

CHAPTER I INTRODUCTION

1.1. Background

Every state basically holds a common idea of becoming developed and advanced. These notions are determined by an important key factor such as state economics of the respective state, which serve as a tool of measuring the states' development and advancement in general. With an advancement in state economics as catalyst, thus all other aspects in a state will also prosper and develop as well.

On the process of constructing national economic, a state need a large amount of fundings, be it from government itself or the people. This concern usually hard to be achieved because of the difference in the source of funding from each of those parties. In this matter, **capital market** provides a solution by being an alternative source of funding which can be exhausted by both parties.¹ When government or corporate parties were in need of a quick funding, they can easily produce obligations or bonds and sell it in the market to the public.² Capital market indeed serve greatly to promote national economic growth, most likely because of its strategic functions, such as:³

1. As a facility for collecting funds from public and distribution of those funds onto productive business;

¹ Tavianayati, Yulia Qamariyanti, *Hukum Pasar Modal Di Indonesia*, (Jakarta: PT. Sinar Grafika, 2009), page 1

² *Ibid.*

³ Yulfasni, *Hukum Pasar Modal*, (Jakarta: Badan Penerbit IBLAM, 2005), page 2

2. Simple, cost friendly, and quick source of capital for business activities and national growth;
3. Produce a working chance and opportunities;
4. Promoting the effeciency of production source allocation;
5. Fortifying the operation of market mechanism on governing monetary system, as capital market could serve as an open market operation from time to time by the decision of Central Bank of Indonesia;
6. Supressing high interest rate to a more reasonable one;
7. Serve as alternative of investment for investors.

The term capital market means a place or system of how funding needs are being met for corporates capital needs, which is a market where people buys or sell securities that they had just produced.⁴ On a more classical understanding, capital market can be defined as a market of commercial papers trading such as shares, share certificates, and bonds or other general form of stocks.⁵ According to Dictionary of Economy Law, capital market is defined as a place where seller and buyer which trade for long termed commercial papers, such as shares, and bonds.⁶ Indonesian Capital Market Regulation, which is Act number 8 of 1995 Article 1 (13), defines:

“Capital Market is a business concerning with public offering and securities trading, public corporate in relation to security that it produced, and also

⁴ Munir Fuady, *Pasar Modal Modern (Tinjauan Hukum)*, (Bandung: Citra Aditya Bakti, 1996), page 10

⁵ Najib A. Gisymar, *Insider Trading dalam Transaksi Efek*, (Bandung: Citra Aditya Bakti, 1999), page 10

⁶ A. F. Elly Erawaty dan J. S. Badudu, *Kamus Hukum Ekonomi*, (Jakarta: Proyek ELIPS, 1996), page 14

institutions and profession which related with securities.” [Pasar Modal adalah kegiatan yang bersangkutan dengan penawaran umum dan perdagangan efek, perusahaan publik yang berkaitan dengan efek yang diterbitkan, serta lembaga dan profesi yang berkaitan dengan efek.]

The positive and supportive attitude of the government is one of important aspect to ensure the success of capital market development in a country.⁷ Such attitude refers to actions that should be taken by the government to support capital market in its state. Eventhough Indonesian’s interest on participating in capital market is still at low level when compared to other nations,⁸ the existence of capital market is undoubtly still significant for the prospect of state’s economic growth, particularly on developing countries. Now, the prospect of investment in Indonesian Capital Market is keep getting better as shown firstly by the number of ”*Indeks Hasil Saham Gabungan*” (IHSG) in 2010⁹ which achieved a new level at 3000 in 21 July 2010.¹⁰ This number indicates the inclination on the number of transactions in Indonesian Capital Market.

