

IMPLEMENTATION OF GUARANTEED STOCK ON STOCKS OF GO PUBLIC LIMITED LIABILITY COMPANIES BASED ON LEGAL AGREEMENT IN INDONESIA

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ABSTRACT

The theory of dividend signal hypothesis states that not distributing dividends can have negative impact on the image of the public company and affect an investor not to invest in the Limited Liability Company. If there is no investment for the public company, it does not mean there is no fresh funds to run the economy of the company and can even lead to bankruptcy of the company due to the inability of the company to pay debts. The fixed and definite dividends on the preferred stock can also be categorized as company debts that must be paid to the stockholders. This study examined guaranteed stock agreement in England to be implemented as a source of law in Indonesia. This study used normative legal research method with comparative approach. The data used were secondary data consisting of primary legal material and secondary legal material to be analyzed using interactive analysis method. The result obtained in this study were that the implementation of guaranteed stock agreement in Indonesia was influenced by supporting factors like the implementer structure and legal substance, as well as inhibiting factors in the form of the investment legal culture in Indonesia.

Keywords: Guaranteed stock, legal agreement, limited liability company.

INTRODUCTION

Indonesia has various types of business entities as stipulated in Indonesian Civil Code, starting from the Civil Partnership, Firm, Commander Association (*CV*), Limited Liability Company (*PT*), to Cooperative. Among those various forms of business entities, the Limited Liability Company becomes the most special and favorite form of business entity for many entrepreneurs in this era of rapid economic progress. Limited Liability Company is the only type of business entity that has the status of the legal entity. It means that it can be equated with the legal subject to be able to legally carry out the legal action.

Limited Liability Companies in Indonesia are specifically regulated in Law Number 40 of 2007 concerning about Limited Liability Company. According to Article 1 point 1 of the Limited Liability Company Law, Limited Liability Company is a legal entity which is a capital alliance, established under an agreement, conducting business activities with the whole authorized capital divided into stocks and fulfilled the requirements set out in this law. There are two types of Limited Liability Companies, namely Closed Limited Liability Companies and Go Public Limited Liability Companies. The existence of Go Public Limited Liability Companies turn out to make the distinctive progress in the economic world by investing through securities like stocks.

Stocks are generally divided into two types, namely common stock and preferred stock. Each type of stock provides the fundamental differences to the rights of the stockholders. One of them is the right to get dividends. The distribution of dividends on common stock is entirely in the decision of the General Meeting of Shareholders (GMS), as stated in Article 71 paragraph (2) of the Limited Liability Company Law. Preferred stock has privilege, namely the distribution of fixed dividends every year as stated in the traded stock. Dividend on preferred stock is an obligation that must be fulfilled by the company and cannot be contested even though by the decision of the GMS.

Generally, investors make investments to increase the added value of the funds they have owned, including profits. One of the benefits expected by an investor with investments through stocks is to get dividends. In Black's Law Dictionary, dividend is defined as a portion of a company's earnings or profits distributed pro rata to its shareholders, usually in the form of cash or additional shares.¹ Naturally, every company distributes dividends to the stockholders in return for the fresh funds invested to run the economy of the company.

In fact, there are still go public companies in Indonesia that are reluctant to distribute their dividends to the stockholders. An example is *PT Darma Henwa Tbk*. In the GMS, it was agreed not to distribute dividends to the stockholders for the 2017 financial year because the company still needed additional funds for the production costs in 2018. The thought that has developed so far will not be a problem if what is not distributed is dividends on common stocks because they are fully in the decision of the GMS which is protected by the Limited Liability Company Law. In fact, not sharing dividends on common stocks or dividends on preferred stocks can actually cause problems for a public company.

¹ Bryan A. Garner, (2004), *Black's Law Dictionary 8th ed*, St. Paul : West Group, Page 1443.

