



Execution of Scripless Shares Secured in Fiduciary Security Following the Enactment of The Constitutional Court Decision Number 18/PUU-XVII/2019

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ABSTRACT

Shares, as one of the securities traded on the Share exchange, can be issued in scripless form and the transaction settlement shall be carried out using book-entry settlement. The ownership of the scripless Share shall be evidenced in an electronic form, i.e. the ownership account at The Indonesia Central Securities Depository (KSEI) as the Depository and Settlement Institution in the Indonesian Capital Market. As a movable object, shares can be used as debt collateral, one of which mechanism shall use fiduciary security. However, In a fiduciary security system, the control of such collateral remains with the fiduciary grantor. In terms of scripless Share collateral, KSEI will block the pledged shares in KSEI's account, therefore, the shareholder shall have no longer control over such shares. The position of the fiduciary grantee is prioritized over other creditors due to the executorial power deemed having the same legal force as a legally bound court decision. However, following the enactment of the Constitutional Court Decision Number 18/PUU-XVII/2019 regarding the judicial review of Law No. 42 of 1999 concerning Fiduciary Guarantees, there is a provision that any fiduciary execution cannot be carried out without an agreement among the parties regarding the default by the borrower. The method used in this research is descriptive-analytical using a normative juridical approach by utilizing secondary data i.e. regulations in capital market, fiduciary security and Constitution Court Judicial Review Decree.

ABSTRAK

Saham sebagai salah satu efek yang diperdagangkan di bursa, dapat diterbitkan tanpa warkat (scripless) dimana kepemilikannya dibuktikan secara elektronik melalui kepemilikan rekening di PT Kustodian Sentral Efek Indonesia (KSEI) dan penyelesaian transaksinya dilakukan melalui pemindahbukuan (book-entry settlement). Sebagai benda bergerak, saham dapat dijadikan sebagai jaminan utang yang salah satunya adalah dengan pembebanan jaminan fidusia dimana penguasaan objek jaminan tetap berada pada pemberi jaminan. Namun terkait saham tanpa warkat, sedari awal memang saham sudah berada di bawah pengelolaan KSEI dan apabila saham-saham diagunkan, maka KSEI yang akan melakukan pemblokiran atas saham tersebut sehingga pemilik saham pun tidak lagi dapat bertransaksi atasnya. Kedudukan penerima fidusia sendiri oleh undang-undang diutamakan terhadap kreditor lainnya dikarenakan sertifikat jaminan fidusia memiliki kekuatan eksekutorial selayaknya putusan Pengadilan yang berkekuatan hukum tetap. Namun setelah berlakunya Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019 terkait uji materiil Undang-Undang No. 42 tahun 1999 tentang Jaminan Fidusia, terdapat ketentuan bahwa setiap eksekusi fidusia tidak dapat serta merta dijalankan tanpa adanya kesepakatan wanprestasi debitur. Metode penelitian ini bersifat yuridis normatif dengan memanfaatkan data sekunder berupa peraturan perundang-undangan di bidang pasar modal, jaminan fidusia dan hasil putusan Mahkamah Konstitusi

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I. INTRODUCTION

In addition to acting as an alternative means for companies to obtain working capital and a means of investment for people who own capital in financial instruments, the capital market also plays a leading indicator of a country's economic situation. The figure of the Composite Stock Price Index (JCI) or composite index on a country's stock exchange that is declining sharply may indicate that the country is experiencing an economic crisis. It is this strategic role that ultimately makes the existence of the capital market in the modern economy crucial.

With the rapid globalization, business actors in the capital market include investors from various countries. The Group of Thirty (G30) concluded in its 2008 study, that the rapid growth spurt in the financial services sector in the past two decades is due to technology having created a market without borders. (The Group Of Thirty, 2008) The development of information technology as a manifestation of globalization itself has encouraged dynamics in the capital market where then, transactions in the financial market and commodity market are currently widely implemented the model of trading via the internet (online trading) remotely (remote trading). This allows foreign investors to manage their investment portfolios in seconds (real time) (Ferdiansyah, 2016) This also ultimately gave birth to a change in the securities transaction system on the stock exchange from the beginning of securities traded and handed over manually, namely in the delivery in the form of physical securities (certificates or certificates) or known as paper-based to electronic form, namely through the mechanism of book-entry of securities accounts or also known as scripless trading.

