

LEGAL PROTECTION FOR INVESTOR'S STOCK IN CAPITAL MARKET

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ABSTRACT

Legal protection for investor is a crucial issue because many evidence of the misuse of company's resources has been found for extensive period. Moreover, there are also the case of stock lose, case in IPO, short selling, securities fraud, market manipulation, and insider trading. Stock market is about trust, if it lose, the market will collapse and it will affect the other sector, mainly economic sector. Stock Market Law (SML) have regulate very important activities in security market, especially the regulation of investor protection. This research aims to discuss the problem of the needs of investor to get a legal protection, the right of investor in security market that is not provided legal certainty in SML, and analyze the law conception problem that can be developed in the legal protection for the rights of investors in security market. The results of the research show that, first, investor is one of the most important element in security market activities whose rights are oftenly forgotten because of the lack of information towards company's resources compared to that of issuers. Hence, it needs protection from law that fair and balanced, with the norm of law interference that purposefully made by the state. Second, legal protection set in Incorporated Company Law (ICL) is not enough to investors in the capital market. Relationship between SML and ICL is Lex Specialis with Lex Generalis. ICL has authorized the forming of the Act to regulate the rights of investors in SMA in the future in order to give more legal certainty, especially in the regulated of compensation, full disclosure and criminal provisions. Therefore, the approach of SMA in security market can be classified in two, that is the institutional approach and activity approach. Third, the concept that can be developed to increase the protection for investor is to make SMA give stronger legal framework through the regulation of the protection of investor's right and maximize the transparency of information for go public company and for company that have not go public yet, as the guarantee of certainty of law that is needed by investor with some steps.

Keyword : Legal Protection, investor, capital market

Introduction

Capital market is a way to make a meet between Incorporation Company (IC) that in need of additional capital by selling its share with creditors as its buyer. For IC, capital market can be used as a way to gain capital from society that are spreading and less productive, at least as the alternative capital source if the other capital source are hard to get and less beneficial. For a creditors, capital market can be used as alternative investment (allocation of fund) with a prochapterility to gain a company profit that are given as dividend and/or the profit from the increasing value of the share that is owned (capital gain).

Capital market is also an alternative for funding the economic development of a nation. Fund to develop economic's nation is not only from government but also from society. In this case, private sector become a motor of economic activities (private sector leads economic growth), in this case the government intervene market activities. The Government makes rules to enforce the law to create a fair and efficient market.¹

The presence of Government in economic activities has been stated in Article 33 Constitution 1945, Chapter XIV entitled "National Economy and Social Welfare ". Society's prosperousness is inseparable from freedom's purpose / dream. By placing Article 33 UUD 1945 means that the national development of economic must be based on the increasing of society's prosperousness. Article 33 UUD 1945 is a verse of economic restructuring, a law to solve economic structural gap problem.²

The effort from government of Indonesia to build Indonesia's Economic System can be seen in appendix of President Regulation No. of 2010 on Mid-term Development Plan (MDP) 2010 – 2014.³

It can be concluded that government's policy for capital market according to MDP 2010 – 2014 are : 1. Increase the role of syariah capital market; 2. Restructuration of capital market; 3. Increase the protection of domestic investment in capital market through transparency of information and carefulness. That also aligned with the problem that appear when Indonesian Capital market even when they have rule of law for capital market that is Law No. 8 of 1995 on Share Market (SML) and its practical regulation, in reality that's not sufficient enough, because there are still things that harm investor's right. It means there are still problems that haven't managed proportionally yet, it also can be caused by conflict of norm whether with same rule or not, but it also possible there are already the rule but need further explanation.

¹Robert Pardy, Institutional Reform in Emerging Securities Markets, The World Bank, Washington DC-USA, 1992, in Jusuf Anwar, "On Certainty Legal Studies Institute for Capital Market Performance In Indonesia In Effort Supports National Development", Doctoral Dissertation in Legal Science Program, University of Padjadjaran, Bandung, 2001, p. 2.

²Sri-Edi Swasono, "Article 33: The concept of Indonesian Economic System", <http://frenndw.wordpress.com/30.01.2010/article-33-concept-economic-systems-Indonesia/> accessed March 31, 2011.

³National Development Planning Agency (Bappenas), Attachment Indonesia Presidential Regulation No. 5 of 2010 on the National Medium Term Development Plan (RPJMN) in 2010-2014, Book I of the National Priorities, Chapter V Section. 5.2.4. Investment Requirements and Policy and the National Development Fund Utilization, p.89, aline 4.

Protection for investor is the crucial issue because it has been found many evidence of the expropriation of company's resources for extensive period. This expropriation consist of profit manipulation, unfairness in assets trading, inappropriate transfer pricing, unqualified family members that join company's board, excessive compensation for executive, etc.⁴Moreover, there are also the case of stock lose, short selling, fake report, case in IPO and right issue, and insider trading. Those case harm investor's interest that need to be protected.

