Arrangement model for the implementation of pledge of shares execution for a public company by private sale to create sustainable economic development

Putri P. R. Marditia^{(a)*} James Xavierius^(b) Jeff Gerardo^(c)

Rya Teresa Manihuruk^(d) Ryan Ricardo^(e)

^(a,b,c,d,e) Faculty of Law, Atma Jaya Catholic University, Jakarta, Indonesia

ARTICLE INFO

Article history:

Received 19 December 2021

Received in rev. form 11 Feb. 2022

Accepted 14 February 2022

Keywords:

Regulatory model, execution, pledge of shares, public company, private sale

JEL Classification:

P36

ABSTRACT

Since 2020, the pledge of shares has been re-recognized as one of the efforts for business development, as an example of which will be carried out by PT Pegadaian after the merger with PT Bank Rakyat Indonesia. This fact shows that Pledge of Shares has developed as a new trend in economic development, especially in limited liability companies. However, in Indonesia, this trend growth has not been matched by a regulatory system that guarantees legal protection for debtors, especially in the Pledge Of Shares Execution for a Public Company, which are carried out by private sale. This condition has created many legal vacuums, which have led to inconsistent court decisions regarding the pledge of shares execution in public companies. Therefore, according to the above, through this writing, the author aims to describe a regulatory pattern that can create a protection mechanism for debtors related to the Pledge of Shares Execution for a Public Company by private Sale—aiming to provide recommendations on regulatory patterns based on a comparison of the pledge of shares execution for public companies in several countries that have a frequency of active business transaction activities with Indonesia, namely Singapore and the United States of America, in the hope of providing a comprehensive reference to determine the regulatory pattern that suits the needs Indonesia to produce sustainable economic development. The preparation of this writing was made using a normative juridical method. So that through the results of this writing, it can be an alternative solution to the legal vacuum.

© 2022 by the authors. Licensee SSBFNET, Istanbul, Turkey. This article is an open access article distributed under the terms and conditions of the Creative Commons Attribution (CC BY) license (<http://creativecommons.org/licenses/by/4.0/>).

Introduction

According to The Central Statistics agency through the official website, it has been reported that the economic growth of Indonesia up 4.21% compared to the quarter I 2018 (Q Toq) and grew 5.27% compared to the same period last year (YoY). Economic growth of this period has been the highest since 2014. In the last five years, since the quarter I 2014, economic growth is at an average range of 4.7 to a high of 5.21%. In 2017 precisely the quarter I economic growth increased by 5.01%, quarter II was numbered at 5.01%, quarter III rises at 5.06% and continues to experience good in the FOURTH quarter with a recorded economic growth of 5.19%. In 2018 economic growth decreased in the quarter I and the rise in the quarter II was numbered at 5.27%. Internal and external factors have been determining the economic growth of Indonesia, as are the internal factors such as unemployment rate, foreign exchange reserves, inflation rate, infrastructure, and others. While the external factors consist of investment, export – Import, exchange rate,

* Corresponding author.

© 2022 by the authors. Hosting by SSBFNET. Peer review under responsibility of Center for Strategic Studies in Business and Finance.

<https://doi.org/10.20525/ijrbs.v11i1.1685>

Citation: Marditia, P.P.R., Xavierius, J., Gerardo, J., Manihuruk, R.T., and Ricardo, R. (2022). Arrangement model for the implementation of pledge of shares execution for a public company by private sale to create sustainable economic development, International Journal of Research in Business & Social Science, 11(1), 398-406

and others. In addition, the growth of capital markets in Indonesia continues to increase annually (Reza, & Widodo, 2013; Maqin & Sidharta, 2017; Barata, 2019; Yoo & Kim, 2006).

The capital market has an important role in the economy of a country, because the capital market has functions as a means for the company to get funding from investors to be used for business development, expansion, and the addition of working capital and as a means for the community to invest in financial instruments (Ridwan et al., 2021; Ibrahim et al., 2021; Sukono et al., 2021). One of the financial instruments sold in the capital market is bonds. Bonds are a non-transferable long-term debt letter indicating that bond issuers borrow a certain amount of funds to investors by having an obligation to pay interest at a certain period and settle the underlying debt at the appointed time to the bondholders. Bonds are issued by governments and corporations. Corporate bonds are rated more profitable than government bonds, this is seen from the higher corporate bond yield compared to state bonds. In addition, corporate bonds are dominated by domestic investors who tend to pay more attention to domestic economic indicators different from country bonds, as 38% of the Outstanding is owned by foreigners, making it more sensitive to global issues (Latif, & Marsoem, 2019; Bao et al, 2011; Annisa et al, 2019). Bond Yield is the most important factor for investor consideration in purchasing bonds as its investment instrument. Yield is the advantage of investment bonds expressed in percentages. Yield bonds are also the interest rate that equates the present value of all interest receipts and the nominal value of bonds, with the price of bonds. One of the most frequently used methods of investors to measure the yield in investing in bonds is the yield to maturity. Yield to maturity is a compound return rate that investors will receive when investors purchase bonds at the current market price and hold them to the bonds. The Yield bond becomes the size of the bond income that the investor will receive, which tends to be non-permanent. There are 5 (five) bond yield sizes that can be used by investors, namely: Nominal yield, Current yield, yield to call, Realized (Horizon) yield, and Yield to maturity (Weniasti, & Marsoem, 2019). Investing in investor bonds certainly expects the benefit of interest and the underlying loan to be paid at the specified time but in fact there is a risk to be faced is the risk of failing to pay (default risk) whereby the issuer is unable to pay the principal of loans and interest in accordance with the specified time period. To conduct risk assessment the bond can use bond rating. Bond rating is the symbol of the character given by the rating agent to measure the risk of failing to pay by the issuer as the debtor in paying the coupon and the underlying loan at the appointed time. Bond rating is very important because it is used to measure the level of risk and return on an investment. The lower the bond rank the higher the risk the investor will face. The factors used in this study to know the influence on bond ratings are financial factors that include profitability and liquidity.