Moreover, this development was followed by the establishment of Indonesian Stock Exchange¹¹ that serve to facilitate capital market activities which gave positive

⁷ Iman Sjahputra, *Hukum Pasar Modal*, (Jakarta: Harvarindo, 2011), page 60 (Bagian I)

⁸ Iswi Hariyani dan R.Serfianto D.P., *Buku Pintar Hukum Bisnis Pasar Modal*, (Jakarta: Transmedia Pustaka, 2010), page 3

⁹ IHSG is one of capital market indicator used by Indonesian Stock Exchange (IDX) which consist the movement of all regular securities price and preference securities recorded in IDX, Iman Sjahputra, *op.cit.*, page 81 (Bagian I).

¹⁰ Iswi, Serfianto, *op.cit.*, page 5

¹¹ The term used for the place of selling and buying commercial papers (stocks) as well as the system which run it, Yulfasni, *op.cit.*, page 7

impact toward Indonesian capital market development. With stock exchange available, the selling and buying activities on capital market can be done with an improved organizing, subtleties, and efficiency.¹² With this, companies could achieve various benefits, such as easier access to capital gain; more fluid liquidity; business development through acquisition or strategic corporation; and many more.¹³

The main feature of stock exchange right now is the state of the art securities trading system which is called scripless trading. This system concerns on the means of transaction that would be done by the parties.

This advanced system of trading is one result of globalization.¹⁴ In the era of globalization, there's an integration of international market which caused several challenges, such as a tougher market competition; the increase of infrastructure needs; and volatility or uncertainty.¹⁵ Globalization has caused scripless trading system to be applied on stock exchange throughout the world. Because of this reason, our stock exchange also consent on applying this system which has firstly been applied by developed countries as an effort to increase the competitive quality of our market.

¹² Tavinayati dan Yulia Qamariyanti, *Hukum Pasar Modal di Indonesia* (Jakarta: Sinar Grafika, 2009), page15

¹³ David N. Feldman, *Reverse Mergers : Taking A Company Public Without an IPO* (New York: Bloomberg Press, 2006), page 7

¹⁴ Globalization is a process of interaction between individuals, groups, and states, where they're interacting, dependent, connected, and influencing one to another regardless of the space boundaries or distances between them, <<http://id.wikipedia.org/wiki/Globalisasi>>, last accessed 5 October 2011

¹⁵ A World Bank Policy Research “*Private Capital Flows to Developing Countries*” The Road to Financial Integration, 1997

Therefore, it is imperative for legal practitioners and government to gain in depth understandings and synchronize domestic law of capital market system adapting to the new situation that could emerge because of the technological development. This adjustment is important to avoid obstacle in any kind on the fluidity of stock exchange activities which could be caused by cases and legal conflicts that might emerges from the application of this system, that would indirectly jeopardize our state's economic growth.

Before the new trading system exists, the transaction between buyer and seller in stock exchange are done through a tangible script.¹⁶ The script comes in form of commercial papers which serve as a proof of ownership of a shareholder over a securities that he intended to trade. On the old transaction system, when a person has an intention to buy someone else's securities product, then the holder of the product will physically submit the securities which is in form of commercial paper or document to the intended buyer. Whilst in the new transaction system, the transaction is done without a physical submission of the paper, but through a system of book entry settlement¹⁷ by an electronic exchange of asset from respective parties accounts. These activities are done in our stock exchange through a system called Jakarta Automated Trading System (JATS).¹⁸

¹⁶ Within the capital market context, script is a proof of ownership over a securities , Gunawan Widjaja, *Seri Aspek Hukum Dalam Pasar Modal: Penitipan Kolektif*, (Jakarta: PT Rajagrafindo Persada, 2006), page 167

¹⁷ Yulfasni, *op.cit.*, page 103-104

¹⁸ *Ibid.*, page 342-344

Surely, this trading system must adequately fulfill the society's general demand in conducting transaction, which ideally requires fluency, instant speed of transaction, and legal certainty. On the aspect of speed, this system profits more than the usual way of transacting because the trade will be done instantly by the way of book settlement between two accounts of the transacting parties without any need on physical action between the buyer and seller. However, seeing this new system from the fluency and legal certainty aspect, it still has some flaws like the common transaction.

