

# *Indonesian Business Law: Legal Construction Between Bank-Creditor and Bank-Debtor in the Sub-Participation Contract*

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**Abstract-** The papers aims to analyze the legal construction between bank-creditor and bank-debtor in the sub-participation contract, which apparently has not been well covered by the two legal fields in the event of a dispute, whereas the funds lent in the banking business are very important to immediately withdraw and run to extend credit to other sectors, or to support the liquidity. In the case of bankruptcy requests for the banks, Bank Indonesia is legally entitled to submit to the Commercial Court even not as a part of contract. However, the institution never once took a request to the Commercial Court. Even before Indonesian banking supervision adopted a multiple supervision of banking system. Bankruptcy Act 2004 does not legally entitled the right to the creditor directly, nor does Banking Act 1998 regulate the mechanism of creditor' claim in the event of a sub-participation contract, other than complaining to Bank Indonesia to request being his "advocate(?)" to litigate to the court.

**Keywords:** *Sub-participation Contract, The Right to Paid, Bank Liquidation, Bankruptcy Law.*

## I. INTRODUCTION

Under Indonesian legal system, there is a gap between banking regulations *vis a vis* Bankruptcy Act 2004. Banking regulations explicitly regulate *only* the rights of creditors-depositors, formally called *Nasabah Debitur*, 'Depositor', insofar as Bank Liquidation occurs after being categorized as a non-systemic impact by the banking authorities. Banks are double faced institutions. From a macroeconomic view, the bank is an intermediary institution, being the driving wheel of the modern economy and determining the level of stability of a state's economy [1].

From a microeconomic view, the banks similiarly other business lines, profit-oriented, in which its limitations depend on the form of the banks, as stated in Articles 1 paragraph (2), stated. Bank is a corporate entity mobilizing funds from the public in the forms of Deposits and channeling them to the public in the forms of Credit and/or other forms in order to improve the living standards of the common people.

Differences, the bank's business offers a deposit services by giving interest as a teaser and conduct it after to those who need capital through a credit contract scheme with the rent charging. This is the main business all of the banks, profits derived from margin. Bank liquidity is supported by public funds by offering deposit contract [2].

Mostly of bank capital is collected from costumers fund here I called 'creditors-depositors' which are deposited to the bank based on contract. Under Banking Act 1998 Indonesian version officially called *Nasabah Penyimpan* and officially translated 'Customers' only. The contract was mentioned as *perjanjian penyimpanan dana*, translated 'agreement' only, as stated Article 1 number 5 the phrase itself ambiguous in frame of the general genus of Indonesian privat law: Civil Code. At first sight, analyze the phrase of *Penyimpanan*, 'Storage', similarly to custodial. On the other, the second term was formulated differently by Article 1 number 14 of Act of Banking 1998: the keeping party of contract *does not* recognized as property owner. Insofar, the deposit contract closely refers to a loan/borrowing contract, meaning where the goods of the contract replaced and being the property of the storing party: the bank.

In addition, bank capital obtained and collected from non-depositors through contract, i.e through a sub-participation contract, which is reached between two parties are both banks, in which the Bank-creditor has no legal relations to borrower except the lead. Regarding the sub-participation contract, Buchheit [3] stated, the salient feature of a sub-participation is that the bank originating the loan (lead) will remain in its role as the nominal lender and will continue to manage the loan notwithstanding the fact that it may have sold offmost or even all of its credit exposure.

The contract generally to exceed the limits of loan disbursement permitted by banking regulations, and if the contract periode is end, its important to recall and allocate

to supply the business of the creditors when the receivables are due. Creditor-bank withdraw it as much as possible because there is an adage time is money in business-practice. Debtor-bank not impossible to default in the future. The first party that the right to pay has been banned, there is no other way unless go to Bank Indonesia to complain and ask to be a represent the creditor-bank to Commercial Court to accept to liquidate of debtor-bank which is considered default. In practice, Bank Indonesia has never even become a 'advocate of the creditors' to the Commercial Court.