The profitability ratio is a ratio that measures the company's ability to generate profit or profit (Syarifah, 2021; Mahdi & Khaddafi, 2020). The higher the profitability level of the company then the lower the risk of paying inability (default), so the better the rankings are given against the company. Profitability is a ratio that measures the effectiveness of the company as a whole indicated by the big small gains gained in its relationship with sales or investment. In this study, the benchmark used to measure profitability is by using Return on Equity (ROE). The higher the return on asset means the higher the amount of net profit generated from each rupiah of funds embedded in the total assets. The return on equity is the ratio to measure net profit after tax with its own capital. On average profitability in 2014-2015 is experiencing a decline in developments, while in the year and 2016-2018 have increased (Arditti, 1967; Hindradjaja, 2019; Susanti et al 2020). The liquidity ratio is a ratio that illustrates the company's ability to meet short-term obligations. liquidity is the ability of a company to fulfill all financial obligations that can immediately be disbursed or are already due, specifically the liquidity reflects the availability of funds owned by the company to meet all the debts that will be due. High liquidity level will show the company's strong financial condition, the higher the liquid level the better the bond rank. In this study the benchmark used to measure liquidity is to use the current ratio. The current ratio is the ratio for measuring the company's ability to pay for short-term or debt obligations that are immediately due at the time of being billed as a whole. On average the liquidity in 2014-2016 increased, then in the year 2017 decreased but in the year 2018 experienced an increase in return (Ruziqa, 2013; Devi et al, 2020).

Nowadays, the creditors' trust level toward the process of collateral execution in Indonesia is inferior. It can be proven that the total number of executions carried out through the court decision or parate execution is more or less 6% from the total Non-Performing Loan ("NPL"), which is worth IDR141,8 billion. There is an indication that the execution through auction dominated with the execution of mortgages. In contrast to the execution of pledge of shares, the numbers are small from the banking industry perspective. It was also discovered that one of the central banks in Indonesia had not executed the pledge of shares for quite a long time. This is also indicated that the statutory provisions regarding pledges and the execution process have almost no progress. If it is calculated, the rules regarding pledge of shares are 174 years old.

The development of Limited Liability Company's shares or not listed in the Indonesian Stock Exchange is not considered as significant collateral. It occurred that creditors rarely consider shares as additional collateral that remind debtors to breach a contract, so they risk losing their company. To increase the quality of pledge of shares, local and foreign creditors instruct the debtors to carry out a shares offshoring. This condition requires the debtor to transfer the shareholders from companies in Indonesia to companies abroad. So that creditors can take pledges of shares through foreign companies and also to their subsidiaries in Indonesia, this has implications for additional costs that are pretty high for entrepreneurs because the costs include the cost of consulting services for the transfer along with taxes and the cost of maintaining companies that are abroad. It may also indicate that the high costs show how entrepreneurs do not trust the law in Indonesia (Krasavina, 2010; De Carvalho & Pennacchi, 2012).

The value of the pledge of shares, which is relatively low then, also impacts the obstacles for entrepreneurs to be able to obtain financing. For example, a company with good value shares but no assets (land) will find it challenging to access costs. If you go to

the end of 1990, the guarantee system for land and movable objects reached the year where the enactment of the Mortgage Law and the Fiduciary Law had progress and quality improvement in statutory pledging regulation was not the case. The implementation of pledge of shares in Limited Liability Company seemed old-fashioned and unattractive for the entrepreneur than other forms of pledge, the Author indicates that this is due to the reason as follows:

- i. *The system for registration that has good credibility value as well as ease to access does not exist. With a record whose management is under the company's board of directors and not publicly or an independent third party, its credibility is very low;*
- ii. *There is no certainty in the execution process;*
- iii. *Stock liquidity has its own problems.*

Therefore, the formula above shows how pledge of shares is lagging in terms of laws and regulations and its attractiveness to entrepreneurs. Uncertainty over the law governing more pledge of shares may be seen in the execution of guarantees. In the process of execution, pledge of shares can be conducted by court application or execution prate. However, such execution is still hazardous. But there has been an effort for the process of execution of this guarantee, namely if you review the auction issue, the Ministry of Finance (Kementerian Keuangan) has prepared regulations under the Directorate general of Auctions (Directorate General of State Wealth). As for the execution, the Directorate General of The General Judicial Agency in 2019 has also completed the execution guidelines.