Bird in hand theory states that the value of a company can be maximized by setting a high dividend payment ratio.² This theory was pioneered by John Lintner (1956) and Myron Gordon (1959). This theory was then supported by the theory of dividend signal hypothesis proposed by Bhattacharya in 1979. The study of dividend policy can be done by testing dividend signaling hypothesis. It means that dividend change indicates the existence of the important and internal company information that is useful for the investors.³

This information is used as a guide by the investors regarding to the prospect of the company. Furthermore, MM (Modigliani-Miller) argues that dividend increase is usually a signal to the investors that the management of the company predicts good dividend income in the future.⁴ The lower the value of dividends or even not paid, the company will be judged not to have good prospect in the future and cause the investors to be reluctant to invest in the company.

Without investors, there will be no fresh funds coming in to run the company. If the company experiences business bottleneck, it means that there will be no income and it cannot even pay off its debts which can lead to bankruptcy and liquidation of the company. In order to avoid that condition, the author wants to implement an innovation of stock in the form of guaranteed stock in go public companies in Indonesia. Guaranteed stock first appeared in England in mid-1840 by giving compensation to the stockholders by the guarantor company if the publishing company cannot distribute its dividends.

In addition to providing economic protection to the stockholders from possible investment losses, guaranteed stock also protects public companies from the negative views of the investors. However, starting from the beginning until now, there has been no legal regulation that specifically regulates the implementation of guaranteed stock in England. Previous research, like an article by Rainer Fremdling and Günter Knieps in *Scandinavian Economic History Review*, Vol. 41, No. 2, 1993 entitled *Competition, Regulation and Nationalization: The Prussian Railway System in the Nineteenth Century* only discusses guaranteed stock from the economic perspective. Guaranteed stock is described as cooperation based on agreement without discussing the agreement from the legal perspective.

The agreement does indicate the existence of freedom and flexibility in accordance with the needs of the parties. However, to implement the concept of guaranteed stock agreement in England as a source of implementing the law in Indonesia, it is necessary to conduct the further research because the concept of the agreement in a country is not necessarily the same as the concept of the agreement in other countries. Therefore, the author will examine the implementation of guaranteed stock in go public companies in Indonesia which is adopted from the concept of guaranteed stock agreement in England.

PROBLEM STATEMENT

Based on the explanation above, the problem statement showed in this study was: how was the implementation of guaranteed stock on stocks of Go Public Limited Liability Companies based on Legal Agreement in Indonesia?

RESEARCH METHOD

This study was a normative legal research using comparative approach, an activity to compare the law in a country with another country.⁵ The research data used were the secondary data consisting of the primary law material and secondary law material. The collected law materials were analyzed using interactive analysis method by reducing and drawing a conclusion to answer the legal issue in this study.

DISCUSSION

1. Guaranteed Stock as Innovation of Common Stock and Preferred Stock

Guaranteed stock or guaranteed share is stock that is guaranteed to be safe for risks not to get dividends. Guaranteed stocks are shares issued by company A, but the guarantee is from company B.⁶ Black's Law Dictionary defines guaranteed stock as "Preferred stock on which a dividend is guaranteed by someone (usually a parent corporation) other than the issuer".⁷ Another definition states that guaranteed stock as "An infrequently used form of common or preferred stock, whose dividends are guaranteed by a third party".⁸

² Lia Setiyawati- *et al.*, (2017), "The Influence of Dividend Policy, Debt Policy, Independent Commissioner, and Institutional Ownership on the Firm Value with Growth Opportunities as Moderator Variables", *Jurnal Bisnis Strategi*, Vol. 25, No. 2, Page 148.

³ Nana Nofianti, (2014), "Pengaruh Struktur Modal, Ukuran Perusahaan, dan Kebijakan Dividen Terhadap Koefisien Respon Laba", *Jurnal Etikonomi*, Vol. 13, No. 2, Page 137.