Indonesian Capital market will decline if this case is not solved. Investors will transfer its portfolio outside capital market and choose the other more beneficial instrument. Rumors that are spreading that SML is not relevant in this time and need revision. Indonesian Capital market for now in need of a Capital market Law that can be used as reference, and there must be an effort to ensure the affectivity of its implementation. The purpose of it so there is a guarantee of legal protection for investors rights in Capital market that contained in one comprehensive law. Because of that Capital market Law revision is really important to prevent repetitive things that harm investors.

Fuad Rahmany stated that capital market law need to be revised, because Bapepam always meet obstacles when doing their task, so that the investigation that they did could not run well. There is limitation of law, so that the manipulation are hard to be solved. With the revision of capital market law, Bapepam will be easier to investigate a case, like insider trading. Another thing, with this revision Bapepam can follow MoU with IOSO, where the investigation that will make Bapepam trading its data with the other country become easier.⁵

The aims of this article are to analyse why investors in Capital market need to get legal protection; why the regulation about protection of rights in Capital market can't be regulated explicitly in Act No. 8 of 1995 about Shares Market ?; How concept of law that can be developed in regulation of legal protection for rights of investor in capital market in the future that is contribution of the development of Nasional Law of Indonesia ?

Research Method

This is a normative legal research using legal material as its main resources.⁶ The approach used are: (1) Statute approach; (2) Legal philosophy approach; (3) Legal historical approach. Legal materials analyzed using prescriptive–normative methods to find law principle that determine what being obligation and juridic law law subject based from law framework that is implemented that always refer to positivity, coherence, and justice. From the result of analysis, next is interpretation by using theories, also research concepts that intended to have a result, restructure and make a system of new found law, so that the final purpose of this research can be achieved.

RESULT and Discussion

The Urgency of Legal protection for Investors

2.1.1. The Position of Investors and Issuers

One of the important elements in capital market activity is investor. Investor is important in the development of capital market. Because of that role investor need to be guided, as well as protection. Guidance here means they know their rights, the capital market system, profit and risk in the investment, etc.⁷ Protection for investor is one of the really important pillar, because if the investor doesn't get proper protection, they won't have transactions in stock exchange, especially small investor. Without the right amount of investor market activity will slowing down and the role of capital market will not have developed.

The legal protection in this case is the protection that is given by law towards investor for their rights from irresponsible act. For investor, the basic interest beside profit is getting a protection for the equal and fair treatment between them and issuers. This protection and treatment are needed by investor because of the fact that investors and issuers are often not in equal position.⁸

The importance of protection for investor can be seen in Article 4 of SML which means the protection for investor from potential fraud from company or issuers need to be interfered by government by presenting one institution that is Bapepam; regulatory body that run regular function, because if it well - organized, it must be efficient.⁹ The meaning of fair, is capital market run proffer, not forced, made, or politicized.¹⁰ It always based on protection for investor, even if the investor unaware of that fact.¹¹ Protection for investor shouldn't be meant for certain investor to get special treatment. We need to understand that in capital market there is no different treatment for small or big investor. All investor have proportional rights.¹²

⁴Akhmad Syakhroza, "Best Practice of Corporate Governance in the Local Context Indonesian Banking, Entrepreneur Th.XXXII No.06 June 2003.

⁵Statement former Chairman of Bapepam, Fuad Rahmany, in the IDX Building, Jakarta, Wednesday (12/8/2009) <http://economy.okezone.com/read/2009/08/12/278/247492/draf-aman-demen-uu-stock-market-still-enhanced>, accessed August 21, 2010.

⁶Soerjono Soekanto and Sri Mamudji, Normative Legal Research A Brief Over-view, Rajawali, Jakarta, 1985, p. 14.

⁷Fuad Rahmany, "welcome the Chairman of the National Gathering Masyarakat Pemodal Indonesia Capital Market", http://www.bapepam.go.id/old/old/publikasi/pidato/silaturahmi_pemodal, pp., February 26, 1999.

⁸Surya and Indra Ivan Yustiavandana, Implementation of Good Corporate Governanance aside the Special Rights for Business Continuity, Kencana Prenada Media Group, Jakarta, 2008, p. 71.

⁹The Government Explanation Meeting of the Special Committee of the House of Representatives to 7 RUUPM No. 8 of 1995, Thursday, August 24, 1995, "Minutes of the House of Representatives Special Committee", p. 326.

¹⁰*Ibid.*

¹¹Fuad Rahmany, *loc. cit.*

¹²Fuad Rahmany, *Ibid.*

There is a strong relation between SML and ICL.¹³ SML was made with the purpose to maximize the protection for investor that invest their fund in the form of stock in capital market.

In legal relation between investor and issuer, Article 1 paragraph (1) ICL stated that :
....“Incorporation Company that next called IC, is the corporation that is capital partnership, established based on agreement, doing their business by basic capital that all of it are divided in the form of share and fulfill the requirement that is regulated in this law and also its practical law.”

