BPJS Healthcare.
4.) Cooperation as referred to in paragraph (2) and paragraph (3) shall be implemented by entering into a written agreement. "

Another legal basis of engagement is the Minister of Health Regulation No. 71 of 2013 on Health Services on National Health Insurance, Article 4 as follows:

1.) "Health Facilities as referred to in Article 2 shall cooperate with BPJS Healthcare.
2.) (2) Cooperation of Health Facilities with BPJS Healthcare referred to in paragraph (1) shall be done through cooperation agreement.
3.) (3) Cooperation agreement of Health Facility with BPJS Healthcare shall be conducted between the leader or owner of Health Facility with BPJS Healthcare.
4.) (4) The cooperation agreement as referred to in paragraph (3) shall be valid for at least 1 (one) year and may be renewed upon mutual agreement. "

To be able to work in cooperation with BPJS Healthcare, Health Facilities must meet the requirements and should consider the adequacy of the number of Health Facilities with the number of participants to be served. For advanced hospitals / health facilities the requirements to be met are in accordance with Article 7 as follows:

1. Operating Permit
2. Hospital Classification Letter
3. Practice License (SIP) of health practitioners
4. Taxpayer Identification Number (NPWP) of the agency
5. Cooperation agreements with networks, if necessary
6. Certificate of accreditation

Meanwhile, the terms of the validity of the agreement pursuant to Article 1320 of the Civil Code must meet the following requirements:

1. Agree those who bind themselves.
2. The ability to create an engagement.
3. A certain thing.
4. A lawful cause.

The first and second requirements are called subjective requirements, as they pertain to the subject making the covenant. While the third and fourth terms are called objective terms because of the object in the agreement.

If an agreement does not meet the subjective requirements, then the agreement may be canceled. Whereas, if an agreement does not meet the objective requirements, then the agreement is null and void.

The engagement between the Rawamangun Special Surgery Hospital with BPJS Healthcare meets the subjective requirements and objective nerves. Against all conditions of filing which is a basic requirement in accordance with Article 7 of Regulation of the Minister of Health of the Republic of Indonesia Number 71 Year 2013 on Health Services on National Health Insurance has been fulfilled.

2. Contents of the Cooperation Agreement between Rawamangun Special Surgery Hospital With BPJS Healthcare

Basically, the contents of the cooperation agreement between Hospital / health facilities advanced with BPJS Healthcare more determined by BPJS Healthcare. BPJS Healthcare has the authority to actively revise the contents of the agreement in accordance with the implementation rules or implementation guidelines issued by the Minister of Health Regulation. While the hospital/advanced health facilities are passive and accepting. The contents of the cooperation agreement bind the parties and its contents do not deviate from the Minister of Health Regulation.[7]

Understanding authority or authority according to Kamus Besar Indonesia can be defined as the right and

7 *Kamal Hidjaz (2010), Effectiveness of Implementation of Authority in Local Government System in Indonesia. Napier: Reflection Library.*

power to act, the power to make decisions, to govern and delegate responsibility to other people / bodies.

Authority is an understanding derived from the laws of governmental organization, which can be explained as all the rules pertaining to the acquisition and use of governmental powers by the subject of public law in public law relations, this statement put forward by H.D Stout .[8] Authority is the right to use the authority possessed by an official or institution in accordance with the applicable provisions. Authority concerns the competence of legal action that can be done according to formal methods. Authority is a formal power held by officials or institutions.

3. Default / breach of contract

The Cooperation Agreement Between Hospital and BPJS Healthcare mentions explicit default / breach of contract in Article 4 on Rights and Obligations, Article 5 on Confidentiality of Information, Article 6 About the Class of Care, Article 7 on Service Tariffs, Article 10 on Monitoring and Evaluation, Article 11 About Witnesses .

Article 11 Concerning Sanctions paragraph (3) stipulates that in the case of the hospital proved to do the following:

1. Not serving the participants in accordance with their obligations
2. Not provide facilities and health services to participants in accordance with the rights of participants
3. Collect additional fees to participants outside the terms and or
4. To violate the provisions of this agreement.

BPJS Healtcare gave a warning letter stating that the hospital has been default / breach of contract so that there is an obligation for the hospital to compensate for the resulting loss. The obligation of the defaulting party to compensate for the loss is mentioned in Article 1243 of the Civil Code that: "The replacement of new charges, losses and interest shall be the obligation that the debtor shall pay, after which he has been reprimanded for performing the covenant, warning referred to. "

Article 11 paragraph (2) explains in the case that the Hospital Party is proven to be true if three written warning letters have no response or repair from the hospital. Then the first party has the right to terminate the agreement unilaterally.

Article 11 paragraph (5) explains in the case that one of the parties abuses the authority by conducting moral hazard activities, such as making fictitious claims which can be proven from the result of the Internal and External Audit Team examination so as to prove to the detriment of the other party, the abuser use the authority is obligated to recover the losses incurred and the injured party may terminate the agreement. The definition of moral hazard is not expressly mentioned in the law, but it can be understood from Law Number 40 Year 2004 regarding National Social Security System Article 22 paragraph (2) that: (2) "for the type of service which may cause misuse of services, "is categorized as unlawful because it is clearly regulated in the Minister of Health Regulation No. 36 of 2015 on fraud prevention in the implementation of the Health Insurance Program on the National Social Security System Article 5 paragraph (3) one of the forms of fraud is:

(3) JKN fraud actions conducted by health providers in FKRTL as referred to in paragraph (1) letter b, include:

a. writing excessive diagnostic code / upcoding
b. plagiarizing claims from other patients / cloning
c. false / phantom billing claims
d. inflation of drug bills and alkes / inflated bills
e. solving service episodes / services unbundling or fragmentation;
f. false referrals / selfs-referals
g. repeat billing
h. extend length of stay / prolonged length of stay
i. manipulating the treatment class / type of room charge
j. cancel the required action / cancelled services
k. take unnecessary action / no medical value
l. deviation from standard of service / standard of car
m. undertake unnecessary treatment / unnecessary treatment

8 *Ridwan HR. (2013), State Administration Law. PT Raja Grafindo Persada. Jakarta 2013*

n. increase the length of time ventilator use
o. not doing the visitation / phantom visit
p. not performing the proper procedures / phantom procedures
q. repeated admission / readmission
r. conduct patient referrals that are not suitable for the purpose of obtaining certain benefits
s. asking for cost sharing is not in accordance with the provisions of legislation

Article 11 paragraph (5) for the party whose rights are impaired due to the act against the law of fraud and moral hazard may terminate the agreement without having to comply with the termination of the Agreement Article 12 paragraph (1) in this cooperation agreement. So the cancellation is automatic when the party whose rights are impaired determines the time of termination of the agreement and does not need to give written notice to the first or second party in violation of the agreement. However, termination of the agreement does not eliminate the obligation of the party who commits the act unlawfully to recover the loss.