⁴ Sigit Widhichayono - Bambang Sudiyanto, (2015), "Determinan Kebijakan Dividen Perusahaan Non Keuangan (Studi Bursa Efek Indonesia Tahun 2009-2013)", *Jurnal Bisnis dan Ekonomi*, Vol. 22, No. 2, Page 173.

⁵ Peter Mahmud Marzuki, (2015), *Penelitian Hukum (Edisi Revisi)*, Jakarta : Kencana Prenadamedia Group, Page 173.

⁶ Munir Fuady, (2001), *Hukum Perusahaan Dalam Paradigma Hukum Bisnis*, Bandung : PT Citra Aditya Bakti, Page 34.

⁷ Bryan A Garner, *Op Cit*, Page 4443.

⁸ GuaranteedStock, <https://www.investopedia.com/terms/g/guaranteedstock.asp>, diakses pada tanggal 9 Oktober 2018, pukul 13.48 WIB.

There are two classes of guaranteed stock. The first is taking part in the fixed and unchanged dividends. The second is guaranteeing the minimum interest and participating in the additional profits.⁹ In fact, those two classes are the unity that cannot be distinguished. The form of “taking part” in the fixed dividends from guaranteed stock is by guaranteeing the minimum interest that should be gotten by the stockholders.

Here are the examples of guaranteed stock that have ever existed in England. The first is the Birmingham-Gloucester railroad that issues a preferred stock of £123 with a fixed dividend return of £4.17 annually. The line is leased to a Midland Railway Company with a fixed guarantee of 6%.¹⁰ The second is the London & Greenwich line, whose preferred stock is guaranteed by the South Eastern Railway Company at 5%. For the record, the guarantee number in question is the percentage of the value of dividends that should be obtained by the stockholders.

The basic difference between guaranteed stock and stocks in general is on the parties involved in them. In general, the parties involved in investment activities through stocks are publishing companies and stockholders. There are three parties involved in guaranteed stock, namely publishing companies, stockholders, and insurance companies. The guarantor company will carry out its function in taking over the obligation of the publishing company to provide compensation to the stockholders if the publishing company cannot distribute its dividends.

The way the guaranteed stock works is based on the agreement between the publishing company and the guarantor company. The agreement contains the value of the compensation that the guarantor company must meet with the stockholders. Certainly, the amount is not as large as the dividends that should be obtained by the stockholders, but only a few percent of the amount is in accordance with the collective agreement. So, the guaranteed stock price is usually more expensive than the unsecured stock.

2. The Implementation of Guaranteed Stock on Stocks of Go Public Limited Liability Companies in Indonesia

Based on the explanation above, agreement was the only source of law in implementing guaranteed stock in England at that time. In Article 1313 paragraph (1) of Indonesian Civil Code, agreement is defined as an act in which one or more people attach themselves to one or more other people. On the other hand, according to Black’s Law Dictionary, agreement is defined as “a mutual understanding between two or more persons about their relative rights and duties regarding past or future performance”.¹¹ England as a country that adheres to the common law legal system has fundamental differences regarding the concept of agreement with Indonesia as the adherent of the civil law legal system. The differences can affect the success in implementing guaranteed stock in Indonesia, both the factors that can encourage and inhibit it.

These factors are the main elements in every law system consisting of the implementer structure, arrangement substance, and entity culture. Structure is the whole legal intuition and its apparatus, including polices with polices, prosecutors with prosecutors, courts with judges, and so on.¹² In the case of an agreement as a source of law, the implementer structure of the law can be interpreted as the parties bound to the agreement.

The agreement as a legal act means that it can only be done by legal subjects according to the law. In the concept of common law, legal subjects/personas consist of two types. Natural persona is living organism; artificial persona is corporation, business entity.¹³ In Indonesia, legal subjects consist of two types, namely people (*natuurlijk persoon*) and legal entities (*rechtspersoon*). Not necessarily, a business entity has a status as a legal entity.