The method applied is normative legal research through Arrangement Model for The Implementation of Pledge of Shares Execution for A Public Company by Private Sale to Create Sustainable Economic Development. The research was conducted ding and examining primary and secondary legal sources. Primary legal sources are actual sources of law, namely, laws and court decisions and regulations related to Arrangement Model for The Implementation of Pledge of Shares Execution for A Public Company by Private Sale to Create Sustainable Economic Development. Meanwhile, secondary legal sources are materials that include commentary on the law discovered in legal literatures and journals. The approach used by the author for this legal writing in this study is a statutory approach (the statute approach).

Literature Review

Pawn shares have their own characteristics. In the case of share pledges, dividend rights are calculated as repayment of creditors' receivables. However, the voting rights of the GMS remain in the hands of the shareholders. Shareholders who pledge their shares are required to report to the directors of the company where he is a shareholder. This report is intended to record the pledged shares in the Register of Shareholders in accordance with article 43 paragraph (1) of the Company Law. Another characteristic of share pawning is that when the debtor is in default and the creditor wants to get his receivables repaid by selling the pledged shares, then the articles of association of the PT must comply with the block dry clause. The execution of the pledge of shares can be carried out through parate execution under Article 1155 BW and court mediation according to Article 1156 BW. Parate execution of the pledge of shares is carried out through the auction office. Meanwhile, court mediation is carried out by the creditor filing a lawsuit to the court and the judge will make a decision according to article 1156 BW. However, article 1155 and article 1156 BW can be deviated by the parties. Deviations from Article 1155 and Article 1156 BW can only be made if the debtor is in default. The deviation referred to here is to make sales under the hands. Agreements for underhand sales can only be made by the parties after the debtor is in default. It is not allowed to enter into an underhand sale at the time of closing the pledge agreement. This is because at the closing of the pawn agreement, the position of the parties is not balanced. As a result, the debtor will accept all the requirements put forward by the creditor--including the onerous conditions--because the debtor needs a loan from the creditor. It is different if the creditor submits an underhand sale after the debtor defaults. When the debtor defaults, the position of the parties is equal. Thus the debtor can freely accept or reject the terms of the sale under the hands of the creditor. If the debtor does not agree to the offer, the creditor can sell the pawned object through an auction or the creditor files a lawsuit as regulated in article 1156 BW.

Scientific paper titled "Execution Against Shares pledged End of Period Relating to Pawn In Scriptless Trading System", using normative research methods. Issues raised is how to execute the pledged stock without paper relating to the expiration of the lien in scripless trading system. Based on the research conducted, the results showed that the presence of the shares are at a third party, namely PT KSEI be mortgaged if both parties agree. PT KSEI will do the freezing/blocking number of pledged securities in the Sub Account on behalf of the collateral. The execution of the object lien pledge of shares done by the rules that exist in the Civil Code under Article 1155 of the Civil Code is to parate and Article 1156 of the Civil Code executie is by private sale (Budha & Resen, 2017).

Based on the Supreme Court Decision No. 240 PK/Pdt/2006 and the Supreme Court Decision No. 115 PK/Pdt/2007. Second, how the Supreme Court Decision No. 240 PK/Pdt/2006 and the Supreme Court Decision No. 115 PK/Pdt/2007 provide legal protection to the mortgaged shareholders. This is normative legal research with case and legislation approach. The results indicate that there are differences in the outcomes of the Supreme Court Decision No. 240 PK/Pdt/2006 and the Supreme Court decision No. 115 PK/Pdt /2007 in the substance of the similar case. Based on the Supreme Court No. 240 PK/Pdt/2006, the execution of share-mortgage by PT BFI Finance Indonesia Tbk is illegal, while in the Supreme Court Decision No. 115 PK/Pdt/2007 the execution by PT BFI Finance

Indonesia Tbk is legal. The difference in the outcomes of the decisions in the substantially similar cases has created legal uncertainty over the protection of PT BFI Finance Indonesia Tbk's rights as a creditor as well as the mortgaged share holder (Putri, 2020).

Arrangement and Implementation of Public Company Shares Pledged Execution in Indonesia

Indonesian Civil Code (Kitab Undang-Undang Hukum Perdata or "ICC") is the landscape of execution of pledge of shares for public company in Indonesia as an implementation agreement in which the collateral object is share. However, in its implementation, many inconsistencies in the application have occurred as mentioned below:

The inconsistencies of Article 1155 of the ICC in relation with the implementation of Private Sale and Parate Executie.

Article 1155 of the ICC mentions that unless it has been agreed between the parties, the creditor is entitled to sell the pledged good publicly without court order when the debtor is in default to pay his obligation. This stipulation has arise multi-interpretation. The problem that arises is whether the previous party can agree to sell privately if the debtor in defaults by not making a public sale or with another agreement then the parties can waive their right to make direct sales through auction without court assistance or commonly known in practice as parate execute. As stipulated in Article 1155 of the ICC, creditors have no obligation to wait until the debtor to be declared in default due to the statement of Article 1155 of the ICC described that the agreement can be given before the debtors in default. Moreover, in the explanation of the first interpretation can be seen that only limited to the default by the debtor, then the creditor is entitle to do a private sale. One of those who support this is Satrio who explains that sales made in private sale can only be made after a breach of contract. However, this does not mean that doing a private sale will result in the agreement clause being cancelled by one of the parties.