The scripless trading mechanism began to be implemented in Indonesia since July 2000 as a government response to economic globalization. Its implementation is supported by capital market regulations that have existed since the previous five years, namely in Article 55 Paragraph (1) of Law Number 8 of 1995 concerning the Capital Market ("Capital Market Law"), namely "Settlement of stock exchange transactions can be carried out by bookkeeping settlements, physical settlements, or other means stipulated by government regulations. Based on these provisions, scripless trading is defined as a bookkeeping settlement to complete securities transactions on the exchange. This bookkeeping settlement, also known as book entry settlement, is the fulfillment of rights and obligations arising as a result of exchange transactions carried out by means of a reduction in securities from one securities account and the addition of securities in another securities account at the custodian, which in this case is carried out electronically. (Law on Capital Market, Number 8 of 1995, LN Number 64 of 1995, n.d.)

The implementation of scripless trading in Indonesia is carried out by Self-regulatory Organizations (SROs) in capital market institutions, namely PT Bursa Efek Indonesia, PT Kliring Penjaminan Efek Indonesia (KPEI) and PT Kustodian Sentral Efek Indonesia (KSEI). KSEI itself in the capital market institutional order, functions as a Depository and Settlement Institution (LPP) by providing central custodian services. Regarding the implementation of book entry settlement, KSEI will centrally manage all securities to be transacted stored electronically in KSEI securities accounts, so that securities companies and custodian banks are obliged to open securities accounts in KSEI based on customer or investor data in related securities companies. (Nasarudin, M. Irsan, Indra Surya, Arman Neffe, & Adiwarmarman, 2011) The application of scripless trading is supported by KSEI's main system, namely The Central Depository and Book Entry Settlement System (C-BEST). ("Https://Www.Ksei.Co.Id/about, Retrieved January 12, 2021.," n.d.) One of the securities transacted in the capital market is stocks. In the Capital Market Law, shares are categorized as one of the securities that are equity in nature (Law on Capital Market, n.d.).

Regarding this nature of equity, M. Yahya Harahap, S.H. argued that in the sense of capital or capital of the company in general, shares are issued by the company as a sign of the receipt of a certain amount of capital by the company in the form of money. (Harahap, 2019) Law Number 40 of 2007 concerning Limited Liability Companies ("PT Law") stipulates that shares are the nominal value of the Company's authorized capital and further in Article 52 paragraph (1) it is regulated that "*Shares give the right to their owners to: a. attend and make a vote in the GMS; b. receive payment of dividends and the remaining wealth from liquidation; c. exercise any other rights under this Act.*" (Law on Capital Market, n.d.)

In scripless trading, shares are traded in the form of an electronic securities account located in KSEI, where as a form of proof of ownership of such securities, KSEI as the central custodian will issue a written confirmation to the owner of the securities account. (Nasarudin et al., 2011) Furthermore, KSEI will place all funds registered in the securities account to the payment bank in a special current account. (Hariyani, 2010) Accordingly, in the event of a transfer of ownership of such securities, the transfer occurs at the time when the securities in the account of the original owner of the securities are reduced and added to the buyer's securities account or in other words at the time when the securities are transferred to the entitled securities account. (Rokhmatussa'dyah & Ana, 2018)

Shares are movable objects that provide material rights to their owners as regulated in article 52 of the PT Law. (Undang-Undang Perseroan Terbatas, n.d.) With this treasury right, the owner of the shares can sell, grant, charge collateral and/or obtain a result (dividend) from the shares. The charge on shares is in the form of a lien or fiduciary guarantee.

Fiduciary guarantees are subject to Law No. 42 of 1999 concerning Fiduciary Guarantees ("Fiduciary Guarantee Law") which regulates fiduciaries as a transfer of ownership rights to an object on the basis of trust whereby control over the object whose ownership rights are transferred remains with the owner of the object. (Law on Fiduciary Guarantee, Number 42 of 1999, LN Number 168 of 1999, n.d.)

The existence of the principle of trust in fiduciary guarantees allows the guarantee provider to obtain financing from the guaranteed debt but still be able to take advantage of the collateral in carrying out its business activities. (J. Satrio, 2002) The charge includes movable objects both tangible such as motor vehicles, machine tools and inventory items, as well as intangible ones, such as stocks, bonds and intellectual property rights. Fiduciary guarantees themselves were born as an answer to the growing need in the business world for the existence of capital funds that need to be balanced with clear and complete rules about guarantee institutions. (Salim H.S, 2017).