Agreement of guaranteed stock is the agreement between the publishing company and the guarantor company. The publishing company must be in the form of a limited liability company and a legal entity. What needs to be considered is the status of the guarantor company. In the term of the executing structure of the agreement (legal subject) in England, it does not rule out the possibility that the guarantor company is an ordinary business entity. In order to support the success of its implementation in Indonesia, the guaranteed stock agreement needs to be ensured that the guarantor company must be a legal entity in order to become a legal subject according to law.

Agreement is not only between people and people, but can also be between people and companies with legal entities, or between companies with legal entities. Actually, the agreement of guaranteed stock is not only the agreement between the publishing company and the guarantor company. It is also necessary to create an agreement between the publishing company and the stockholders which asserts that the guarantor company is responsible for providing a number of compensation from the amount of the dividends that should be obtained by the stockholders if the publishing company cannot share it.

⁹ John Whitehead, (1847), *Railway And Government Guarantee : Which Is Preferable 2nd ed.*, London : Smith, Elder, and Co., Page 5.

¹⁰ *Ibid*, Page 14.

¹¹ Bryan A. Garner, *Op Cit*, hlm. 209.

¹² Achmad Ali, (2009), *Menguk Teori Hukum (Legal Theory) dan Teori Peradilan (Judicialprudence)*, Jakarta : Kencana Prenada Media Group, Page 225-226.

¹³ William T. Major, (2018), *Hukum Kontrak*, Bandung : Nuansa Cendekia, Page 150. Terjemahan dari William T. Major, (1973), *The M&E Handbook Series Law of Contract 3rd ed.*, Inggris Raya : Macdonald & Evans Ltd., Penerjemah Lala Herawati Dharma – Virginia Ekawati.

Substance is the whole rule of law (including the principle of law and the legal norm), both written and unwritten, including court decisions.¹⁴ Substance can be defined as a discussion of the content or scope of a law. The discussion of the agreement substance as a source of law means peeling the contents of the agreement itself.

The existence of an agreement or which is currently commonly known as a contract is inseparable from fulfilling the requirements regarding to the validity of an agreement/contract.¹⁵ In general, the legal requirements of the contract in England are in Section 10 of the Indian Contract, including the agreement of the parties, the ability to make contracts, considerations, and legitimate objects. On the other hand, the legal requirements of the agreement in Indonesia are regulated in Article 1320 of Indonesian Civil Code, including agreements, skills, a particular issue, and a lawful cause.

An agreement is a fixed price in an agreement in both common law and civil law countries. There are two elements of an agreement in the agreement concept in England:

1. Offer or a proposal; and
2. An acceptance of that offer or proposal.¹⁶

Before declaring the agreement, the parties have the freedom to judge whether the agreement will bring mutual benefits or not. In Indonesia, agreements are not only limited to offer and acceptance, but also involving consideration that underlies the intention to create legal relation from the parties. In England, the consideration is distinguished from the agreement, while in Indonesia, these two things constitute an interrelated entity.

Consideration can be used as a basis for fulfilling the principle of proportionality in an agreement. Proportional means balanced. This principle is a development of the theory of justice. According to Plato, fairness is equal for all people in accordance with God's Law. Then, the theory was developed by Aristotle who put forward the values of rationality that divide justice in the form of commutative and distributive justice. Because it is not in accordance with social values, John Rawls perfects the concept of justice with the concept of the greatest equal principle that emphasizes the balance of benefits, not equality.

The principle of proportionality is also called as the principle of balance. The balance in question is not fair like a watermelon which is split as the same big parts. The purpose of the balance principle is the final result that places the position of the parties balanced (equal) in determining their rights and obligations.¹⁷ A contract is designed to benefit the parties. It is not for the same profits, but for the balanced profits in accordance with their respective rights and obligations.