This cooperation agreement specifies otherwise the termination of the agreement that is the waiver of termination of the agreement under the provisions of the Civil Code, listed in Article 12 paragraph (3) that:

"The Parties hereby agree to exclude the provisions of Article 1266 of the Civil Code so far as to require a judgment or determination of the Judge / Court in advance to annul / terminate a Agreement;"

This cooperation agreement in Article 12 paragraph (3) on the termination of the agreement determines to exclude the provisions of Article 1226 based on the agreement of the parties. Against Article 12 paragraph (3) the cooperation agreement between the hospital and BPJS Healthcare which overrides Article 1266 Civil Code is called applicable lex specialist derogate legist generalist principle. Lex specialis derogat legi generalis states that both rules govern the same material then rules that are specific to rule out general rules. Thus, this cooperation agreement is legitimate to be carried out by excluding the provisions of the treaty law because the cooperation agreement made under the agreement of the parties, applies as a law for those who bind each other.

4. Regulation of the Minister of Health as Guidance for the Tariff of Health Insurance Program Too Fast Changed and Applied

Regulation of the Minister of Health as the guideline for the implementation of the Health Insurance Program for hospitals and BPJS Healthcare is often the cause of differences of opinion that could harm the losses on the parties who cooperate. The losses caused can be time and cost. This disadvantage arises because the rules governing the implementation are retroactive. Here are some examples of health ministry regulations that apply retroactively:

a. Regulation of the Minister of Health of the Republic of Indonesia Number 59 of 2014 on Service Tariff Standards in the Administration of the National Health Insurance Program. Effective September 1, 2015, set August 22, 2014 and is billed on September 12, 2015

b. Regulation of the Minister of Health of the Republic of Indonesia Number 64 Year 2016 Regarding Amendment to Regulation of the Minister of Health of the Republic of Indonesia Number 52 Year 2016 Concerning Service Tariff Standard in the Implementation of National Health Insurance Program. Effective November 24, 2016, set 23 November but enforced on 26 October 2016.

c. Regulation of the Minister of Health of the Republic of Indonesia Number 4 Year 2017 Concerning Second Amendment to Regulation of the Minister of Health of the Republic of Indonesia Number 52 Year 2016 Concerning Service Tariff Standards in the Implementation of National Health Insurance Program. The date of the February 1, 2017, date is set for January 17, 2017 and enacted on January 19, 2017

As a result of the changes in the above mentioned regulations are fast and retroactive, there are several potential problems to be disputed between Rawamangun Special Surgery Hospital with BPJS Healthcare, are because:

a. The hospital has provided services to patients with the old tariff base tariff, but in billing claims to BPJS Healthcare is required to use a new tariff in accordance with the change of tariff. This is detrimental to the hospital because of the considerable tariff difference.

b. In one of the implementation guidelines it is mentioned that if the patient wishes to change his / her rights to be higher, the patient pays the increase to the hospital. In the next regulation of tariff, the revoked rule is deemed no longer valid. This retroactive tariff guideline causes potential conflicts between hospitals and patients

for violating ministerial regulations, and in terms of cooperation with BPJS Healthcare Parties, hospitals seem to violate Article 11 cooperation agreements on sanctions verse (3) c. collect additional fees to participants outside the provisions.

c. This retroactive regulation change regulation is used by BPJS Healthcare to charge payment to the hospital which is considered to be incorrectly claimed and incorrect. Whereas the diagnose claim codes submitted are based on the results of consultation with BPJS Healthcare Code officers.

d. Re-charge what has been paid by BPJS Healthcare to this hospital because hospital is declared incorrect claim code is considered to be part of the implementation of Minister of Health Regulation no. 71 Year 2013 article 39 paragraph (3) that BPJS Healthcare shall apply the Utilization Review and medical audit periodically

Referring to the procedure for the enactment of the law in its entirety, the right not to be prosecuted on the basis of retroactive law is a human right which cannot be reduced under any circumstances as set forth in Article 28I paragraph (1) of the 1945 Constitution ("1945 Constitution "). This principle is known as non-retroactive principle, the principle that prohibits the retroactivity of a law. In Article 7 paragraph (1) of Law Number 12 Year 2011 on the Establishment of Legislation, it is mentioned that the hierarchy of laws and regulations is as follows:

a. 1945 Constitution of the State of the Republic of Indonesia;
b. Decision of the People's Consultative Assembly;
c. Law / Government Regulation in Lieu of Law;
d. Government regulations;
e. Presidential decree;
f. Provincial Regulations; and
g. Regency / City Regulations

Therefore, the prevailing health minister's regulation cannot be applied to civil cases / engagements. Although the Cooperation Agreement between the two parties is a special rule, the case of repayment requests made by BPJS Healthcare cannot be justified, except for indications of moral hazards and fraud.