In the charge of collateral on securities in the form of shares, the practice of pawning shares usually applies. But that doesn't mean no one is taking advantage of this fiduciary guarantee institution in the capital market. This is because the control of the pledged shares is not in the hands of the debtor as a fiduciary guarantee provider as stipulated in the Fiduciary Guarantee Law, but in the hands of KSEI where the securities will be frozen by KSEI as long as the status is still in collateral. In addition, the position of the fiduciary beneficiary takes precedence over other creditors because the fiduciary guarantee is registered with the state through the Directorate General of General Legal Administration under the Ministry of Law and Human Rights and the fiduciary guarantee certificate issued has the executory power of a Court decision with permanent legal force. (Law on Fiduciary Guarantee, Article 15 Paragraph 2, n.d.)

However, in 2019, there was a Constitutional Court Decision Number 18/PUU-XVII/2019 related to the material test of the Fiduciary Guarantee Law, which among other things determined that against article 15 paragraph (2):

“The Fiduciary Guarantee Certificate as referred to in paragraph (1) has the same executory power as a court decision that has obtained the force of law remains invalid as long as it is not interpreted as to a fiduciary guarantee for which there is no agreement on the injury of the promise (default) and the debtor objecting to voluntarily surrendering the object that is the fiduciary guarantee, then all legal mechanisms and procedures in the execution of the fiduciary guarantee certificate must be carried out and applicable equally to the execution of a court decision that has permanent legal force.” (Mahkamah Konstitusi, Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019 Tahun 2019., n.d.)

Thus, the execution of the fiduciary guarantee shall follow the additional provisions of the award which then affects the execution of the object pledged in the fiduciary guarantee and how then the creditor as the recipient of the fiduciary guarantee can claim his rights if there is a default by the debtor.

Based on the explanation above, the author tries to raise the discussion about the fiduciary practice of shares without bondage in Indonesia with the formulation of the following problem: "What is the form of execution of shares without bond pledges in the fiduciary guarantee institution after the Constitutional Court Decision Number 18 / PUU-XVII / 2019?"

II. RESEARCH METHODS

The research method used in this writing is normative juridical where a problem will be studied from its legal aspect by examining legal principles, laws and regulations, and literatures regarding the capital market and fiduciary guarantees which are then associated with the discussion of execution practices for unsung shares in fiduciary guarantees. This research is descriptive analytical by utilizing secondary data consisting of primary, secondary and tertiary legal materials and analyzing facts systematically.

III. RESULTS AND DISCUSSION

1. The Practice of Charging Fiduciary Guarantees of Unsung Shares

Based on Article 4 of the Fiduciary Guarantee Law, a fiduciary guarantee is an accession agreement of a principal agreement in the form of credit debts/financing that requires the parties to fulfill an achievement. In Article 7 of the Fiduciary Guarantee Law, debts pledged with fiduciaries may be: a. existing debts; b. debts that will arise in the future for which the amount has been previously promised; and c. the amount of debt at the time of execution may be determined under the principal agreement.

As for the objects that can be used as collateral for the treasury are *"everything that can be owned or transferred, whether tangible or intangible, registered or unregistered, movable or immovable which cannot be burdened with dependent or mortgage rights."*(Law on Fiduciary Guarantee Article 1 Number 14, n.d.) Based on this, this article does not apply to:

- a. Mortgage relating to land and buildings, to the extent that the regulations specify that guarantees for such objects shall be registered;

- b. Mortgages on ships are registered with a gross size of 20 (twenty) M3 or more;
- c. Mortgages on aircraft; and
- d. Pawn/Pledge.(Law on Fiduciary Guarantee Article 3, n.d.)

In terms of ownership rights to shares, in this case shares on the stock exchange, there are 2 (two) parties who are entitled to such ownership, namely the custodian who is listed as the registered owner of the shares (registered owner) and on the other hand, namely the financier or investor as the beneficial owner of the shares (beneficial owner. Bapepam Regulation No. VI.A.3 concerning Securities Accounts in Custodians, Capital Market and Financial Institutions Supervisory Agency (Bapepam-LK, now OJK), gives the meaning of beneficial ownership or ownership of rights to securities as the right of securities account holders to certain benefits of securities recorded in collective custody on securities accounts in securities companies, custodian banks or Depository and Settlement Institutions (LPP) benefits where arising from securities account contracts between holders of securities and custodial accounts. Meanwhile, registered ownership or direct ownership of securities is defined as the right of the holder of securities to the issuer in relation to the securities registered in the issuer's book on behalf of the holder of the securities.

2. Execution of Pledged Shares

Shares as intangible movable objects and also as capital goods have implications for the selection of different guarantee institutions. As an intangible movable object, shares can be pledged through a lien guarantee Institution whereas as capital goods the shares can remain under the control of the debtor so that they can be collateralized through the fiduciary guarantee institution.(Rizki Achmad, 2009).