As for the private sale is also found in the Decision No. 332/Pdt.P/2001/PN.Jak.Sel – Decision No. 343/ Pdt.P/2001/PN.Jak.Sel in which the Deutsche Bank Aktiengesellschaft acted as an applicant. The South Jakarta District Court has declared that the creditor entitled to sell all the shares pledged through private sale prior to public sale since it has been stipulated in the pledge of shares agreement. Further, the inconsistency in the explanation of the private sale can be identified in the Supreme Court Decision No. 115 PK/PDT/2007 jo. No. 517/PDT.G/2003/PN.JKT. PST stating that the sale must be made by way public auction or in other ways that have been determined by a Court Decision with permanent legal force. This conclusion is drawn from the consideration that the execution of the pledge of shares has been expressly regulated in the provisions of pledge that are closed and cannot be deviated, where the sale must be carried out through a public auction (following the provisions of Article 1155 of the ICC) or by other means determined by the law. Court decisions that have permanent legal force. This decision does not provide an affirmation that there is a rejection of the private sale but must go through a court decision which is final and binding in public.

On the other hand, the second interpretation explains that when the debtor defaults after the due date is expired and has already been warned through notification letter, the creditor is entitled to execute pledge of shares with parate executie (*zonder tussenkomst van de Rechter, eigenmachtig verkoop*). It is evident that the Article 1155 of the ICC arises inconsistencies in the implementation due to the law is silent regarding when collateral can be executed by private sale or parate executie.

The controversy of private sale mechanism as stipulated in the Article 1156 of the ICC

Pertaining to Article 1156 of the ICC, execution shall be exercised under court assistance. However, there is a multi-interpretation in which the phrase "the prosecution before the Judge" in the Article 1156 of the ICC which may be perceived as a legal step for filing lawsuit or prosecution before the Judge as an application in the event that the debtor in default. Supreme Court Justice Mariana Sutadi's view explained that shares must be sold through a public auction and creditors must file a case as a plaintiff and sue the debtor as a defendant to obtain a court decision before executing the pledge of shares. Decision No. PTJ.KPT.01.2005 to Decision No. PTJ.KPT.04.2005 in conjunction with Decision No. 33/Pdt.P/2002/PN. Jaksel to Court Order No. 36/Pdt.P/2002/PN. Jaksel, the South Jakarta District Court has decided the procedures to execute the collateral by filing an application. Thus, the procedure shall not be taken by a lawsuit but by an application. However, in this matter the pledge of shares agreement is an accessoir and a follow-up to the principal loan agreement. Therefore, the pledge of shares agreement is included in a dispute case between interested parties (creditors and debtors), hence it should be submitted in the form of a lawsuit. As observed from the decisions, the execution of pledge of shares must be exercised only by an application, unless the pledge of shares agreement is accessoir. In substance, Article 1156 of the ICC also reaffirms the rights given to the pledge recipient to solve the problem when the debtor unable to pay the debt at the specified time. In conclusion, although coercive and binding, the ambiguity of the contents of Articles 1155 and 1156 of the ICC causes legal uncertainty in the Republic of Indonesia.

The Contradictions of the transitional concept of Article 613 of the ICC in the pledge of shares system.

The transfer of chattel and tangible property create a conflict of norms (contradictory) with the submission of existing provisions on the leveraging of securities in the capital market, especially in the scriptless stock system. If the provisions of Article 613 of the ICC challenged with Article 55 Paragraph (1) of Law Number 8 of 1995 concerning the Capital Market related to the scriptless stock system using electronic devices, where the transfer of rights is not carried out physically, or by cession or endorsement but by transfer of books (Book entry settlement) is a stock exchange transaction through a scriptless stock system which is carried out by subtracting and adding securities from one securities account and adding the securities to other securities account electronically. Following the legal principles as regulated in civil law, there will be a conflict of norms since the transfer of rights to shares should be done by

physical, cessie or endorsement, considering that these scriptless shares are intangible movable objects. The review of the occurrence of this norm conflict is due to the provisions of Article 55 paragraph (1) of Law Number 8 of 1995 concerning Capital Markets and Article 613 of the ICC still needed a complete adjustment to technological developments but also providing legal certainty and legal benefits as the goal of strengthening regulations.

Best Practice

Private Sale in United States of America (USA)

Uniform Commercial Code (“UCC”) has stipulated the disposition of collateral after default where the secured party may sell, lease, license, or otherwise dispose of in any mechanism. UCC recognized two foreclosures of collateral after default, that is foreclosure by private sale or public sale. The UCC enforced all the collateral can be sold with a commercially reasonable, including the method, manner, time, place, and other terms as mentioned in the agreement between the parties. Pertaining to UCC, a sale of collateral will be commercially reasonable if (i) made in the usual manner on any recognized market; (ii) made at the current price in any recognized market; or (iii) in conformity with reasonable commercial practices among dealers in the particular type of collateral. In addition, the sale of collateral must be prepared with a notice that is provided 10 days prior to the earliest time of sale set forth in the notice specified to debtors, secondary obligors, and/or any secured party. Once the requirement for the sale of collateral has been fulfilled, then the sale of collateral (including pledge of shares) can be done by private disposition due to shares being one of a kind that customarily sold on a recognized market or the subject of widely distributed in standard price quotations.