The case of potential sengketa mentioned above should be anticipated and will not occur if the implementation of Monitoring and Evaluation and Grievance Handling is done in stages from the city level to the level of the health minister, and in the implementation of the national health insurance, various parties conduct monitoring and evaluation in accordance with their respective authorities. respectively. The parties to the Monev are the Financial Services Authority (OJK), the National Social Security Council (DJSN), the Ministry of Health, the National Planning Agency (BAPENAS) and the Social Security Insurance Administration Board (BPJS-Kes) in accordance with the Minister of Health Regulation No. 28 Year 2014 About Guidelines for Implementation of National Health Insurance Program Chapter VII on Monitoring and Evaluation and Handling of Grievances

Conclusions and recommendations

1. Based on the above discussion it can be concluded that the legal basis of the engagement between Rawamangun Special Surgery Hospital With BPJS Healthcare is Presidential Regulation No. 12 of 2013 on Health Insurance, Article 36 and Regulation of the Minister of Health No. 71 of 2013 on Health Services on National Health Insurance, Article 4.
2. Constraints hospital in the implementation of JKN program, are:
    a. Regulation of the minister of health concerning the prevailing Standard Tariff
    b. Differences in interpretation of applicable regulations
    c. INA CBG's tariff system is too cheap for private hospitals.
    d. Differences in the perception of coding between the hospital code officer and the BPJS Healthcare code officer
    e. The digital file verification process does not want to see the real conditions in the hospital
    f. Health services through multi-level referral systems have not gone well
    g. Referral health care system is not in accordance with the condition of First Level Health Facilities that are not ready at any time
    h. The quality control and cost control program at home is not working

i. Clinical Pathway does not work and is not followed by an executing physician.

3. Writing a code of excessive diagnosis / upcoding
   a. Plagiarize claims from other patients / cloning
   b. False / phantom billing claims
   c. Bubbling of drugs bills and alkes / inflated bills;
   d. Breakdown of service episode / services unbundling or fragmentation;
   e. Referral / selfs-referals;
   f. Repeat billing / repeat billing charges;
   g. Prolonged length of stay / prolonged length of stay;
   h. Manipulate the treatment class / type of room charge;
   i. Cancel the required action / cancelled services;
   j. Taking unnecessary action / no medical value;
   k. Deviation from service standard / standard of care;
   l. Carry out unnecessary treatment / unnecessary treatment;
   m. Increase the length of time the ventilator is used;
   n. Not doing a proper visitation / phantom visit;
   o. Not performing the proper procedures / phantom procedures;
   p. Recurrent / readmission inputs;
   q. Conduct patient referrals that are not suitable for the purpose of obtaining certain benefits;
   r. Ask for cost sharing not in accordance with the provisions of legislation

4. With regard to the problems between the hospital and BPJS Healthcare that potentially disputes both parties may seek by way of musyawarah and if not get an agreement can be forwarded the implementation of Monitoring and Evaluation and Handling of Grievance is done in stages from the city level to the level of the minister of health, and in the implementation of national health insurance various parties carry out monitoring and evaluation in accordance with their respective authorities. The parties to the Monev are the Financial Services Authority (OJK), the National Social Security Council (DJSN), the Ministry of Health, the National Planning Agency (BAPENAS) and the Social Security Insurance Administration Board (BPJS-Kes) in accordance with the Minister of Health Regulation No. 28 Year 2014 About Guidelines for Implementation of National Health Insurance Program Chapter VII on Monitoring and Evaluation and Handling of Grievances

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THE POSITION OF NOTARIES AS AUTHENTIC DEED MAKERS AND AS OFFICIALS OF LAND DEED MAKERS (IN THE LAND REGISTRATION PERSPECTIVE)

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Abstract

Indonesia is a state of law. It is required that every interaction of society and state must be based on law. It is intended to create a legal certainty in every interaction of society and state. Legalization on legal binding of community which is done by a notary is also a form of confirmation for the existence of legal certainty. Law Number 30 Year of 2004 concerning the position of a notary publicly amended by Law Number 2 Year 2014 concerning Amendment of Law Number 30 Year of 2004 regarding the position of a notary, it has authorized notary to make authentic deed of legal binding beyond the land. Meanwhile, as a continuation of Law No. 5 in the year of 1960 on Basic Agrarian Law, in order to provide legal certainty on land transactions, it has been stipulated with Government Regulation No. 37 of 1998 on Officials of Land Deed Makers.Notary authority in making deed which is related to land has raised the debate, because there are other officials beside PPAT (Authority of Land Deed Maker) who also have authorities in making deed related to land. In the perspective of land registration as mentioned in Government Regulation No. 24/1997, one who assists the Head of Land Agency is PPAT, the notary is not mentioned as an official who can also help make the deed which is used for land registration, but there are some deeds used for land registration made by a notary, such as the deed of sale and purchase agreement as well as the power of attorney to sell. The author tries to examine what the meaning of deed which is related to land, as it has been given to the notary and the author viewing it in the perspective of land registration in the city of Bengkulu.This study is based on secondary data consisting of reference books, legislation, magazines, journals and internet. This study concluded that a notary is a public official who is appointed and sworn by the government, with the main task of providing services in legalization of legal attachments by public in the field of general and land affairs. The ultimate goal is in order to provide legal certainty.

Keywords: Legal certainty, notary, public deed and land deed

Introduction and Problem Statement

In article 1320 of the Civil Code, the requirement for the validity of the contract is: 1. Agree those who commit themselves. 2. The ability to make an agreement. 3. A certain thing. 4. A halal cause (R. Subekti and R. Tjitrosudibio, 1995). Thus, if the conditions as mentioned above are fulfilled, then the agreement is binding and applicable as the Act for those who make it

In its development, the agreement that was originally made orally and then made in writing, this arises because it is felt important by all parties who entered into the agreement and it can be a proof that there has been an agreement made by the parties that make it.

One of the powers granted to a public notary official is to make an authentic deed. The authentic deed pursuant to article 1868 of the Civil Code is a deed made by an authorized official whose form is determined by law. With the authority granted by the state to a notary as stipulated in Law Number 30 Year of 2004 in conjunction with Law Number 2 Year of 2014 concerning the amendment to Law Number 30 Year of 2004. Article 15 (1) Notaries are authorized to make an authentic deed of all deeds, agreements and determinations which are required by legislation and / or desired by the interested parties to be stated in an authentic deed.