The law above strictly said that company is corporation that is capital partnership that are divided in shares and owned by its owners (shareholders/ stockholders) based on agreement. In capital market activity, shareholders from company that are listed in stock exchange can be differentiated in two, *first*, majority shareholders that are existed before go - public company (founders) and the actor behind the company decision to issue shares, because of that this group can be categorized as issuers (company that issue shares and sell the part of it in capital market); *second*, minority shareholders that get shares from the shares trading that is issued by issuers in capital market, either in public offering or towards capital market, this group called investor. But, even the shares that are issued by issuers for investors are minority,¹⁴ in funding perspective its very significant, because usually issuers (with underwriters) set high paid in capital (agio saham) in IPO.¹⁵

2.1.2. Investors Rights That Need to be Protected

Based on the regulation in Article 6 number 6 and 15 of SML, issuers issuing their shares in capital market must be Incorporated Company (IC). IC is the partnership that is corporation, where the original form of it is IC. According to Article 1618 KUHP data, the thing that called “ Civil Incorporate” is the agreement between two people or more that bound themselves to insert something (inbreng) in the partnership with the purpose to share the profit in that partnership, so that these IC also mean a Civil Incorporate that contain together’s will, cooperation, purpose for together, and profit for together.

The investor’s rights according ICL are set in article 51, article 52 (1) a and b, article 52 (4), aarticle 60 (1), article 62 (1), article 85 (1).

Fitzgerald explained that law protect someone’s right by allocate its authority precisely to act based on its importance, that’s called right.¹⁶ Right is not only has protection and importance element, but also will.¹⁷ Law necessity is managing human’s interest, because of that law represent highest authority to decide the interest of people need to be protected and managed.¹⁸

Based on Fitzgerald theory, it can be understood that law are created for the purpose to protect interest in the form of investor’s right in getting fair play and information that is needed in stock trading between each capital market subject, by managing and limiting other sides interest in the form of right gain commercial profit unfairly and allocate authority to investor to act, e.g. sue through law institution.

2.1.3. Types of Protection for Investor’s Rights

Legal protection can be interpreted as all form of norm or act that have purpose to create peaceful, pleasant, and legal certainty for all legal subject be it personal or corporation. By the existence of legal protection hopefully can prevent conflict, even if the conflict happen, the existing norm can solve it.¹⁹

The purpose of legal protection is to achieve justice, because the function of law is not only to realize legal protection, but also to achieve guarantee and balance that is not only adaptive and flexible, but also functioned to create stability between businessman’s interests with consumer, government with its people. Even law is really needed to protect socially weaker people, economy and politic to achieve social justice.²⁰

SML was born to give maximum security toward shareholders that invest their fund by stock trading in capital market. SML is also meant to strengthen shareholders right that is regulated in ICL. The main principle that are regulated in SML are the protection for investor especially common society and also to make it clearer and to guarantee transparency is running by issuers either financially, management, production, etc. that have strong relation with the responsibility as public company towards society. This guarantee is really important for society or potential investor as consideration to invest their fund. Because of that,

¹³Excerpted from the description SGB Tampubolon, spokesman of the Indonesian Democratic Party, delivered at the Council Introduction factions in the House of Representatives Special Committee Meeting of 7th Parliament of RUUPM No. 8 of 1995, Tuesday, July 11, 1995, "Minutes of the House of Representatives Special Committee", p. 49.

¹⁴The number of shares released into the capital market issuers generally between 10-30%, a portion of the investor (minority shareholders).

¹⁵For example PT UIC (in 1989) to 9 million public offering of common stock on behalf (of 70 million total shares to its capital base) with a nominal value of Rp. 1.000, - per share to the Offer Price Rp. 17 250, - per share, the PT UIC as the issuer has received Agio Rp. 16.250, - per share. Compare the proceeds from the sale of 12.8% stake acquired funds from capital market investors Rp. 155 250 000 000, -, while its issued and paid up by the founders of Rp. 56.4 billion, - (representing 87.2% voting shares) (Source: Prospectus PT UIC).

¹⁶*Ibid.*

¹⁷G.W. Paton, A Text-book of Jurisprudence, London, Oxford University Press, 1964, p. 250, as quoted by Satjipto Rahardjo, Legal Studies, Aditya Citra Bakti, London, 2000, p. 54.

¹⁸*Ibid.* h. 69.

¹⁹Philip M. Hadjon, *Legal Protection for the people in Indonesia*, Bina Ilmu, Surabaya, 1987, p. 1.

²⁰Lili Rasyidi and I.B. Wyasa Son, 2003, *Law as a System*, ed. 2, Bandung. 2003, p. 118.

the material from SML are supposed to pay attention to fundamental aspect in making rule of law that is contained following aspect :

First, philosophically SML must reflect the soul and spirit of Indonesian Philosophy that is Pancasila as nation's constitution that is UUD 1945.

Second, by juridical SML must have law certainty aspect, justice, and righteous-ness and also do not against the other law.

Third, sociologically SML must absorb and accommodate societies aspiration and stimulate dynamic in society.

Forth, politically SML must be done and its the effort to ensure national development process by examine carefully motivation, constellation, and anticipation for the future in realizing Indonesian's dream that is prosperous society based on Pancasila and Constitution of 1945.