Regulation Landscape of Private Sale in United States of America (USA)

Uniform Commercial Code (“UCC”) has stipulated the disposition of collateral after default where the secured party may sell, lease, license, or otherwise dispose of in any mechanism. UCC recognized two foreclosures of collateral after default, that is foreclosure by private sale or public sale. The UCC enforced all collateral can be sold with a commercially reasonable, including the method, manner, time, place, and other terms as mentioned in the agreement between the parties. Pertaining to UCC, a sale of collateral will be commercially reasonable if (i) made in the usual manner on any recognized market; (ii) made at the current price in any recognized market; or (iii) in conformity with reasonable commercial practices among dealers in the particular type of collateral. In addition, the sale of collateral must be prepared with a notice that is provided 10 days prior to the earliest time of sale set forth in the notice specified to debtors, secondary obligors, and/or any secured party. Once the requirement of the sale of collateral has been fulfilled, then the sale of collateral (including pledge of shares) can be done by private disposition due to shares being one of a kind that customarily sold on a recognized market or the subject of widely distributed standard in price quotations.

Practice and Implementation of Private Sale in United States of America (USA)

As mentioned above, USA regulation has a strong legal basis to do a private sale under the UCC. Furthermore, the implementing regulation for pledge of shares execution for public company by private sale mechanism is stipulated in the Securities Act of 1993 as amended. Under the Securities Act of 1993, there is a prohibition to sell shares of a public company or we known as stock, if the stock is not registered in the Securities and Exchange Commission (“SEC”). SEC is a USA government oversight agency responsible for regulating and supervising the securities markets and protecting investors. Securities Act of 1993 has recognized the registered stock execution by private sale mechanism and any execution of unregistered stock is deemed as an unlawful transaction.

Private Sale Regulations in Singapore

First of all, in Singapore, in regards to lending credit facilities are limited only to those who are legally allowed to lend, in relation to this, it has been explained in the Moneylenders Act (Chapter 188) of Singapore (“MLA”) in section 5(1) it is stated regarding parties who can provide credit facilities are those who: (a) he is authorized to do so by license; (b) an excluded moneylender; or (c) he is an exempt moneylender. The term “excluded moneylenders” has also been explained in section 2 of the MLA, where “excluded moneylenders” are: (a) anybody corporate, incorporated or empowered by an Act of Parliament to lend money in accordance with that Act (e.g: Banks); (b) any person licensed, approved, registered or otherwise regulated by the Authority under any other written law, to the extent that such person is permitted or authorized to lend money or is not prohibited from lending money under that other written law; (c) any society registered as a credit society under the Co-operative Societies Act (Chapter. 62); (d) any pawnbroker licensed under the Pawnbroker Act 2015; (e) any person who – (i) lends money solely to his employees as a benefit of employment; (ii) lends money solely to accredited investors within the meaning of section 4a of the Securities and Futures Act (Chapter 289); (iii) lends money solely to corporations, limited liability partnerships, trustees or trustee-managers for the purposes of the business trusts, trustees of real estate investment trusts for the purposes of the real estate investment trusts; and (f) any person carrying on any business not having for its primary object the lending of money in the course of which and for the purposes where of the lends money.

“Exempt moneylenders” are lenders who have been granted freedom of application in accordance with sections 35 or 36 of the MLA licensing terms. Failure to comply with the regulations contained in the MLA is a criminal offense. It can be concluded that carrying out guarantees in pawnshops in Singapore itself, can’t be carried out by a company freely, but they need to be complying with the law that has been regulated in the MLA described above, if a company continues to enter into a pledge of shares agreement to obtain credit facilities, the company and creditors may be subject to criminal sanctions. In Singapore, the supervisory authority on this matter is in the Monetary Authority of Singapore (“MAS”), MAS is the central bank of Singapore and is integrated as a regulator as

well as providing oversight in the macroeconomic field. MAS is regulated under the Monetary Authority of Singapore Act (Chapter 186). The functions contained within the MAS itself are to perform: (a) Carry out duties as the central bank of Singapore, including financial policymaking, issuing currencies, overseeing payment systems, and providing banking services to government financial agents; (b) To exercise oversight over financial services and economic stability; (c) Manage foreign reserves from Singapore; and (d) Developing Singapore as an international economic center. MAS itself has a fairly broad scope of authority, the authority of MAS ranging from being able to act as the central bank of the Singapore state to the issuance of business licenses and also supervision carried out on financial institutions in Singapore. In addition to the MAS, there are other regulatory bodies that regulate companies and the transactions related to companies, this regulatory body is the Accounting and Corporate Regulatory Authority (“ACRA”), where this agency focuses more on the administrative fields in the economic and business fields.