Indonesian bankruptcy law does not require insolvency to litigate to the Commercial Court, just requires two creditors and one overdue debt that has not been fullpaid. However, Bankruptcy Act amputate creditors' right to claim in the case of the debtor is a Bank, also excluding creditors in the subparticipation contract. Though this contract not regulated by banking regulations: banking regulations *only* regulate the rights of creditors-depositors insofar liquidation occurs.

Less than two billion and certain qualifications will be paid by the Lembaga *Penjamin Simpanan* (Deposit Insurance Corporation) whether the liquidation has been carried out or not, other creditors are paid after the assets have been sold. The good of the sub-participation contract uncategorized as *Simpanan*, 'deposit', to the bank-debtor, but a loan by the bank-creditor to the bank-debtor where the good by the second party directly used to provide credits to the borrower. Such a contract also carried out to spread out of risk of bad credit so that it does not accumulate at one bank, which in turn impact liquidity.

The right of the bank-creditor under the sub-participation contract stands on the unlaw land, while the obligation stand outside. The nature of the emergence of 'law of distribution of debtor assets' to prevent creditors to take action outside the law and to create distribution fairly. There is a deviation by Article 2 paragraph (3) of Bankruptcy Act 2004: the applicant for bankruptcy is on Bank Indonesia (as a creditor, creditors advocate, or banking supervisory authority?) The achievement of contract automatically gives the right to pay to creditors, its only applies to those who commit themselves in it; the contract does not bind the rights and obligations outside the parties that binds itself under the contract. At the same time, the assets of debtor being guarantee in the term does not pay back, through confiscation of court decisions formally. Genus of regulation were regulated by Civil Code.

Based on the legal issues have been presented above, this papers, firstly, explore the conception of non-depositors' legal relations with banks and to whom the attribute of the claim should be attached in the sub-participation; secondly, explore the legal order between banking law and bankruptcy in the frame of law as a system theory.

## II. RESEARCH METHOD

The jurisprudence closely related to logical activity on certain facts or legal events, hence the study *sui generis* normative, the goal is to provide a prescription of the issue being studied. The object of study is abstract law generally and its theoreticals with the intention of finding the basic principles to establishing norms onto legal regulations which subsequently form of the legal system [4]. The approach here is statutory and conceptual [5]. First approach places regulations as the only legal source that is legally referenced, not other, to find the law for a any phenomenon of law, while character on second approach inherently deconstruct the sources of formal law—authoritative rules—to pulled back to 'headwaters', namely as the sources of material law, the way to reconstruct the rules in such the way and return it to the theories and principles of law to analyze the validity of the reason behind it [6], which it becomes a pillar supporting legitimacy for the building of articles into and/or intra regulations. The reasoning methodology here is inductive in the first approach and deductive in the second approach [7].

## III. FINDINGS AND DISCUSSION

### 1. *Legal Relation between Creditor-Nondepositors and Bank-Debtor and the Claiming Rights to Paid through in Contract Should be Attached*

Law is human logical work on how to regulate spheres of social life. The more developed a population, the more complex the legal fields. These spheres—which are marked positively mean that it shall be written in contemporary law do not required any contradiction of each fields to achieve legal certainty, nor should they turn their backs on principles. The principle raises the theory, in which extracted into rules of law. *Vice versa*, a conflict between fields must be returned to basis of principle. The principle is a guiding line of thinking to find and establish a legal norm in a valid manner, on the contrary it also serves as a test tool for the norms incarnated in interagency and inter-legislative articles [8].

There are 2 points to guide the readers to the legal issues discussed here: explane the banks trough the

economics' perspective and, furthermore, the legal relation of creditors, both depositors and non-depositors, and banks whose essentially from this view the contract formulated in law; starting with a general description of contract in order to obtain a description of the rights and obligations of each parties who bound themselves under contract theoretically. Subsequently, discuss the law and irregularities under Bankruptcy Act 2004.