Default is one of the issues that need a special attention in relation to the flaw of this system as described above. By the occurrence of default, it simply means that one of the obligations from one of the parties has not been fulfilled on the time of due date. This issue will surely cause a serious problem if it happened within the scripless trading system used by capital market, and would potentially jeopardize the fluency of transaction activity and legal certainty on the fulfillment of transaction within the system. On Exchange Transaction, default is called Payment Failure.

There are essentially 3 (three) concerning matters which we need to look upon regarding the problematic outcomes that could happen as the result of default on scripless trading system. First, it is almost impossible to commit a cancellation over transactions in scripless trading system. Second, the occurrence of default on a transaction could hinder the trading activities on stock exchange floor, as the authorities will suspend the settlement process of all transactions for several days based on their consideration. Third, investors or securities company clients are

represented by proxies or the brokers in doing transaction, which according to the regulation of Indonesian capital market law are impervious to be directly sued by the other party in transaction (seller or buyer).

When a there's a meet between an offer and acceptance or when a transaction is deemed as matched, the computerized system will automatically closed that transaction. This would make all transaction to be potentially vulnerable to default. Moreover, this system would also insist the parties to finish the defaulted transaction without cancellation alternative. This would cause loss in the form of cost and time for the parties, because in one side the buyer will be obliged to provide a fund in a sudden, and in the other side, the seller can't do any commercial activities in the trade floor because of the suspension enacted by the authorities.

The complication on handling default cases in securities trading furtherly aggravated when done by the investor or the securities company's client. The conflict which most likely to arise is when it turns out that such investor as a client of Exchange Member (Securities Company) doesn't have enough fund to fulfill the transaction in his deposit at the settlement process.¹⁹ This would resulted into a problem, because the name which registered as the buyer of such securities will be the name of the securities company acting on behalf of his client, or the investor,

¹⁹ According to opinion of Michellius Renatta, a broker on PT. OSK Nusadana Securities Indonesia, through interview on 1 November 2011 conducted in Plaza Lippo Lantai 14, Suite 1401.

which is a consequence of collective custody.²⁰ Because of that, a question arises regarding the responsibility issue of the occurring default.

On addressing this problem, a civil suit will surely reduce the capital market's efficiency on all aspect, and this would likely make other investors to be reluctant on participating or to invest on the stock exchange. Such result is most likely to be the case because the dispute settlement using that method will take too much time and also caused by the lack of trust by the investor regarding the credibility of Indonesian judges and court proceeding, which make investors to be rarely prompted to take this choice as it has an image of inefficiency and uncertainty.

Therefore, the usage of insurance or guarantee service like one that is usually provided by insurance company is a method which must be developed in the stock exchange trading activities. It must be, because there's a certainty on the return of loss and it can be gained by a relatively short amount of time using this kind of service. These two are very beneficial factors to the transaction system in stock exchange which requires efficiency. Clearing and Underwriting Institution (LKP) is one of the Self Regulating Organization in stock exchange which made specifically to fill this role to be an insurance company. This organization is a party which establish the service on clearing and guarantee the Exchange Transaction settlement.²¹ PT. Kliring dan Penjaminan Efek Indonesia (KPEI) or Indonesian Securities Clearing and Guarantee Company is the only legal institution right now which undertaking this

²⁰ Gunawan Widjaja, *op.cit.*, page 170

²¹ Iswi, Serfianto, *op.cit.*, page 42

role. The clients which utilize this service are basically securities company or Exchange Members that has fulfilled the requirements of membership and will be called Clearing Members.

Therefore, the legal relationship between securities company with KPEI is between the insured and insurer, which is the same as the relationship in insurance company with its client. The original legal relationship between the transacting Clearing Members will change as well, which priorly are rights and obligations to one and another over a Exchange Transaction that they have conducted, into the rights and obligations between the transacting parties (Clearing Member and its counterparty in the transaction) with KPEI.²² On guaranteeing method, KPEI will replace the legal obligation of its defaulting member or whom has failed to fulfill its obligation to the other party, and then such party will be personally responsible to KPEI.