Based on the description of the concept of guaranteed stock at that time, the publishing company was the company that owned the railroad, while the guarantor company was the railroad tenant company whose business was in the field of public transportation services using the railroad. The rail companies set requirements for the tenant companies to pay rent and to be willing to become the guarantor companies for the stocks issued. The profit of the publishing company was to get rent payments and the preferred stockholders received the security guarantee from the guarantor company in the form of a certain amount of compensation if the publishing company could not distribute the dividends. On the other hand, the guarantor company's profit was able to carry out its business activities and the profit of the business became their own. Considering the railway business was growing rapidly at that time, the rail tenant companies were willing to become the guarantor companies because the amount of the compensation guarantee charged to them was very small compared to the profit through the railway public transportation services business.

Based on what happened, we can see that there is balanced profit between the publishing company and the guarantor company. The main purpose of this study was to implement guaranteed stock on Go Public Limited Liability Companies in Indonesia which meant it was not only limited to the railway companies, but also for the whole go public companies. In the guaranteed stock in England, the publishing company and the guarantor company are the companies which synergize with each other. In this era of business development, it is possible that two companies that do not have synergies can collaborate similarly. Therefore, the value gotten from the implementation of guaranteed stock in England is how to get the profit for the proportional guarantor company.

The main point of the implementation of guaranteed stock is about risk transition from the publishing company that cannot distribute dividends of the preferred stock delegated to the guarantor company. Risk transition is a characteristic of the coverage agreement/insurance. Insurance companies provide compensation for the insured things by receiving compensation in the form of premium payments from the policyholders. Guaranteed stock prices are usually more expensive than similarly unguaranteed stocks. This price difference should be used as the premium payment to the insurance companies. So, the most relevant guaranteed stock agreement to be implemented in this modern era is the coverage agreement/insurance.

¹⁴ *Ibid*, Page 226.

¹⁵ M. Muhtarom, (2014), "Asas-Asas Hukum Perjanjian : Suatu Landasan Dalam Pembuatan Kontrak", *Jurnal Suhuf*, Vol. 26, No. 1, Page 49.

¹⁶ H. Salim – Erlies Septiana Nurbani, (2014), *Perbandingan Hukum Perdata (Comparative Civil Law)*, Jakarta : PT RajaGrafindo Persada, page 216.

¹⁷ Agus Yudha Hemoko, (2008), *Hukum Perjanjian "Azas Proporsionalitas Dalam Kontrak Komersial"*, Yogyakarta : LaksBang Mediatama, Page 67.

That consideration underlies the emergence of intention to create legal relation from the parties. Intention to create legal relations can be used as a fulfillment of the principle of consensualism in the formation of agreements. Article 1321 of Indonesian Civil Code affirms that no agreement has the power if it is given because of an error or obtained by coercion or fraud. It is clear that the scheme of the guaranteed stock agreement describes the fulfillment of the principle of proportionality, and as long as it can be proven to fulfill the principle of consensualism, it means that the agreement can be implemented to public companies in Indonesia.

The skills of the parties are related to the discussion of the implementer structure. In the discussion of the implementer structure above, it is found that the guarantor company must be a legal entity so that it can legally carry out legal actions. Article 6 paragraph (1) of Law Number 40 of 2014 concerning about Insurance (Insurance Law) implies that insurance companies must be legal entities, in the form of Limited Liability Companies, Cooperatives or Joint Ventures. In addition, the coverage agreement/insurance can involve three parties, in which Article 1 point 1 of the Insurance Law states that the insurance agreement is a two-party agreement between the insurance company and the policyholder, but it may involve a third party (not the policyholder) as the insured party. Through the insurance companies, the requirement regarding to the ability of the parties to be able to implement guaranteed stock in Indonesia is fulfilled.

The requirement regarding to a particular subject matter is further regulated in Article 1332 of Indonesian Civil Code, namely only goods that can be traded which can be the subject of the agreement. The object in the guaranteed stock agreement is the preferred stock and the tradable item. An insurance agreement is to provide compensation to the insured party because of loss or loss of profit on the insured object. The non-distributed dividend can be categorized as loss or loss of profit that should be obtained by the stockholders as the insured third party.