To create a banking system strongly to supply a state's economic development has placed it regulated and monitored specifically, the reason behind it cause banks are, we called, as half-public institutions. Indonesian regulatory system and supervisory system currently adheres to multiple supervision of banking authorities and the formation as follows: Bank Indonesia as the authority in the macroprudential domain, the Financial Services Authority has the authority in the microprudential, and the Deposit Insurance Agency is authorized to guarantee depositors fund. There are two implies for a bank failure by the banking authorities: bail out if it has a systemic impact and is merged or liquidation if otherwise, as was regulated under banking regulations. As mentioned that relations between bank and other parties is watched from a microeconomic perspective, and from at this perspective banks are placed as legal subjects. The relations between them is a contract. Contract principally is an agreement reached by two parties or more on properties legally based on free will.

The contract legally binding on the parties to obtain rights while carrying out certain obligations in the agreement asymmetrically [9]. If one party default on the clause of contract, opposing party can sue to the court. The right to sue constituting the right to claim in the case of a loan contract inherently exist in creditors themselves in any form of contract. The parties which has signed a contract to the bank classified into two classifications: the creditors depositors and non-depositors. The first is subject of banking legal rules and does not have 'the right to claim' according to Bankruptcy Act 2004, however they have been guaranteed rights by banking regulations when liquidation occurs, generally a small nominal deposit: less than 2 billions. Whereas the right to claim of non-depositors 5 according to the Bankruptcy Act 2004 does not recognized. Non-depositor of creditors, are generally banking business actors, banks as itself, and the good of the contract is a big deal nominal that can sustain liquidity, for example.

## *2. Norms of Norms between Various Banking Law Regulations and Bankruptcy Law in the Frame of Law as a System*

Government intervention is important in order to improve the performance of the financial sector and overall economic function because the financial markets in general and the banking sector in particular are different from other markets, also in order to patch up market imperfections. The chaotic banking sector of a country can spread to the economic, social and political turmoil. We cannot deny these facts that the existence of banks is the spearhead of the country's economy [10]. It means that the instability of the financial sector generally and the banking sector particularly will get an impact on macroeconomic conditions, specifically related to the effective transmission of monetary policy [11]. Therefore, banking supervision carried out and supervised directly and specifically by the supervisory authority through various regulatory. Viewing the functions of the Bank as stated similarly we look at macroeconomic view. The institution, from this view, as an agent of development, but there is no different than other business institutions in frame of microeconomic view: profit-oriented.

Regarding non-depositors, i.e. creditors as a party under sub-participation contract, Banking Act 1998 and other banking regulations do not regulate the legal relations of sub-participation parties, while there are restrictions to creditor's claim on the rights to paid, nor Bankruptcy Act of 2004 did not pay attention on how to creditor claiming his rights. Whereas both the parties under the contract is banks and payable by debtor to bank-creditor or to saking of business continuity and maintaining business liquidity. At this point, there is a need for amendments in the two areas of regulation so that there is legal certainty that guarantees the right to paid for bank-creditors in the sub-participation contract. Bank Indonesia legally an "advocate" in the case of depositors. Whereas contract which signed by creditor bank and debtor-bank not subject of Banking Act 1998.

## IV. CONCLUSION

There's a big hole between what was regulated by banking regulations and Bankruptcy Act 2004. Banking law just regulates on how to create a national banking system strongly rather than as a legal and protection mechanism for its stakeholders, specially in the case of sub-participation contract. Sub-partition contract is not subject of banking regulations because it is not a between bank and his creditor-depositors as mentioned by Article 1 number 5 of Banking Act 1998. Bank-creditor under sub-participation contract not qualified as Nasabah (Customer). On the other, the right of bank-creditors under sub-participation contract also castrated by the Bankruptcy Act 2004, have no right to claim to paid, must

be Bank Indonesia in litigation to the Commerce Court. Amendments to the two legal regulations are needed in these different fields. The aim is to provide legal certainty for banks-creditors in agreements such as this.

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