2.2. The Management of Investor's Right Protection in SML

2.2.1. Legal protection for Investor and National's Importance

The approach that is taken by SML in managing capital market, can be divided in two, that is " Institutional Approach and Activity Approach ". Institutional approach in SML feels really strong, as example : Bapepam is supervising institution of capital market, BEI as the organizer of secondary market, LKP and LPP act as institution that finished exchange transaction, and the existence of the other institution like Supporting Body of Capital Market, and capital market supporting profession. As for activity approach can be seen in SML's rule that contain activity from each institution that mentioned above.

Besides, according to Mar'ie Muhammad the point is SML is based on the soul and spirit of " fair competition". It can be observed from the body of SML like there must be transparency, obligation to report, prohibition like manipulating market insider trading, the spreading of wrong and misleading information, and the regulation about punishment either administrative, civil or crime.²¹

2.2.2. Legal Aspect of Agreement in Stock Trading in Primary and Secondary Market

Capital market is a stock trading system that in here there are sub – system like exchange sub–system, LKP sub–system, LPP sub–system, etc. It means if capital market is transparent, so its sub–system must be transparent. In SML, capital market are defined by Article 1 number 13 as following :

....."Capital market is the activity that related to public offering and stock trading, public company that related to the stock that it issued, and institution and profession related to stock."

From the definition above, there are two terms that need to be explained, that is " Initial Public Offering " and " Stock Trading " that point two sub–system in stock trading in capital market. For IPO it is done in Primary Market, while stock trading in Secondary Market or stock exchange.

Primary Market is a place where share of one company offered for the first time in capital market for a period of time before those share are listed in Stock Exchange.²² The price in the Primary Market is decided by the agreement of issuers and underwriters, it just it cannot be offered below par value (nominal price).²³

Secondary market is a market that is supported by stock exchange for stock trading that is gained in Primary Market or after the end of Primary Market. In other words secondary market is the place where investor can do stock trading after that stock are listed in stock exchange. So secondary are the continuance of the Primary Market. Talking about secondary market, means we are talking about the mechanism of trading in stock exchange.²⁴ This need to be explained to observe the mechanism of transaction in each market for purpose of looking at the agreement aspect and its legal protection toward investor.

Stock trading that is done either in Primary Market through IPO or in stock exchange basically connected by two things, that is :

1. The types of the agreement or transaction and 2. Object that is traded, that is stock.

The form and types of transaction in capital market developed rapidly along with the development of information technology and more variety of instruments that are traded. The development of this is possible because the system of law in agreement follow the principle of freedom of having contract that is regulated in Article 133B paragraph 1 KUHP data that is : " all agreement that has been made legally stand as the rule for those who made it.

²¹The Government answer (represented by the Minister of Finance Mar'ie Muhammad) Introduction to the Assembly Special Committee on the House of Representatives in the discussion RUUPM, dated July 12, 1995.

²²Article 1 point 1, the number 859/KMK.01/1987 decree, concerning Issuance of Shares on the Exchange, and Sumantoro, Sumantoro, Legal Aspects and Potential Capital Market In Indonesia, Ghalia Indonesia, Jakarta, 1988, p. 27.

²³Check the Article 17, the Minister of Finance No. 859/KMK.01/1987.

²⁴Under the terms of Article 9 in conjunction with Article 11 of Capital Market Law, a self-regulatory body Securities Exchange (SRO), the body which is authorized to regulate (make their own rules) for the implementation of activities that bind the parties relating to the trading of Shares on the stock exchange. The new regulations take effect after the approval of the Securities and Exchange Commission. Even Article 12 of Law no. 8 of 1995 says "The stock exchange shall establish inspection unit for running the periodic inspection or at any time against members of the Exchange and the activity of stock exchange.

2.2.3. Law of Agreement That Developed in Stock Trading in Capital Market²⁵

Basically, in stock market activity either running its as funding medium (Primary Market) or investment medium (Secondary Market) based on the transaction. The development of the agreement that have been made by businessman in capital market is really fast, so it appeared there are new agreement that is not known by the law of Indonesia. The development of this is becoming more varied because of the influence of Common Law System that is originated from Anglo Saxon country, especially United States, that is country with advanced capital market and influence the development of developing country like Indonesia.

The influence of Common Law in Indonesian Capital Market can be seen in the business transaction that is developing that will be explained below :

1. Guarantee Agreement

Since the mid of 2000, scripless trading system is in effect in stock exchange, it is the system that finish the transaction by posting book-entry settlement that is kept in the account of the side that is related in the trading as in an account in bank. Practically, this trading system without letter involve stock exchange as the place for stock trading transaction, PT Kliring and PT KPEI as the institution that responsible for clearing and guarantor of the results of trading and PT KSEI as the side that obliged to finished the trading by posting.