Practice and Implementation of Private Sale in Singapore

Concerning to the collateral provided for the pledge of shares listed on the Singaporean Exchange (“SGX”), it must comply with section 81SS of the Securities and Futures Act (Chapter 289) of Singapore (“Securities and Futures Act”) and other laws that was made following section 81SU of the Securities and Futures Act. Generally, the pledge of shares has been regulated in the Securities and Futures Act, which related to pledged shares arising in Singapore, these pledged shares may as well act as a guarantee for payment of debts or obligations in a form of a Charge. Charge is a form of security that bears interest and frequently owned by a lender or creditor to guarantee payment for a credit facility that has been granted, these charges are divided into two forms, namely Fixed Charges, and Floating Charges, the difference between these two charges is Fixed Charge related to fixed assets (e.g., lands, buildings) and Floating Charges related to non-specific and general assets (e.g., money, shares). These charges are then registered to ACRA through filing agents (e.g., law firm, accounting firm or corporate secretarial firm) or directors of the company may register by themselves, these charges are registered by no later than 30 days after the agreement has been made.

The execution of this charge shall be carried out after fulfilling the registration requirements in ACRA, if within the specified time the charge has not been completed, then the given charge may be transferred to another name and the creditor is free to sell whatsoever to meet the debts arising from the debtor.

Table 1: Comparison of Landscape of Regulations in Indonesia, Singapore and America

Variable	Indonesia (Pursuant to ICC)	Singapore (Pursuant to Securities and Future Act.)	America (Pursuant to UCC and Securities Act of 1993)
Subject	Creditor and debtor	This Act does not apply to a person in respect of whom a transitional approval or transitional licence mentioned in section 66 of the Commodity Trading Act (Cap. 48A) is in force, to the extent that the activities carried out by the person are regulated under, and authorised by, that section.	All of the collateral in its present condition or following any commercially reasonable preparation or processing.
Object	Only governs regarding the position of creditor and debtor	Governs the regulation of activities and institutions in the securities and derivatives industry	Governs the regulation of secured creditor, unsecured creditor, and debtor in commercial transaction including securities.
Execution Requirements	No stipulation	Must be a registered charge, that has been registered to ACRA through filing agents.	Must fulfilled the commercial reason and registered to the SEC.
Legal Certainty in execution	Uncertain	Certain, due to the ACRA and BizFile effectiveness of usage that bind the whole country of Singapore.	Certain, due to the effectiveness of UCC that bind all the countries in USA.
Dispute settlement	Can submit an appeal to the district court that has the jurisdiction based on Article 118 of HIR.	Can submit an appeal to the district court that has the jurisdiction as well as submitting an appeal to the Minister.	Governed by and constructed in accordance with the law of the State of New York. The authority that entitled to settle the dispute is the court based on jurisdiction as mentioned in the agreement and based on Section 5-1402 of the General Obligation Law of the State of New York

Policy Necessity Analysis and Policy Recommendations for The Development of Regulatory Models

Analysis of Policy Necessity in Indonesia

Shares deposited in collective custody, namely at PT KSEI, possible to apply with a lien guarantee. In accordance with Article 61 of Law No. 8 of 1995 concerning capital markets. The things that need to be done in underwriting with a stock lien are as follows: (1) The existence of a stock lien agreement; (2) The surrender of pledges. The submission of pledged goods is called bestselling, which makes that although the mortgaged material is in the control of the pledge holder, the pledge holder should not enjoy or take advantage of the material used as lien object. Due to the function of the lien is only as a guarantee of debt repayment. As for the delivery of pledged goods, is by being entrusted to third parties, namely custodian institutions, namely PT KSEI.

Pledge object is a share that is bound by the capital market trading system, so there are third parties involved in pledge transactions, namely the capital market authorized to regulate the delivery of shares. After the existence of the pledge of shares deal, shareholders as the giver of mace notify the issuer or the Securities Administration Agency/Badan Administrasi Efek (BAE) with the application to block the pledged share in the list of shareholders of the issuer. Shareholders will then obtain a letter of confirmation from the issuer or BAE regarding the share lien that has been recorded in the shareholder list and the issuer or BAE declares that it agrees not to list other liens against the pledged shares. The recording is carried out based on the existence in POJK No. 31 / POJK.04 / 2015, namely by paying attention to the disclosure of information that must be publicly announced on the shares of public companies to be mortgaged must be reported to OJK. BAE will list the name of the lien holder on the shareholder list and the name of the pawnbroker remains listed on the shareholder list as a juridical shareholder.

Rights relating to guaranteed shares, including cash dividends, stock dividends, bonus shares or other rights relating to share ownership during the underwriting process take place not to be part of the guarantee, but rather remain the full rights of the lien, unless otherwise specified in the insurance application instructions by the account holder. If you want to revoke the blocking of shares to be traded in the capital market, then the account holder may apply for a written revocation of the status of profit collateral securities to KSEI with the approval of the recipient of the guarantee and the guarantor. Therefore, the unsecured giver will not have the power to demand the return of the guaranteed shares before paying the debt and interest. The rights of the lien holder if the Pawnbroker fails to fulfill their obligation are: (1) The rights of the lien holder; (2) Right to parate execution.