In article 15 (2) letter F mentions that notary is authorized to make deed related to land. That's the meaning of vagueness or Vague Norm. In the explanation of the Law, it is stated that Article 15 (2) letter F is mentioned "clear enough" meaning that there should be no interpretation difference related to the provisions of that paragraph, so that immediately all matters relating to the land, the notary is authorized to make deeds(Undang-undang Pokok

Agraria No.5 Tahun 1960 pasal 1 ayat 1).In the matter of authority deed related to land, it must be understood first the problem of land and land rights (Abdulloh, Jurnal, Fakultas Hukum, Universitas Brawijaya).Taking into account the above description by referring to the provisions of the existing Legislation in the notary's office, view at the two positions as state officials having duties and functions as The Officials of AuthenticDeed Makers as well as The Officials of Land Deed Makers .

Formulation of the Problem

Based on the description above, the authors make the formulation of the problem as follows:

1. Why are notaries assigned double duties and functions as Officials of Authentic Authority and also authorized as Officials of Land Deed Makers?
2. What is the deed function made by a notary in the registration perspective?

Theoretical Framework

Notary: Is a public official authorized to make authentic deeds and other powers referred to in the Act.

PPAT: Land Acquisition Officer is a public official authorized to make an authentic deed of certain legal acts concerning the right to land or property rights of the apartment units.

Land Registration: Land registration is a continuous and regular series of activities undertaken by the government, including collection, processing, bookkeeping and presenting and maintaining physical data and juridical data, in the form of maps and lists, on land parcels and apartment units, including the provision of a certificate of title to the existing landrights and the property rights of the apartment units as well as the specific rights that impose on them.

Research Methods

This study uses an empirical juridical approach, which is a method used to solve problems with 6 first examine the primary data in the field, then proceed with research on the existing secondary data (Soejono Soekanto, 1984). This research will produce descriptive data in the form of written or oral data of research object holistically (intact) related to notary's position as authentic authors and officials of landdeed makers.

Discussion

Notary as a state official who runs the legal services profession to the community, who in carrying out their duties need to get protection and guarantee for the achievement of legal certainty (Konsideran Sub c UU Nomor 30 Tahun 2004). In addition, notary as state officials are able to provide assurance of certainty, order and legal protection required authentic written evidence of circumstances, events or legal acts held through certain positions (Konsideran Sub b UU Nomor 30 Tahun 2004).

Tasks performed by the notary include making authentic deeds. The deed is an authentic deed made by or in the presence of a notary according to the form and ordinance established in this Act (Pasal 1 ayat 7 UU Nomor 30 Tahun 2004). In addition, the forms of deed that are administrative are regulated in government regulations and regulations of the Minister of Law and Human Rights.The position of a notary has the duty to provide legal service in the form of authentic deeds and the making of the land deed. There are two main functions in the duties: First, the notary has a legal certainty to the public for every ratification of the legal binding, and secondly, the notary has the authority which is proclaimed by the law as a state official to provide legal reinforcement of the legal binding, which ultimately gives peace and security to the community.

Authentic deeds essentially contain formal truths in accordance with what the parties notify the notary. However, a notary has an obligation to include that what is contained in a notarial deed is fully understood and in accordance with the wishes of the parties, namely by reading it so that the contents of notarial deed becomes clear , as well as providing access to information, including access to legislation that related to the parties signing the deed. Accordingly, the parties may decide freely to approve or disapprove the contents of notarial deeds to be signed. It is expected that the authentic deeds made by or in front of a notary are able to guarantee certainty, order and legal protection. Whereas notarial deeds as authentic deeds are the strongest and most complete written evidence,

what is stated in a notarial deed must be accepted, unless the parties concerned can prove otherwise satisfactorily before the court proceedings.In performing such functions or authorities, the notary must act honestly, thoroughly, independently, impartially, and safeguard the interests of the parties concerned in the conduct of the law. Notaries provide services in accordance with the provisions of applicable legislation. Namely, Law Number 30 Year 2004 in conjunction with Law Number 2 Year 2014, unless there is reason to reject it. The reason for refusing it here is the reason that the notary does not take sides, such as the relationship of blood or semenda with his own notary or with his spouse. Notary also must conceal everything about the deed he made and all the information obtained for the making of the deed, this is done to protect the interests of all parties related to the deed so that there is legal certainty.

Appointment of Officer of Land Deed Officer now comes from a notary which means that person has 2 positions as notary and as PPAT (Officer of Deed of Land). As PPAT he must be guided by Law No. 5 of 1960 on Basic Agrarian Law and its implementation regulation. All actions relating to the implementation of obligations in the making of the PPAT deed are initiated by the head of the local land office.

Notary function can replace PPAT function in making deed before a notary is based on their respective function. Notary can make deed for land that has not been certified and to certified land. Notary also can make its deed to replace the authentic deed that should be made by PPAT to the land, this is done if there are justifiable reasons, such as the master certificate has not been broken or the land to be purchased is still in the absentie ground.

Legal consequences arising from a deed that should be drawn up by PPAT but made before a notary public will remain valid against a deed that has been made by a notary, but if the notarial deed which is made deviate from the applicable provisions, the deed becomes invalid because it contains legal defects.

The function and duty of a notary as Land Acquisition Official (PPAT) in making the deed of sale and purchase of land rights is to help create the order of land administration, because as the apparatus of public interest organizer can arrange land administration in order to make the deed of sale and purchase of land rights. The existence of the deed of sale and sale made by PPAT notary will facilitate the registration of the name. Thus, the registration behind the name that will help the creation of an orderly four in the field of land are as follow: the order of land law, orderly land administration, orderly use of land and orderly maintenance of land and the environment. As for the function of the deed of the official who makes the land deed in the sale and purchase of land rights for the purposes of registration of its right in the land office had time to get the land certificate.

In the sense of law, the land is not merely intended as the earth's surface or the uppermost layer of the earth, but includes the space above and below the surfaceof earth and any objects arising above and / or permanently attached to the surface of the earth, including those related to land ownership (Yudhi Setiawan, 2009).

Because of its importance, then to regulate human life especially in the case of land required a registration of land. Land registration is an important issue in the life of the nation and the state. So in Indonesia, about land registration is regulated in the UUPA. Land registration is the beginning of the process of establishing a proof of ownership of the land, this is intended to ensure legal certainty for the owner, as mandated by the Act.