Related with the development of agreement that happened in capital market, one of it is Guarantee Agreement that was done by PT KPEI. To give protection for every investor and the security in transaction, so every transaction will be guaranteed, means that the investor that sell their stock will be guaranteed to get its selling price, and for the buyer will be guaranteed to get the stock that they bought. With guarantee, the failure of transaction either in stock hand over or default (*failed to pay*) that potentially obstruct the liquidity of market can be solved. The guarantee for finishing exchange transaction can be offset, the use of guarantee money that is managed by PT KPEI, and the use of securities lending and borrowing.

2. Benefit Ownership Concept and Collective Deposit

Trading system without letter, as regulated in the rule of law in capital market, where conceptually this agreement is not known in Indonesian Law System. The birth of this type of agreement indicated from the existence of scrip less trading system as one of the requirement that is recommended by IOSCO and G – 30 Nations so that Indonesian Capital Market can fulfill International Standard. In scrip less trading system, all stock that is traded in stock exchange is kept in the form of electronic in central custodian. All rights that followed it represented by Central Custodian as registered owner. For comparison, trust that is known in Common Law System introduce dual ownership that differentiate beneficial owner as the one that receive economic benefit and legal owner²⁶ as the owner by law, that is allowed to do legal actions for all the assets for the importance of beneficial owner. This concept is introduced in Bappepam Chairman Decision No. Kep – 48/PM/1997 on share account in Custodian.

3. Fungibility of Stock for The Trading Object Stock

In scripless trading system there is process of stock adjustment that is not known before in scripless trading system that is fungibility. Trading rule in stock exchange and capital market rules required stock that are traded are registered stocks. Practically in Indonesia, following the rule in ICL, issuing registered stocks from incorporation is given number that shows issuance series and listed in the list of shareholders as its owner (Article 50 paragraph (1) ICL). Next article 56 Paragraph (1) indicate that transferring registered right is done by transferring right deed and next is delivered in written form to Perseroan so that the receiver of that stock transferring is approved as the new owner and listed by Perseroan in shareholder's list.

Those right transferring procedure is really hard to be done in capital market considering the movement and right transferring of stock that is transacted are fast and massive in value. The difficulties can be seen in recording administration of shareholders. Because of that we should pay attention to Article 56 Paragraph (5) ICL that regulated :

....“The regulation about the step of right transferring for stock that is traded in capital market is regulated in the rule of law in capital market.“

To solve the problem that shown above Article 57 anticipate it by regulating fungibility of shares for collective deposit share, that is the same type and same clarification share that is issued by certain issuers that is considered equal and can be exchanged with one another.

Article 57 SML stated :

.....“In collective deposit, stock from the same type and classification that is issued by certain issuers are considered equal and can be traded for one another.“

The fungibility of shares meant by Article 57 have the purpose to increase the efficiency of finishing stock transaction, stock in collective deposit is considered equal.

4. Proxy Agreement in Stock Transaction

²⁵Lastuti Abubakar, *Derivative Transactions in Indonesia (Law Review On Derivative Transactions in Indonesia)*, Terrace Books Library, Jakarta, 2009, p. 99-111.

²⁶Indonesia Capital Market does not explicitly use the term legal owner, registered owner but rather used the term for the Indonesian Central Securities Depository (KSEI) representing all shares holders to obtain their rights. In addition, as this is the legal owner KSEI who are enrolled in the Register of Shareholders of the Issuer.

In economic, finance and banking encyclopedia, proxy is :²⁷

.....“Absolute authority for the one that obtain full authority. Especially that related with voting in Perseroan shareholders meeting is an authority given by a shareholder that give management or sides that clash with that management, the right to vote for the share that owned by personal shareholders.“

With that, proxy can defined as giving authority with special way about one interest or more, that is regulated in Article 1972 KUHPerdata and Article 1795 KUHPerdata about the meaning of giving authority and giving special authority.

2.2.4. The Legal protection for Investor in Stock Trading Transaction²⁸

One of the way to solve the problem of the lack of complete norm that regulate about transaction problem in capital market because of the influence of common law system that enter civil law system especially to that related with legal protection for investor, is to complete SML with practical regulation that basically give guarantee to the sides that doing transaction, that their right are protected. The regulation in practical rule of SML have given some step of legal protection for investor that will invest, as following :

1. The Legal protection Through Finishing Exchange Transaction Guarantee

According to the decision of Chief of Bapepam Nomor Ke-46/PM/2004 about Finishing Exchange Transaction Guarantee, it's the responsibility of Clearing²⁹ and Guarantee Institution (LKPP) to directly take the responsibility for the failure of clearing member to fulfill their obligation in Finishing Exchange Transaction.

2. The Legal protection Through Risk Management in the form of Security Fund

In capital market this wanpretsi is called default. KPEI rule Nomor II-7 Angka 1 have the definition of default as the obligation of clearing member to pay certain amount of money to KPEI to fulfill the obligation of Finishing Stock Exchange Transaction that is not fully or artly fulfilled.³⁰

In capital market activity, basically Finishing Exchange Transaction is finished by KPEI. In this regard the task of KPEI is to finish clearing between broker if the transaction has reached the deal or called matched. Likewise if a failure in payment by buying or selling exchange staff happened, basically KPEI has the task to finish the transaction by using fund that exist in KPEI so that the transaction is happen, so that neither customer are loss.