The last legal requirement for the agreement is a lawful cause. This requirement is not available in England, but its existence is very important in Indonesia. Article 1337 of Indonesian Civil Code states that a reason is forbidden if the reason is prohibited by the law or if it is contrary to morality or public order. The main purpose of the guaranteed stock agreement is to prevent the company from accumulating debt due to not being able to distribute dividends on the preferred stock which can have negative impact and lead to bankruptcy of the company. Certainly, this is not prohibited by the law, but the parties must have good intention in implementing the agreement.

With the existence of the guaranteed stock, it does not mean that the publishing company can manage the company arbitrarily. In good faith, the implementation of the contract is related to the issue of propriety and decency.¹⁸ The main point of the guaranteed stock agreement or projected into the form of the coverage agreement/insurance in this study is regarding to the compensation to the preferred stockholders if there is an uncertain event in the form of loss that may be suffered by the publishing company. In other words, the guaranteed stock agreement is just in case if there is an inability of the publishing company to distribute dividends. Although the stocks have been guaranteed by the guarantor company, they still have to prioritize the purpose of establishing a Limited Liability Company, in which one of them is seeking profit.

Legal culture is related to parts of general culture, namely habits, opinions, ways of acting and ways of thinking that direct social forces towards or away from the law and special ways.¹⁹ The legal culture in England as the common law country that prioritizes law based on cases and experiences has a far-reaching orientation to find a way out of the past experiences. For example, with the experience of companies that could not distribute the dividends, they look for ways to prevent bankruptcy and provide protection for the stockholders by implementing guaranteed stock.

The investment legal culture in Indonesia cannot yet be oriented far ahead. The habit that does not distribute dividends on the preferred stock will be accumulated and paid when the economy of the publishing company has returned to stable with profit. In addition, if the publishing company experiences bankruptcy, by adhering to Law Number 37 of 2004 concerning about Bankruptcy and Postponement of Obligations to Pay Debt (Bankruptcy Law), the preferred stockholders feel secure because they receive the priority rights in distributing the remaining proceeds of liquidation.

This is what can hinder the implementation of guaranteed stock in Go Public Limited Liability Companies in Indonesia. Companies and investors consider problems regarding to the investment through the stocks to be completed with the existence of Limited Liability Company Law and Bankruptcy Law. However, filing the bankruptcy application is not easy and requires a long time. Guaranteed stock can avoid the company from the threat of bankruptcy. Waiting for the remaining proceeds of liquidation results in the stagnant investment for the stockholders. With guaranteed stock, the preferred stockholders are still able to receive profits although the economic condition of the company is not healthy.

CONCLUSION AND SUGGESTION

The implementation of guaranteed stock agreement as a source of law in England to be implemented as a source of law in Indonesia is influenced by the factors of the implementer structure, legal substance, and legal culture. In terms of the implementer structure and legal substance, guaranteed stock agreement can be implemented in the whole Go Public Limited Liability Companies in Indonesia because it fulfills the legal requirement of an agreement according to Article 1320 of Indonesian Civil Code projected in the form of the coverage agreement/insurance. The inhibiting factor comes from the legal

¹⁸ Elisabeth Nurhaini Butarbutar, (2015), "Implementation The Principle Of In Good Faith In The Standart Contarct", *International Journal of Business, Economics, and Law*, Vol. 7, No. 4, Page 45.

¹⁹ Achmad Ali, *Op Cit*, Page 227.

investment culture in Indonesia which is still comfortable with the protection for the company and stockholders provided by the Bankruptcy Act. The suggestion from this study is that the Indonesian Government should follow up on the idea of implementing guaranteed stock in Indonesia because it is not only beneficial to the stockholders, but also to the Limited Liability Company to avoid the threat of bankruptcy.

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