Based on the description of landscape arrangements in Indonesia related to the Power of Execution of Unwarned Pledges in Indonesia, there are 3 main problems: (1) Inconsistency of Article 1155 of the ICC against Private Sale and Parate Executie; (2) Debate of Article 1156 of the ICC on the mechanism of Private Sale; (3) The Concept of Transition of Article 613 of the ICC in the pledge system as evidence of transfer of ownership. Based on the study, the authors tried to conduct a comparative study of the implementation of Best Practice in other countries, namely the United States and Singapore to get a comprehensive picture of the Policy of Execution Power against Unwared Pledges in Indonesia. The results of this comparative study can be used as a basis in determining the regulatory model in Indonesia.

Settings Model Recommendations

The regulatory model to be offered is to focus on building arrangements centered on the empowerment and synchronization of the performance of the Securities Administration Agency (BAE) and KSEI, which are integrated with the C-BEST (The Central Depository and Book-Entry Settlement System) system and integrated investment management system (S-Invest), are as follows:

Transitional Arrangements of Article 613 of the ICC in the pledge system as evidence of transfer of ownership. Where stock transactions are conducted electronically, so there needs to be proof of share ownership, since it provides benefits and protection for the interests of the owner. The proof of ownership in question does not rule out the objectives of efficiency and effectiveness of scripless trading, hence shall be achieved by the following mechanisms:

Custodian, KSEI provides proof of ownership in the form of written confirmation which contains information on the status of securities transactions including:

- i. Purchase or sale of securities, or
- ii. Storage of Securities in an Account, or
- iii. Acceptance or Delivery of Effects, or
- iv. Monthly account statements
- v. Written confirmation issued by the Custodian is published in the form of electronic data, for the purpose where in the event of being required for proof in court.

The arrangements related to Article 1155 of the ICC against Parate Executie and Private Sale, which contain the following provisions:

- i. The execution of the lien cannot be excluded, meaning that even if promised by the pledge giver and recipient, to execute the pledge must be subject to the governing rules and mechanisms, let alone the execution of a close lien.

- ii. The terms of sale of shares, which contain the mechanism of buyers in good faith, shares that are not sold legally) still belong to the buyer in good faith. The seller (creditor) of the shares must be responsible for his actions to sell the shares unlawfully to the pawnbroker.
- iii. The provisions of the notification mechanism of the owner of the shares as a pawnbroker at the time of execution.
- iv. The provision of making an absolute power of attorney or irrevocable power of attorney, in the Execution of a Pledge of Shares due to the birth of the power from the pledge of shares agreement.
- v. The provision of execution of the object of bail through the intercession of the court is through the application for execution of the object of bail. Thus, the procedure taken will not be by a lawsuit, but by application. However, in such cases the pledge of shares agreement is *accessoir* and is a result of the principal agreement of receivables hence included in the case of disputes between interested parties (creditors and debtors) and therefore should be filed in the form of a lawsuit. In conclusion, the execution of a pledge of shares is carried out through an application, unless the pledge of shares agreement is *accessoir*.

Conclusion

Regulation landscape in Indonesia related to the Strength of Execution of Unwarned Pledge in Indonesia has identified 3 main problems: (1) Inconsistency of Article 1155 of the ICC against Private Sale and Parate Executie; (2) Debate of Article 1156 of the ICC on the mechanism of Private Sale; (3) The Concept of Transition of Article 613 ICC in the pawn system as evidence of transfer of ownership. The regulatory model that can be offered is to focus on building arrangements centered on the empowerment and synchronization of the performance of the Securities Administration Agency (BAE) and KSEI, which are integrated with the C-BEST (The Central Depository and Book-Entry Settlement System) system and integrated investment management system (S-Invest).

Author Contributions: Conceptualization, PM., JX, JG., RM, and RR.; Methodology, PM., JX, JG., RM, and RR.; Data Collection, PM., JX, JG., RM, and RR.; Formal Analysis, PM., JX, JG., RM, and RR.; Writing—Original Draft Preparation, PM., JX, JG., RM, and RR.; Writing—Review And Editing, PM., JX, JG., RM, and RR.; All authors have read and agreed to the published the final version of the manuscript.

Institutional Review Board Statement: Ethical review and approval were waived for this study, due to that the research does not deal with vulnerable groups or sensitive issues.

Data Availability Statement: The data presented in this study are available on request from the corresponding author. The data are not publicly available due to privacy.

Conflicts of Interest: The authors declare no conflict of interest.