3. The Legal Protection Through Trading Mechanism

Stock trading in Stock Exchange³¹ is done electronically by a system that its security accuracy is guaranteed. Stock trading mechanism in stock exchange use Jakarta Automated Trading System (JATS) that is the stock trading system that is implemented in stock exchange for trading that is automated by using computer.

4. The Legal Protection Through The Implementation of Cross Colletaralization

The main point of this implementation is one collateral account owned by clearing member can be used to guarantee all the transaction in several stock exchange and for all capital market product. Clearing member don't have to manage many collateral account transact in several stock exchange or capital market product, they just have to manage one collateral account. By now, KPEI manage the collateral from 142 clearing member with the amount of over 3,8 trillion.³²

5. The Legal Protection Through The Supervising of Exchange Transaction

The other form of legal protection is preventive action through continuous supervising of exchange transaction to prevent unfair transaction. According to Article 3 Paragraph (1) dan Article 7 Paragraph (2) SML, Article 3 Paragraph (1) stated :

.....“Developing, managing, and daily supervising capital market activity done by Badan Pengawas Capital market that next called Bapepam.“

Next Article 7 Paragraph (2) stated :

.....“ In accordance to reach the purpose that is meant by Paragraph (1),³³ stock exchange oblige to provide supportive facility and supervise stock exchange member activity.“

It means that Bapepam required stock exchange to have an active role in supervise the trading in stock exchange and the company that becoming stock exchange member. For now stock exchange implement SMARTS to increase market supervising

²⁷Abdurahman, *Encyclopedia of Economics, Finance and Trade*, Volume III, Prapanca, Jakarta, p. 800, according to excerpts Lastuti Abubakar, *op. cit.*, p. 110.

²⁸Lastuti Abubakar, *Op. Cit.*, p. 303-319.

²⁹Clearing is the process of determining the rights and obligations of the Stock Exchange Transaction.

³⁰KPEI Regulations II-7 Number of Failures Kep-013/Dir/KPEI/07700 fulfillment Rights and Obligations of Clearing In The transfer and Handling.

³¹The legal basis for the settlement of trade without scrip-bukuan transfer has been set dapal Article 55 Paragraph (1) of Capital Market Law which states that "the settlement of stock exchange transactions can be carried out with the completion of the accounting, physical settlement, or other means".

³²Lastuti Abubakar, *Op. Cit.*, p. 19.

³³Article 7 paragraph (1) of Capital Market Law: "The stock exchange was established with the purpose of holding shares trade fair, orderly, and efficient".

and decrease abnormal activity. SMARTS can identify market tendency, supervise the pattern of transaction and warn manager of system if there are activity that are not transparent, e.g. insider trading.

6. The Legal Protection for Investor Through Law Enforcement

Basically SML have put a foundation for law enforcement for every violation of capital market activity, that is :

- a. Administrative Sanction (Article 102 SML)
- b. Pidana Sanction (Article 103 SML)
- c. Compensation Claims (Article 111 SML)

Related to compensation, until now there never be compensation claims that based on Article 111 SML. Article 111 SML stated :

...“Every side that harmed as the violation of this law and or its practical law can make compensation claim, either personal or collective with the other sides that have similar claim, towards side or sides that is responsible for that violation.”

It's not easy to realize compensation claims even the investor is really harmed by some sides in capital market because of their mistake. The first obstacle is the base of the claims based on Article 111 SML is the same with Article 1365 Civil Code that follow the principle of liability based on fault, that oblige the burden of proof to the sides that harmed and can proof that those loss appeared because of the mistake. Practically, Article 1365 Civil Code is frequently used as the basis of prosecution, but its hard to be done. The second obstacle is there is a principle in investment that loss is considered the risk of investment. Based on this principle, compensation claims is considered as the action that economically not beneficial, so that the investor think how to manage the risk, so that in investment there is something known as risk management.

7. The Legal Protection Through The Implementation of Good Governance Principle in Conflict of Interest of Certain Transaction

The difference in position of shareholders with management and commissioner in a company, its not rare to cause a conflict of interest³⁴ between the management side and shareholders side. It can be happened by the transaction that contain conflict of interest that is transaction that is done by management or Commissioner for the private interest and harm the shareholders. Because of that SML see this as the problem that potentially harm the investor. It is said that the cause is the company management that is done incorrectly, Good Corporate Governance that is not implemented, caused by the nature of the company that is from family company where the management and ownership of the company is not separated yet. The shareholders can't use their rights properly and potentially make action that contain greater conflict of interest. Bapepam as capital market authority give the protection towards investor from the transaction that contained conflict of interest by issuing the rule No.IX.E.1.35.³⁵

The purpose of the regulation for conflict of interest is to protect the interest of investor from the management, Commissioner, the primary shareholders and affiliated sides because of the decision making that is not transparent.³⁶ To prevent the loss from that transaction, so Bapepam oblige the issuers and public company to gain the majority approval from independent shareholders. For this point it has been regulated in Article 82 Paragraph 2 SML. The obligation of independent shareholders' approval is confirmed in Bapepam Regulation No.IX.E.1 about Conflicts of Interest in Certain Transactions.