As mentioned in article 19 of UUPA concerning the need of land registration for legal certainty, for implementing regulation, Government Regulation No. 24/1997 on Land Registration was established. In the process of registration of this land then required an evidence instrument that provides clarity about the rights and obligations of a person as a legal subject.

In relation to the object of land registration, a deed is required in obtaining the right to the land, ie deeds related to land. In the Indonesian General Dictionary the meaning of the word "related" is related to each other (relating to each other) anything related to (WJS. Poerwadarminta,2014). if you look at Law Number 30 Year of 2004 jo Law Number 2 Year of 2014 regarding Notary Position especially Article 15 (2) letter F then the notary here is entitled to make deeds in relation to land of land rights such as trading, exchange, grant, sharing of rights and so on relating to land.

So it can be concluded that in relation to make deed concerning with the land both notary and PPAT authorized in accordance with the authority possessed which is given by the PPAT Legislation.

Close

Notary as a public official having authority to perform duties as Land Acquisition Officer is in addition to the authority granted by Laws to enact legalization of legal bundles which is conducted by the community, especially in the field of land.The Officials of Land deed makers have the main duty to carry out the activity of part of the land registration activities by making the deed as evidence of certain legal actions concerning the right to land which shall be the basis for registration of the change of registration data caused by legal action.In the execution of the dual duties of a notary it is necessary to harmonize the provisions of the Legislation governing the position of the notaries as the Officials of the Authentic Deed makers which are responsible to the Minister of Law and Human Rights, and the notaries' position as the officials of Land Deed Makers which are responsible to the National Land Agency.

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SRATEGIES TO COUNTER TREATY SHOPPING

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Abstract

The main purpose of double tax treaties is to prevent the risk of double taxation by allocating taxing jurisdiction between two countries. Although it, double tax treaties could be used by persons in order to derive tax advantages that the treaties were not designed to give them. There are several forms of an abuse of double tax treaties, e.g using base companies, treaty shopping, rule shopping.
This paper proposes to analyze the phenomenon of tax treaty abuse and the strategies to counter treaty shopping. Treaty shopping, constitutes an abuse of the tax treaty regime and that the practice violates the economic rationale underpinning the division of tax rights between treaty states under the bilateral tax treaty system, because can result in tremendous loss of revenue for the signatories to the treaty.
The doctrine of Beneficial Ownership, substance over form and/or economic subtance are widespread anti treaty shooping tool. Beneficial Owneshif is decisive in determining whether a person qualifies for tax treaty benefits in repect of cross border dividens, royalies and interest. Subtance – over –form and/or economic substance doctrines have very close essence with Beneficia Ownership doctrine.
Although it would look consequent that Tax Law cannot offer a proper antidote, the counter measure planned by the OECD may finally help resolving these issues.

Key word: treaty shopping, beneficial ownership

Introduction and Problem Statement

The globalisation process has led numerous corporations to overstep the national boundaries either to conduct phases of their economic process where it is more convenient or to expand their business abroad. Hence, the involvement of the diverse tax regulations of the countries, whose territories host such businesses, cannot be avoided. Thus, the lack of neutrality of taxation has brought the managers of big corporations to take more and more into consideration tax issues in their decisionmaking process, especially during periods of crisis. Therefore, multinationals can pursue the aim of optimizing their fiscal burden by exploiting the legal options that the countries involved have given to their taxpayers, which constitute, de facto, the tax competition among the governments. Amongst the most infamous business, newspapers reported Apple, Google, Ikea, Pepsi, Amazon and P&G1, whose strategies proved being effective.

One of the efforts of the taxpayer to reduce the amount of tax payable is by interpreting legislation in the field of taxation whose application is not in accordance with the actual intended by the tax legislation, such as double tax treaty.

In terms of Article 1 of the OECD Model Tax Convention (OECD MTC), the first requirementthat must be met by a person who seeks to obtain benefits under a double tax treaty is that the person must be "a resident of a Contracting State", as defined in Article 4 of the OECD MTC. There are a number of treaty abuse arrangements through which a person who is not a resident of a Contracting State may attempt to obtain benefits that a tax treaty grants to residents of the contracting States. These arrangements are generally referred to as "treaty shopping"; a term describes the use of double tax treaties by the residents of a non-treaty country in order to obtain treaty

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benefits that are not supposed to be available to them.[3] This is mainly done by interposing or organising a "conduit company" in one of the contracting states so as to shift profits out of those states. When a conduit company is set up in a tax-haven jurisdiction, this can result in tremendous loss of revenue for the signatories to the treaty.[4]

Treaty shopping is undesirable because it frustrates the spirit of the treaty. When treaties are concluded, the assumption is that a certain amount of income will accrue to both countries involved in the treaty. The anticipated capital flows are distorted if the treaty is used by third country residents. When unintended beneficiaries are free to choose the location of their businesses, then treaties designed to eliminate double taxation end up being used to eliminate taxation altogether. Treaty shopping makes a bilateral treaty function largely as a "treaty with the world" and this often results in tremendous loss of revenue for the contracting states.[5]

LITERATURE REVIEW

Treaty shopping is a way of using another state's internal taxation system and/or their taxation treaties with a third state, in which an investment or business is to be made, in a way which leads to an advantageous taxation effect (compared with the effect not using the procedure).[6]

In the OECD-written International Avoidance and Evasion, treaty shopping is defined as a procedure that leads to tax benefits in the source state. The tax benefits mainly consists of a reduction of the overall taxation effect achieved through a reduced tax rate regulated in the taxation treaties when it comes to payments of dividends, interests and royalties.[7]

Treaty Shopping is related with benefecial ownership. Beneficial ownership is not defined in all tax treaties implemented between countries today which opens the door for disputes on the interpretation of the concept and the result can lead to tax treaty shopping and excessive tax avoidance.

Reducing the rates of withholding tax levied by the source State on dividends, interest androyalties paid to residents of the Contracting State is one of the major objectives of taxtreaties and is addressed in Articles 10, 11 and 12 of the OECD Model Tax Convention respectively.[8]

The notion of beneficial ownership is decisive in determining whether a person qualifies fortax treaty benefits in respect of cross border dividends, royalties and interest.