References

- Annisa, S., Rahmawati, M., & Afaf, A. (2019). Prosperity of the process and issuance of regional bonds and risk of public bonds registration in indonesia. *Notaire*, 2(1), 89-110.
- Arditti, F. D. (1967). Risk and the required return on equity. *The Journal of Finance*, 22(1), 19-36.
- Bao, J., Pan, J., & Wang, J. (2011). The illiquidity of corporate bonds. *The Journal of Finance*, 66(3), 911-946.
- De Carvalho, A. G., & Pennacchi, G. G. (2012). Can a stock exchange improve corporate behavior? Evidence from firms' migration to premium listings in Brazil. *Journal of Corporate Finance*, 18(4), 883-903.
- Barata, A. (2019). Strengthening national economic growth and equitable income through sharia digital economy in Indonesia. *Journal of Islamic Monetary Economics and Finance*, 5(1), 145-168.
- Devi, S., Warasniasih, N. M. S., Masdiantini, P. R., & Musmini, L. S. (2020). The impact of COVID-19 pandemic on the financial performance of firms on the Indonesia stock exchange. *Journal of Economics, Business, & Accountancy Ventura*, 23(2), 226-242.
- Heikal, M., Khaddafi, M., & Ummah, A. (2014). Influence analysis of return on assets (ROA), return on equity (ROE), net profit margin (NPM), debt to equity ratio (DER), and current ratio (CR), against corporate profit growth in automotive in Indonesia Stock Exchange. *International Journal of Academic Research in Business and Social Sciences*, 4(12), 101.
- Hindradjaja, G. G. (2019). Financial Performance of Construction, Property, and Trading Companies Based on Working Capital, Liquidity Ratio, and Profitability Ratio. *Advances in Civil Engineering and Sustainable Architecture*, 2(1), 1-9.
- Ibrahim, R. A., Sukono, S., & Riaman, R. (2021). Estimation of the Extreme Distribution Model of Economic Losses Due to Outbreaks Using the POT Method with Newton Raphson Iteration. *International Journal of Quantitative Research and Modeling*, 2(1), 37-45.
- Krasavina, L. N. (2010). The risks in the foreign loan sphere and problems of modernizing the debt policy of Russia. *Studies on Russian Economic Development*, 21(4), 426-433.
- Latif, A., & Marsoem, B. S. (2019). Analysis of Company Internal Factors on Yield to Maturity of Corporate Bonds Traded on the Indonesia Stock Exchange. *International Journal of Innovative Science and Research Technology*, 4(10), 33-42.
- Mahdi, M., & Khaddafi, M. (2020). The Influence of Gross Profit Margin, Operating Profit Margin and Net Profit Margin on the Stock Price of Consumer Good Industry in the Indonesia Stock Exchange on 2012-2014. *International Journal of Business, Economics, and Social Development*, 1(3), 153-163.
- Maqin, R. A., & Sidharta, I. (2017). The Relationship of Economic Growth with Human Development and Electricity Consumption in Indonesia. *International Journal of Energy Economics and Policy*, 7(3), 201-207.

- Budha, I. G. K. P. & Resen, M. G. S. K. (2017). Execution Against Charged Shares Related To The End Of The Periodmortgage In Scripless Trading System. *Kerthasemaya Jurnal*, 3(1), 1-5.
- Putri A. O. (2020). Legal Protection of Holders' Rights Share Pawn Guarantee. *Lex Renaissance*, 1(5),108-123
- Reza, F., & Widodo, T. (2013). The Impact Of Education On Economic Growth In Indonesia. *Journal of Indonesian Economy & Business*, 28(1), 23-44.
- Ridwan, A. F., Subiyanto, S., & Supian, S. (2021). IDX30 Stocks Clustering with K-Means Algorithm based on Expected Return and Value at Risk. *International Journal of Quantitative Research and Modeling*, 2(4), 201-208.
- Ruziqia, A. (2013). The impact of credit and liquidity risk on bank financial performance: the case of Indonesian Conventional Bank with total asset above 10 trillion Rupiah. *International Journal of Economic Policy in Emerging Economies*, 6(2), 93-106.
- Sukono, Sambas, A., He, S., Liu, H., Vaidyanathan, S., Hidayat, Y., & Saputra, J. (2020). Dynamical analysis and adaptive fuzzy control for the fractional-order financial risk chaotic system. *Advances in Difference Equations*, 674(1), 1-12.
- Susanti, N., Latifa, I., & Sunarsi, D. (2020). The Effects of Profitability, Leverage, and Liquidity on Financial Distress on Retail Companies Listed on Indonesian Stock Exchange. *Jurnal Ilmiah Ilmu Administrasi Publik*, 10(1), 45-52.
- Syarifah, S. (2021). Effect of Earnings Management, Liquidity Ratio, Solvency Ratio and Ratio Profitability of Bond Ratings in Manufacturing:(Case Study Sub-Sector Property and Real Estate Sector Companies listed on the Indonesia Stock Exchange (IDX)). *International Journal of Business, Economics, and Social Development*, 2(2), 89-97.
- Weniasti, A., & Marsoem, B. S. (2019). The Effect of Bonds Rating, Profitability, Leverage, and Firm Size on Yield to Maturity Corporate Bonds. *International Journal of Innovative Science and Research Technology*, 4(8), 286-295.
- Yoo, S. H., & Kim, Y. (2006). Electricity generation and economic growth in Indonesia. *Energy*, 31(14), 2890-2899.

Publisher's Note: SSBFNET stays neutral with regard to jurisdictional claims in published maps and institutional affiliations.

© 2022 by the authors. Licensee SSBFNET, Istanbul, Turkey. This article is an open access article distributed under the terms and conditions of the Creative Commons Attribution (CC BY) license (<http://creativecommons.org/licenses/by/4.0/>).

International Journal of Research in Business and Social Science (2147-4478) by SSBFNET is licensed under a Creative Commons Attribution 4.0 International License.