

The Existence of Trusts in Indonesian Shariah Law; Study on Law No.19 Year 2008 Regarding State Shariah Commercial Paper

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Abstract— Financing as a method to seek capital inflow for a corporation has switched from debt based to become equity based. Equity based funding need not required the fundee pay a fix amount of interest meanwhile the fundee itself did not make profit. To obtain huge amount of equity funding, fundee need to make it through a collective investment scheme. Such a scheme was developed in the capital market under collective investment contract, which is based on the concept of “trusts”. Such interest-free based funding is also acknowledged in shariah law. In 2008 the Government and House of Representative of the Republic of Indonesia has issued Law No.19 Year 2008 regarding State Shariah Commercial Paper (State Sukuk). This research aims to seek that the concept of trusts can be found in shariah law, by analysing the Law No.19 Year 2008 as an example for discussion. This research is normative legal research. It used secondary data, consisting of primary legal sources, secondary legal sources and/ or tertiary legal sources that will explain the concept of trusts to fit into the conception of issuance State Sukuk based on the Law. Data, which were obtained through literature review, will be analyzed using the comparative approach. Researchers find and argue that the existence of State Sukuk cannot be separated from the existence of trusts. Even though the Law itself does not directly mentioned trusts as a concept but the acknowledgment of “wali amanat” in the Law is sufficient enough to prove the existence of trust in the Law. Wali amanat is the only institution that manages the State Sukuk for and on behalf of the investors without becoming the real owner of the State Sukuk itself.

Keywords: trusts, State Sukuk, Shariah Commercial Paper

I. INTRODUCTION

Trusts play an important role in commercial law, especially in capital market law. Trusts allowed the issuance and trading of securities in capital market to be conducted in Indonesian Stock Exchange. Trusts will allowed the securities issued by Issuers be kept and register under one ownership. The trustee will represent the “real” owner of the securities, meanwhile in the view of law the trustee is the register/ legal owner and the “real” owner will become the beneficiary of the securities [1].

The existence and involvement of shariah law in Indonesian economic and sharia activities can be found since the establishment of Bank Muamalat Indonesia, Tbk (BMI) in 1st November 1991. It was then formalised in 1998 with the amendment of Law No.7 Year 1992 re. Banking by Law No.10 Year 1998 (Banking Law). Exactly in year 2008, Law No.21 Year 2008 re. Shariah Banking (Shariah Banking Law) was promulgated.

Prior to the issuance of Shariah Banking Law, at the same year but earlier, Law No.19 Year 2008 regarding State Shariah Commercial Paper (State Sukuk Law) was issued. The commercial papers regulated in the State Sukuk Law were commercial papers that can be traded worldwide.

The State Sukuk itself of as referred by State Sukuk Law, called as State Sharia Commercial Paper (SBSN) are securities issued by the government of the Republic of Indonesia based on sharia principles to sukuk holders.

State Sukuk becomes alternative choice for investors to invest.

The aim of this research is to prove that, as a collective investment scheme for investors, the existence of trusts can be found in State Sukuk Law.

II. DATA AND METHOD

A. *Data*

This research is a normative legal research. Data used in this research are secondary data, that are collected through literature review. The main data are primary legal sources, that consisted of law and other prevailing governmental regulations, and secondary legal sources that consisted of text books.

B. *Method*

Data obtained are analysed using comparative approach. Discussions are made to understand the conception and characteristic of trusts and then compare it with the process of and the role of institution within the process of the issuance of State Sukuk according to State Sukuk Law.

III. RESULTS AND DISCUSSION

A. *Trusts*

Trusts were first created in common law tradition. It was part of equity. Equity provided justice to people when the court of law cannot do it. However, the product of equity shall not in contrary to the court of law verdicts [2].

From its first creation, trusts has developed to be used for business purposes. A lot of business transactions were conducted through trusts, especially in financial market. Money market and capital market are the financial market that used trusts in most of their activities.

At the beginning, there were many schoolars that doubted as whether Indonesia, like other civil law countries can acknowledge trusts in its legal system. However based on many studies and the fact that trusts has been incorporated in many civil law countries legal systems, its is now widely accepted that trusts can be found in civil law countries [3].

With respect to the existance of trusts in Indonesia,

as a civil law country, in general it will follow the main characteristics of trusts in civil law countries. However a research has proven that there were many institution in that fulfil the trust characteristics.Indonesia.