Article 27 (1) of the Fiduciary Law provides that the fiduciary beneficiary has rights that take precedence over other creditors; (2) The right to precedence referred to in subsection (1) is the right of the Fiduciary Beneficiary to take repayment of its receivables on the proceeds of the execution of the Object to which the Fiduciary Guarantee is subject; and (3) The preemptive rights of the Fiduciary Beneficiary are not abolished due to the insolvency and or liquidation of the Fiduciary Grantor.

Furthermore, Article 29 stipulates that if the debtor or Fiduciary Giver defaults on the promise, the execution of the Object to the Fiduciary Guarantee may be carried out by: a. the exercise of the executory title as referred to in Article 15 paragraph (2) by the Fiduciary Recipient. b. the sale of the Object of the Fiduciary Guarantee on the fiduciary's own power through a public auction and taking repayment of its receivables from the proceeds of the sale; c. underhand sales made under the agreement of the Fiduciary Giver and Receiver if in such a manner the highest price can be obtained in favor of the parties.

The implementation of the sale as referred to in paragraph (1) point c is carried out after the lapse of 1 (one) month since it was notified in writing by the Fiduciary Giver and or Recipient to the interested parties and announced in at least 2 (two) newspapers spread in the area concerned. The provisions of chapter V of article 29 of Law No.42 of 1999 which require that the execution of the object of fiduciary guarantee (if the debtor defaults on the promise) be carried out by means of: *"(i) the exercise of the executory title by the fiduciary beneficiary beneficiary or (ii) the sale of the object of the fiduciary guarantee through a public auction or (iii) a sale under the hands of the fiduciary Giver and Receiver if in such a manner it can be obtained the highest price in favor of the parties"*.

However, looking at Amar the Decision of the Constitutional Court Number 18 / PUU-XVII / 2019 point 3 the existence of a promise injury is not determined unilaterally by the creditor but on

the basis of an agreement between the creditor and the debtor or on the basis of legal remedies that determine the occurrence of a promise injury. Further to this provision, against a fiduciary guarantee for which there is no agreement on default and the debtor objecting to voluntarily surrendering the object to which the fiduciary guarantee is made, then all legal mechanisms and procedures in the execution of the Fiduciary Guarantee Certificate must be carried out and apply equally to the execution of a court decision that has permanent legal force.

Linked to the fiduciary of shares without bond, then by applying what is regulated under KSEI Circular Letter Number KSEI-0101/DIR/0101 dated January 15, 2001, it can be concluded that shares in collateralized status must be controlled by the creditor and/or his/her proxy. In scripless trading, KSEI is the power of attorney of the creditor and to carry out its function as the beneficiary of the collateral. KSEI will then block the collateralized shares from being transacted. This collateral ends in the event that there is an application for revocation of the collateral status of the creditor as the beneficiary of the pledge and/or the debtor as the power of attorney of the beneficiary of the pledgee.

In order to avoid any dispute over the sale of shares without bond as a form of auction by KSEI, the information disclosure requirements must be met or at least must be notified to the debtor in advance and the price determination can be requested to the judge. If the shares pledged by the fiduciary are not the controlling shares, then a non-public execution can be carried out by making a new agreement after the debtor has neglected to carry out the fulfillment of the debt return within a predetermined period (*tempo*) or after being declared a default and may also be requested to the judge to give a pricing of the shares to be sold. Specifically for stock pricing, the judge may appoint the profession of appraiser for the objective assessment of the share price.

IV. CONCLUSION

Unsolved shares are possible as collateral in a fiduciary guarantee institution by using the provisions applicable in the capital market where shares are already listed on the Stock Exchange and have always been subjected to transactions within a 3-month period and the price does not fall below the nominal. To be executed, there must be a debtor default agreement between the debtor and the creditor so that KSEI can conduct an auction of the collateralized shares to the public. However, because from the beginning of the collateral period, the shares under the control of KSEI, the function of the fiduciary guarantee institution in shares without bonding became non-running and the function of shares as capital goods could not be utilized by debtors or shareholders. As for the execution itself, it can apply the practices applicable in the lien of shares on shares without bonding taking into account that a new execution can be imposed if there is an agreement that it is true that the debtor has defaulted.

In order to achieve the effective purpose of the role of the fiduciary guarantee institution for these bondless shares, it would be better if the government and legislatures made a regulation that regulates the collateralization of shares without bond, especially how debtors can continue to use the shares to benefit from them and creditors are maintained the right to fulfill debt repayments and security in terms of guarantees.

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