2.3. The Legal Protection Concept for Investor in the Future Capital Market

The Capital Market of Indonesia has fundamentally changed since the birth of SML. SML beside giving strong legal framework with the law power that is higher than the law before,³⁷ it also increase the transparency that guarantee the protection for investor. The essence of the protection for investor is to create fair capital market, well - organized, balanced, and efficiently avoided from unhealthy and not honest business practice.

Apart from normal risk from business related to investment by investor, there are other risks that oblige government to have special authority in managing and supervising capital market. Because of that, SML in the future need to manage the risk that is not categorized as normal risk in investment business in capital market that is :

First, financial integrity of intermediaries. The protection for financial intermediaries' failure need to be regulated in SML in the future in the form of investor guarantee fund.

Second, securities fraud. Fraud has been clearly defined in KUHP. But to do their function to protect investor, Bapepam need to be given authority to investigate and drag the fraud doer to the court. The reason is because securities fraud related with high level technique and need special abilities to drag the doer to the court.

³⁴Conflict of Interest is the difference between the economic interests The firm with the personal economic interests of the Directors, the Board of Commissioners, or the major shareholder of the Company that could harm intended.

³⁵Keputusan Ketua Badan Pengawas Pasar Modal No. Kep-412/Bl/2009 About Affiliated Transactions and Conflicts of Interest in Certain Transactions.

³⁶Independent Shareholders are shareholders who have no conflict of interest in connection with a particular transaction and / or is not an Affiliate of the members of the Board of Directors, member of the board of directors or major shareholders who have conflict of interest on a particular transaction.

³⁷Law Number 15 Year 1952 concerning the Exchange; Presidential Decree Number 52 of 1976 on the Capital Market following its amendments.

Third, market manipulation. Investor in capital market have the right to know the price in the market is from fair supply and demand process, not from the price that is from collusion. If the price is from market manipulation so that price is not the right investment perimeter..

Fourth, regulation that rule issuers. Transparency in capital market especially for issuers, where the issuers is forced to disclose the information about the condition of the business including financial condition, law aspect, management, and company's assets towards society. The information that is given must be the information with guaranteed truth, and the responsibility of the issuers. If there is material information to be known by society, it is not fully disclosed or the mistake in disclosing so that cause the loss for the investor, so the issuers have to take the responsibility for the loss of the investor. In this case there is transparency mechanism and the guarantee of the truth of the information where implicitly contained protection element for the investor.

Fifth, the development and norm of Good Corporate Governance principle. The implementation of company's management is not only for business world but also for the development of capital market industry. As the capital market regulator, Bapepam have the authority to decide the policy and implement its regulation. Until now, Bapepam Regulation generally have accommodated the principle contained in Good Corporate Governance Principles. But, international practice in Corporate Governance subject continue to develop rapidly, demand the research in the rule and law in capital market that exist now, especially SML. As practical reference of Corporate Governance, KNKCG has initiate and supervise the repairment of management of the company in Indonesia that referred to the principle that issued by OECD that is one of institution that have a crucial role in the development of Good Governance either in governance or in business world.³⁸ The basic principle of corporate governance that issued by OECD in 2004 including :

- a. Assure effective Corporate Governance development framework;
- b. Shareholders right and main function of share ownership;
- c. Equal treatment for all shareholders;
- d. The role of stakeholders in Corporate Governance;
- e. Disclosure and transparency;
- f. Board responsibility (Commissioner and Management).

Those principles must be referred in the research either theoretically or practically especially in capital market. This research's purpose is to see how far the rule and law in capital market can continuously give the reflection of Corporate Governance.

Sixth, demutualization of Indonesia Stock Exchange.³⁹ Demutualization is separation of the membership and ownership in stock exchange. The ownership structure of stock exchange change from ownership structure limited only for stock exchange member, become broader ownership structure. Demutualization process will be followed by the change organization's orientation from non – profit become profit oriented. Its better if stock exchange demutualization and the other supportive institution like KSEI and KPEI can be implemented soon. Several factors that urge demutualization: the need of development fund, repairment of Good Corporate Governance, product development, facility development, increasing value of stock, and continuous development of capital market.

Seventh, reporting development through electronic reporting. Generally, in financial industry and specially in capital market, the existence and completeness of information is very important because it become the basis of decision making of investment. Investor and potential investor will have the chance that vast and rational in deciding their investment choice, if there is information that good, complete, and on time.⁴⁰ One of the alternative is the development of electronic reporting system. Through the development of electronic reporting system its expected that disclosure and good corporate governance principle implementaion can be more effective. One thing that need to be considered is the lack of law for the implementation of electronic reporting system. To ensure that, the organizer of electronic reporting system has to explain the position of electronic data compared to conventional data (paper-based system) as the evidence in law problem. The other problem that related to the authenticity and integrity of report need to get an attention from the organizer.