Under the concept of equity, Trusts is created where the absolute owner of property (the Settlor) passes the legal title in the property to a person (the Trustee) to hold the property on Trust for the benefit of another person (the Beneficiary) in accordance with terms set out by the Settlor [4]. By comparative approach, at least there are 4 similar characteristics that build up the trusts-like institution in Indonesian capital market regulation. They are:

1. Settlor is a party that delivers and entrusted certain trusts to the trustee;
2. All the party that bear the trusts function in any kind of transactions/ agreements are all the registered owner, that it becomes the legal owner of the trust corpus
3. Even though the trusts corpus is registered under the name of the institutions that function as trustee, but the trustee never registered as the asset(s) of the institutions (trustee)
4. In all tranasaction, the absolute owner of the trusts corpus is the beneficial owners (the investors), upon the termination of the trusts [5].

B. *State Shariah Commercial Paper (StateSukuk)*

The explanation given above showed that in trusts there is three parties involved. In State Sukuk Law, Sukuk can be directly issued by the Government of the Republic of Indonesia or conducted through a Special Purpose Vehicle. This Special Purpose Vehicle a legal entity established only for the purpose to issue Sukuk for and on behalf of the Government of the Republic of Indonesia.

The issuance of Sukuk must be backed by Sukuk assets, however the ownership such Sukuk assets need not all be transfered, since it is the proceed of these assets that will be used to pay investors. These Sukuk assets can be in any forms, however it must be State Property which have economic value, in the form of land and/ or buildings as well as the utilisation of the land and/ or buildings, or receivable which provide income that can be used to pay investors. The issuance of Sukuk itself shall be accompanied by Wali Amanat as trustee, who is a party that will represents the interests of Sukuk holders in accordance with the issuance agreement.

Article 1 point 1 of Financial Services Authority Regulation Number 18/POJK.04/2015 regarding Issuance and Requirements of Sukuk stipulated that Sukuk are Sharia Securities consist of certificates or evidence of ownership with equal value and represent an inseparable or undivided part (*syuyu* / part not shared), for the underlying assets. The Sukuk asset itself according to Article 2 point 1 of Financial Services Authority Regulation Number 18/POJK.04/2015, the assets that become the basis for the Sukuk must not in conflict with Sharia principles.

In the event that State Sukuk is issued by the Government of the Republic of Indonesia, then the Government of the Republic of Indonesia will appoint Wali Amanat as the trustee of Sukuk asset, and also as the party who will represent investors who bought the State Sukuk. On the other hand, if the State Sukuk will be issued by the Special Purpose Vehicle, then the Special Purpose Vehicle shall act as Wali Amanat dan take the role of Wali Amanat. The Special Purpose Vehicle shall have the following roles:

1. Sukuk issuer;
2. Trustee representing the interests of investors;
3. Become a government counterpart in asset transfer transactions;
4. Transfer back the Sukuk assets to the Government of the Republic of Indonesia.

The investors of State Sukuk will become the beneficiary, that will received all the proceed earned by State Sukuk. The investor will never become the registered owner of the Sukuk assets. At the end of the State Sukuk period, whereby all investors has been paid accordingly, Sukuk assets will be transfer back to the Government of the Republic of Indonesia.

Based on the explanation above, in general the relationship created within the issuance of State Sukuk contained the principles and characteristics of trusts. They are:

1. Settlor which is the Government of the Republic of Indonesia or the Special Purpose Vehicle;
2. Wali Amanat appointed by the Government of the Republic of Indonesia or the Special Purpose Vehicle, who acts as trustee, is the registered owner of Sukuk assets;
3. Wali Amanat appointed by the Government of the Republic of Indonesia or the Special Purpose Vehicle as trustee becomes the only institution that manages the State Sukuk for and on behalf of the investors without becoming the real owner of the State Sukuk, and in some event the owner of the Sukuk assets itself, which will be return to the Government of the Republic of Indonesia

4. Investors are the beneficial owners who become absolute owner of the State Sukuk.

IV. CONCLUSION

Based in the above explanation we can see that the institution of trusts existed in Indonesian shariah law. From the State Sukuk Law we can see the existance of Wali Amanat as trustee, that represents the interests of investors as beneficiary. On the other side the Wali Amanat also “represents” the Government of the Republic of Indonesia to become registered owner of Sukuk assets for the benefit of all investors.

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