The benefits of a tax treaty might be sought in one of two ways. Firstly, in a positivemanner, which will for example, require the person to be the beneficial owner of the income. Secondly, in the case where a person may not benefit under the treaty if the person is not a resident of one of the Contracting States, as defined, for the purposes ofthe treaty. The latter is also referred to as the so-called 'anti-treaty shopping' or 'Limitation on Benefits' ("LoB") clause.[9]

The term 'beneficial owner' was introduced to counter tax treaty shopping. It furthermore also counters the use of conduit companies in order to obtain reduced rates through states with attractive treaty provisions. The question posed by Philip Baker is: "How artificial must the conduit arrangement be for a treaty benefit to be denied?"[10]

The term, beneficial ownership, was introduced mainly to counter tax treaty shopping. Before the Indofood International Finance Ltd v JP Morgan Chase Bank NA (Court of Appeal, 2nd March 2006, (2006) 8 ITLR 653; [2006] STC 1195) case, there has been limited case law on the term 'beneficial ownership'.[11]

METHODOLOGY

The research method used in this paper is primarily qualitative, comprising the analysis of various documentary

3 *Helmut Becker & FJ Wurm Treaty Shopping: An Emerging Tax Issue and its Present Status in Various Countries ,1988, p. 1; S Van Weeghel The Improper Use of Tax Treaties with Particular Reference to the Netherlands and*
The United States 1998 ,p. 119.

4 *OECD Issues in International Taxation No. 1, International Tax Avoidance and Evasion, 1987 p. 20; A Ginsberg, International Tax Havens ,2nd ed, 1997 p. 5-6; P Roper & J Ware, Offshore Pitfalls ,2000, p. 5.*

5 *Roy Rohatgi, Basic International Taxation ,2002, p. 363; Haug p. 218; Weeghel p. 121.*

6 *P. Sundgren,"Treaty shopping", 1992, Skattenytt 370 p. 370.*

7 *Issues in International Taxation, No 1, International Tax Avoidance and Evasion, Four Related Studies, 1987.*

8 *A.Amatucci, Gonzalez, E. & Trzaskalik, International Tax Law Illustrated edition.Kluwer Law International, C.2006, p. 169*

9 *L. Olivier, & Honiball, International Tax 4th Edition, SiberInk, M. 2008. p. 411*

10 *Philip Baker, Beneficial ownership: After Indofood, 2007, Grays Inn Tax Chamber Review, Vol. VI, No. 1 ,February 2007, p.4*

11 *ibid*

sources of data.

The materials of international tax law in form of double taxation treaties and model conventions, jurisprudence, literature and articles that deals directly or indirectly with treaty shopping, and reports from the OECD are consulted and analysed.

Neither double tax treaties, nor domestic law, nor international soft law draws a borderline between the use of double tax treaties and treaty shopping. They also do not give any hints on how to determine it. Therefore, the paper is going to deduce the procedure for determination of the borderline between the use of double tax treaties and treaty shopping from the definitions of treaty shopping and anti-treaty shopping tools provided for in various sources. The paper, however, is not pursuing a purpose to analyse any particular legal system as the present research is performed within the framework of international tax law area. It also will be focused only upon treaty shopping related issues. Hence, other forms of tax avoidance (evasion) will be left out in the cold.

For these purposes international conventions, double tax treaties and domestic laws, acts of international soft law, existing case-law, legal databases, legal textbooks, journal articles and literature, websites of state authorities and other materials available on-line will be examined.

RESULTS AND ANALYSIS

In any Double Tax Avoidance Agreement or Tax Treaty is usually regulated by various facilities in the international tax law literature called treaty benefits. One example of a treaty benefit is a lower tax rate for certain types of income, such as dividends, interest and royalties. This is in line with main purpose of double tax treaties is to prevent the risk of double taxation by allocating taxing jurisdiction between two countries. Although they are concluded between states, double tax treaties have a direct effect towards taxpayers. They can invoke treaty benefits in the form of tax relief (or a reduced tax rate) for specified types of income and therefore request the application of treaty provisions.[12] The aim pursued by countries granting tax benefits in accordance with the provisions of double tax treaties to their taxpayers is to facilitate international trade and investment between them. These goals may be achieved mainly if the taxpayers provide real business activity within both states. In this case, the use of tax treaty benefits by taxpayers has legitimate character and is, usually, supported by the contracting states.

On the other hand, double tax treaties could be used by persons in order to derive tax advantages that the treaties were not designed to give them. Such situations constitute an abuse or improper use of double tax treaties. There are several forms of an abuse of double tax treaties differing from each other by their purposes and strategies employed, e.g. using base companies, treaty shopping, rule shopping. The author is going to concentrate upon treaty shopping, which relates to situations, in which a person benefits from a treaty without being a legitimate beneficiary thereof.

According to van Weeghel, the term "treaty shopping" connotes a situation in which a person who is not entitled to the benefits of a tax treaty makes use – in the widest meaning of the word – of an individual or legal person in order to obtain those treaty benefits that are not available directly.[13] Rohatgi defines treaty shopping as the routing of income arising in one country to a person in another country through an intermediary country to obtain an unintended tax advantage of tax treaties.[14] According to Becker and Wurm, treaty shopping means that a taxpayer "shops" into the benefits of a treaty which are not available to him [and] to this end he generally incorporates a corporation in a country that has an advantageous tax treaty.[15] Vogel refers to a situation where transactions are entered, or entities are established, in other States, solely for the purpose of enjoying the benefit of particular treaty rules existing between the State involved and a third State which otherwise would not be applicable, e.g., because the person claiming the benefit is not a resident of one of the contracting States.[16] The Advisory Panel on Canada's System of International Taxation stated that treaty shopping is the situation where a person, who is resident in a given country (the home country) and who derives income or capital gains from another country (the source country), is able to gain access to a tax treaty in place between the source country and a third country that offers a more generous tax treatment than the tax treatment otherwise applicable. This situation could arise if the person is