Conclusion :

1. The investor is one of the important elements in capital market activity, without enough number of investor, the function of capital market will not be developed and business world will be slowing down. Investor in one of the stakeholders beside the other stakeholder, that are issuers, board, Commissioner, staff, and creditors. Moreover, together with issuers, investor also the part that bring capital that is fund for issuers company. From agreement law perspective, basically the relation between investor and issuer is contractual relationship where the position of both sides are equal that is regulated in Article 1320, Article 1338, and Article 1618 Civil Code and Article 1 paragraph (1) ICL. The position of investor and issuers can also be seen from the basic funding of Perseroan that is actually legal contractualism, where the interest of company must be complied with its shareholders. Law construction for basic

³⁸First time issued OECD principles of Corporate Governance in May 1999 and was revised in December 2004.

³⁹Irwan Adi Saputra, "Indonesia Stock Exchange Demutualization", Faculty of Economics, Management institutes UI, <http://www.google.co.id/#hl=en&scient=psy-ab&q=demutualization+stock+market+by+dr.+Irwan+adi+ekaputra> accessed 24 Pebruari 2012.

⁴⁰Team Studies Electronic Data Preparation for Capital Market Participants, Studies Electronic Data Presentation For Actors Capital Markets, Ministry of Finance of the Republic of Indonesia, the Capital Market Supervisory Board, Capital Market Efficiency Improvement Project, 2003, p. 1.

funding also legitimate the authority of management to represent Perseroan because shareholders have trusted management through an agreement that is RUPS. But with the gap in share ownership composition and information access towards company financial resource between investor and issuers, caused the imbalance in fulfilling the rights between investor and issuer. Considering the importance of investor in capital market, so they are the sides that need to get equal and fair legal protection between issuer and them, considering reality, that the position of investor is oftenly weaker.

2. SML are *lex specialis* and ICL are *lex generalis*, and like we have already know, *lex specialis* is different from *lex generalis*. The rights of investor is not explicitly regulated in SML because the majority of it has been regulated in LAWPT. The approach that is taken by SML in managing capital market, can be divided in two, that is “ Institutional Approach and Activity Approach “. Institutional approach in SML feels really strong, as example : Bapepam is supervising institution of capital market, BEI as the organizer of secondary market, LKP and LPP act as institution that finished exchange transaction, where this institution run the part of government function, not only have Perdata authority but also public authority. As for activity approach can be seen in its article, SML take an approach based on soul and spirit of fair competition, It reflected in SML like there must be transparency, obligation to report, prohibition like manipulating market, insider trading, the spreading of wrong and misleading information, and the regulation about punishment either administrative, Perdata, or Pidana.
SML regulate the responsibility of issuers and related sides towards investor basically is compensation claim, and can be sued Pidana if contain fraud element and the likes of it that harm investor’s interest (Article 89 jo. 103 SML). In the effort to give legal protection to investor, SML is complemented with regulation that give guarantee to investor that their rights in investing in capital market are protected.
3. In the future SML need to give stronger legal framework in managing the protection for investor’s right and maximum transparency of information for potentially go - public company or have go – public already, as the guarantee of law certainty that is needed by investor through these steps :
 - a. Make Good Corporate Governance referred to OECD 2004 principle as the SML norm reference.
Legal protection for investor can be done also by stock exchange demutualization, because demutualization can
 - b. increase the transparency of information and also quality of stock exchange management as an institution.
In effort to increase the effective disclosure principle, it is needed to have financial reporting system from issuers through the development of electronic reporting system.
Strengthen the authority of supervising institution of capital market that is Bapepam in supervising : First, stock company (dealer) so that it fulfill the requirement financially healthy and well – organized, and a guarantee for investor’s loss through guarantee fund. Second, investigation for violator in capital market such as securities fraud, market manipulation, and insider trading. This authority is needed, because capital market crime use
 - c. advance technique and need special ability. Third, about transparency mechanism and guarantee for the truth of information that is given.
 - d.

3.2 Recommendation

Based on this research, writer recommend some things as following :

1. President with DPR (House of Representatives) as the rule maker soon to make the change for LAW No. 8 Tahun 1995 about Capital market related with some regulation :
 - a. About function, role, and the authority of Bapepam so that the implementation of legal protection to investor can be more optimum.
 - b. Accomodate the messages that is contained in LAWPT regulation. LAWPT have give authority to law that if in the future SML is revised its allowed to regulate some specified things different from the things that regulated in LAWPT norm.
Change th rule of compensation claim based on Article 11 SML, because claim based on it is same with Article 1365 KUHPperdata that follow the principle of liability based on fault, that oblige the burden of proof to the sides that harmed and can proof that those loss appeared because of the mistake. Practically, Article 1365 KUHPperdata is frequently used as the basis of prosecution, but its hard to be done, so that until now there never be a case of compensation claim based on Article 11 SML.
 - c.
2. There still need of a further research for the next researcher towards the other aspects in capital market such as pidana law aspect, administrative law aspect, and law aspects that are contained in the other GCG principle.

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