12 *Raffaele Russo, Fundamentals of International Tax Planning, IBFD, Amsterdam, 2007, p. 11*
13 *Stef van Weeghel , The Improper Use of Tax Treaties With Particular Reference to the Netherlands and the United States, , Kluwer, London 1998, p. 119*
14 *Roy Rohatgi, Basic International Taxation, the 2nd edition, BNA International Inc., London, 2007 p. 165*
15 *Helmut Becker and Felix J. Wurm, Treaty Shopping. An Emerging Tax Issue and its Present Status in Various Countries, Kluwer, London. 1988, p.1*
16 *Klaus Vogel, On Double Tax Conventions, Kluwer, Deventer/Boston, 1991, p.50.*

resident in a country that does not have a tax treaty with the source country, or if the tax treaty between the source country and the person's home country offers less generous tax treatment than the tax treaty between the source country and the third country. [17]

The doctrine of beneficial ownership is the most widespread anti-treaty shopping tool. It has been developing and existing for many years in the domestic (non-tax) law of the common law states. It was incorporated for the first time in a tax treaty in relation to income into the 1966 protocol to the 1945 United Kingdom–United States double tax treaty. The doctrine was introduced into the OECD Model Tax Convention in 1977.[18] The term 'beneficial ownership' is also used in later versions of both the OECD Model Tax Convention and the UN Model Tax Convention, and has similarly been incorporated into many double tax treaties between different states. The doctrine is decisive for determination whether a person qualifies for treaty benefits and for the allocation of the taxing right between two contracting states in respect of dividends, interest and royalties. In this respect, tax treaties typically use a wording to the effect that the person claiming the treaty benefits (normally a reduced withholding tax) must be the beneficial owner of the dividends, interest or royalties.[19] It is pretty clear that the beneficial ownership limitation was introduced to counter treaty shopping by the channeling of the relevant income through a resident of a state with a suitably attractive treaty provision.[20]

Nevertheless the doctrine is so widely applied; the term "beneficial owner" is neither defined in the OECD Model Tax Convention , nor in the UN Model Tax Convention,[21] nor in the majority of existing double tax treaties. The problem is hidden in differences in legal systems and traditions of civil and common law countries, including different understandings and meanings of ownership. E.g., in Italy, the position that was traditionally taken was that the real rights (which included ownership and usufruct) of enjoyment of an asset were expressly defined and limited by the Italian Civil Code. These were the sole rights of enjoyment, which could be enforced against anyone, as opposed to contractual arrangements such as lease agreements, which could be enforced only between the contracting parties. Any right of enjoyment other than those defined and governed by the Italian Civil Code could not exist and, consequently, could be deemed to be contrary to public policy.[22]

Due to the fact that the beneficial ownership is not explicitly defined neither in the OECD Model Tax Convention, nor the UN Model Tax Convention and their commentaries, countries usually follow the negative definition provided for in the respective OECD Commentaries or their own definitions of beneficial ownership elaborated in their domestic legislation or case-law.

Except for existing case law, some countries defined the term beneficial ownership in their domestic laws. E.g. article 4(4) of the Dutch Dividend Tax Act (1965) sets forth that a shareholder who is the recipient of dividends will not be considered the beneficial owner of the dividends if, as a consequence of a combination of transactions, a person other than the recipient wholly or partly benefits from the dividends, whereby such person retains, whether directly or indirectly, an interest in the shares on which the dividends were paid and such person is entitled to a credit, reduction or refund of the dividend withholding tax that is less than that to which the recipient is entitled.[23]

The Indonesian tax authorities in its ruling letter S-95/PJ.342/2006 set forth that, the foreign company, to qualify as a beneficial owner, must either (a) have income subject to tax or an active business in its country of residence; or (b) have a full power or control over the income to use in its operations; or (c) its shares must be traded on a recognized stock exchange.[24]

The Technical explanation to the 2006 US Model Income Tax Convention defines the beneficial owner as a person to which the income is attributable under the laws of the source State. Thus, if a dividend paid by a corporation, that is a resident of one of the States (as determined under Article 4 (Residence)), is received by a nominee or agent that is a resident of the other State on behalf of a person that is not a resident of that other State,

17 *The Advisory Panel on Canada's System of International Taxation, Enhancing Canada's International Tax Advantage: A Consultation Paper Issued*

18 *Charl du Toit , The Evolution of the Term "Beneficial Ownership" in Relation to International Taxation over the Past 45 Years, , Bulletin for International Taxation, 2010 (Volume 64), No. 10/IBFD database, §1*

19 *Ibid,, §2*

20 *Philip Baker, Beneficial Ownership: After Indofood, Grays Inn Tax Chamber Review, Vol. VI, No. 1 (February 2007), p. 15*

21 *The commentaries on articles 10 and 11 of the OECD Model Tax Convention contain only negative definition of the term "beneficial owner".*

22 *G. Maisto, The Taxation Of Trusts In Civil Law Countries – Italy: Aspects of Trust Taxation, European Taxation 8 (1998), p. 242*

23 *Stef van Weeghel and Reinout de Boer, Anti-Abuse Measures and the Application of Tax Treaties in the Netherlands, IBFD Bulletin, August/September 2006, p. 363*

24 *Roy Rohatgi, Basic International Taxation, the 2nd edition, BNA International Inc., London, 2007 p.178*

the dividend is not entitled to the benefits of this Article.

As we can see there are no significant differences in understanding of the concept of beneficial ownership between different states. Generally speaking, under beneficial owner they understand a legal entity or an individual that has a full power or control over the income to use in its operations not burdened by any additional obligations. However, there is still no international definition of the term, which means that local judges and tax authorities may apply and interpret it differently.

A lot of states have been considering treaty shopping as a serious problem for quite a long time and for combating this problem a beneficial ownership doctrine has been employed. Other states instead of or together with the beneficial owner doctrine have developed in their domestic laws or case law anti-treaty shopping doctrines, such as substance-over-form and/or economic substance doctrines. Even though they have different names they have very close essence.

Another interesting example of a substance-over-form doctrine is the US regulations dealing with financing arrangements.[25] For the purposes of these regulations, a financing arrangement is a series of transactions by which the financing entity advances money or other property to the financed entity, provided that the money or other property flows through one or more intermediary entities. An intermediary entity will be considered a "conduit", and its participation in the financing arrangements will be disregarded by the tax authorities if (i) tax is reduced due to the existence of an intermediary, (ii) there is a tax avoidance plan, and (iii) it is established that the intermediary would not have participated in the transaction but for the fact that the intermediary is a related party of the financing entity. In such cases, the related income shall be re-characterized according to its substance.[26]

Other countries have dealt with the issue of treaty shopping through judicial doctrines established by their domestic courts. For example, according to a bona fide taxpayer doctrine established by the Russian courts in the Yukos case[27] on the basis of the Ruling the Constitutional Court of the Russian Federation of 25 July 2001, mala fide taxpayers are deprived their rights and privileges granted by Russian law, an integral part of which is double tax treaties concluded by Russia, only to bona fide taxpayers. The taxpayer is considered as a mala fide, if

(1) it is acting with the sole intention to deprive the state treasury of tax receipts; and

(2) the objective result being the non-payment of taxes.[28]

Art. 31(1) of the Vienna Convention on the Law of the Treaties (1969) provides that a treaty should be interpreted in light of its object and purpose. Accordingly, the provisions of a bilateral double tax treaty should be interpreted to prevent tax avoidance.[29] Hence, even if there is no General Anti Avoidance Rule (GAAR)/Special Anti Avoidance Rule (SAAR) in the domestic law or a relevant double tax treaty, the position of the OECD is that it will still be possible to deny treaty benefits based on an anti-abuse rule inherent in the double tax treaty. This inherent anti-abuse rule is also based on an economic substance doctrine.

Touching on applicability of the new version of the Commentaries to the previously concluded double tax treaties, it should be noted that § 35 of the Introduction to the 2003 OECD Model Tax Convention and Commentary states that changes or additions to the Commentaries are normally applicable to the interpretation and application of conventions concluded before their adoption, because they reflect the consensus of the OECD member countries as to the proper interpretation of existing provisions and their application to specific situations. However, there is no unity among the states or at least among their courts with regard to the application of the above approach. E.g., in the recent Yanko-Weiss case[30] an Israeli court applied the 2003 OECD Commentaries to interpret the provisions of the Israel - Belgium Income and Capital Tax Treaty (1972), while in the Canadian landmark case (Mil Investments) the court interpreted Art. 31(1)(c) of the Vienna Convention on the Law of Treaties to mean that one can consult only the OECD Commentaries in existence at the time the treaty was negotiated without reference to subsequent revisions.[31]

Summing up, despite the fact that above mentioned doctrines have different names, forms and ways of adoption

25 *the U.S. Department of Treasury conduit regulations under section 7701(l) of the Internal Revenue Code from August 11, 1995*

26 *the UN Committee of Experts on International Cooperation in Tax Matters, Improper Use of Tax Treaties, June 2009, pp.15 – 16 , §52*

27 *The decision of the Arbitral court of Moscow city of 26 May 2004 in case №A40-17669/04-109-241*

28 *Roustam Vakhitov, Recent Developments Regarding Judicial Anti-Tax Avoidance in Russia, European Taxation, April 2005, p. 163*

29 *Brian J. Arnold, Tax Treaties and Tax Avoidance: The 2003 Revisions to the Commentary to the OECD Model, Bulletin - Tax Treaty Monitor, June 2004, p. 248.*

30 *Yanko-Weiss Holdings ltd vs Assessing Officer of Holon case, the decision of the District Court of Tel Aviv-Yafo of 30 December 2007.*

31 *Mil Investments S.A. vs Her Majesty the Queen, the decision of the Tax Court of Canada of 18 August 2006.*

they all are based on the same criteria for determination whether transactions in question or strategy are/is abusive – they simply disregard forms of the transactions and look at their substance. Accordingly, if in the tax planning scheme an intermediary legal entity does not perform any sufficient economic (business) activity and the only purpose of its interposing between the legal entities established in a source state and a final destination state is to enjoy a more favourable tax regime, the above doctrines will treat such a situation as abusive with the relevant consequences (the taxpayer will be denied double tax treaty benefits).

CONCLUSION

This paper has focused primarily on the use of tax treaties in the treaty shopping context, and the issue whether treaty shopping constitutes an abuse of the bilateral tax treaty regime. Treaty shopping involves the channeling of income through a conduit entity resident in a treaty jurisdiction by non-treaty residents, in an attempt to derive benefits under the tax treaty between the source state, the jurisdiction where the investments are carried out, and the state of residence of the conduit entity.

The bilateral tax treaty regime, modeled after the OECD model convention, lays the foundation for a principle of abuse, or anti-abuse rule that treaty states may invoke to challenge the legitimacy of the tax avoidance practices employing tax treaties. The paper concludes that treaty shopping, as a general proposition, constitutes an abuse of the tax treaty regime and that the practice violates the economic rationale underpinning the division of tax rights between treaty states under the bilateral tax treaty system. This is the result of the use of conduit devices that lack an independent economic rationale or a sufficient economic presence in a treaty jurisdiction to be legitimately entitled to claim treaty relief under a convention. This analysis supports and lends credence to the general proposition expressed by the OECD and OECD member states, that the use of artificial legal maneuvers to derive benefits under a tax treaty constitutes is an abusive practice.

The borderline between sophisticated tax planning and treaty shopping is always floating. Hence, the only thing that is possible on the current stage of development – is to analyze each specific transaction (scheme) separately under the provisions of the relevant double tax treaties and national laws in order to find an answer whether such and such transaction or a group of transactions correspond(s) a treaty shopping creature or an acceptable use of a double tax treaty.

The sophisticated limitation on benefits provisions should be abolished, while states, in general, and the OECD, in particular, should focus upon the development of the common anti-treaty shopping doctrine based on the common denominator. The common denominator of all the above doctrines could be such elements as artificiality, lack of economic substance in the arrangement and taxpayer's subjective intention to avoid taxes.

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