KPEI gain profit by collecting the payment fee from its members on the service that they provide. On executing its guarantee function, KPEI will then collects another fund from its members as one of the requirements of their membership. This fund will then be used by KPEI to conduct guaranteeing,²³ thus the loss which might occurred could be avoided or compensated without any need for bringing such matter into court attention.

²² *Ibid.*, page 49

²³ M. Irsan Nasarudin, *et.al.*, *Aspek Hukum Pasar Modal Indonesia*, (Jakarta: Penerbit Kencana (Prenada Media Group), 2006), page149

Moreover, KPEI also taking role as an authorized body to do the clearing process or determining the right and obligation of the seller and buyer parties in the Exchange Transaction. On each clearing process, through computer, KPEI will determine the securities ownership in a transaction, and the fulfillment of payment over the ownership of such securities, which made this institution is one of the most important party on the Exchange Transaction process. For these reasonings, KPEI is an adequate institution to answer the issues provided by this paper.

The function of this body is described clearly in article 1 point 10 of Indonesian Capital Market Law (UU No. 8 tahun 1995 tentang Pasar Modal, herinafter referred as ICML):

“Lembaga Kliring dan Penjaminan adalah Pihak yang menyelenggarakan jasa kliring dan penjaminan penyelesaian Transaksi Bursa.”

Furthermore, article 14(1) of ICML governs the purpose of LKP as such:

“Lembaga Kliring dan Penjaminan didirikan dengan tujuan menyediakan jasa kliring dan penjaminan penyelesaian Transaksi Bursa yang teratur, wajar, dan efisien.”

KPEI's obligation on guaranteeing the settlement in Exchange Transaction is specifically regulated in article 55(2) of ICML:

“Lembaga Kliring dan Penjaminan wajib menjamin penyelesaian Transaksi Bursa.”

Each Exchange Transaction is an interconnected transactions one to another from time to time. It is because the transaction which has happened before is a basis

to the next transaction, therefore the cancellation of the prior Exchange Transaction will influence the next; from this point of view, Clearing and Underwriting Institution have the obligation to ensure the completion of Exchange Transaction by realizing the fulfillment of each Exchange Member's right and obligation conducting the Exchange Transaction.²⁴ In its function, KPEI applied *multilateral continuous net settlement* system, which means that the Clearing Member's obligation today which is not yet fulfilled, will be combined with the right and obligation which would be acquired the next day.²⁵ This system ensure the possibility of instant settlement on the moment when the transaction happened, therefore when dispute settlement, especially in the matter of transaction settlement guaranteeing, the process would not be long-winded. In other word, the guaranteeing service would promote certainty to the fulfillment of Exchange Transaction for Clearing Member which already fulfilled their obligations, certainty on the timing of the settlement, reduction of the Exchange Transaction failure frequency, and in the end would promote trust and confidence in investor to transact in Indonesian Capital Market.

The work of LKP or KPEI is very significant towards the movement of the market, and at this moment, LKP is having a really good result. In the whole year of 2011, it is reported that not even one Clearing Member was having Payment Failure or default in the Exchange Transaction settlement. This fact was cited from press

²⁴ Explanation article 55(2) of ICML

²⁵ Irsan, *et.al.*, *op.cit.*, page 87

broadcast of KPEI, on Saturday (31/12).²⁶ The volume of Exchange Transaction which settled through KPEI was 42,48% or 2,10 billion unit of share per-day; and value efficiency from the average daily Exchange Transaction settlement is at 82,32%, so that the daily average of fund settlement value which is done through KPEI is in amount of 17,68% or Rp 845,79 billion. With a significantly good level of Exchange Transaction clearing settlement efficiency, seen from both the amount of securities or the fund, it surely will reduce the burden of Clearing Members in settling its Exchange Transaction obligation which finally will improve the efficiency process of Exchange Transaction and will improve the market liquidity.

Issues and reasonings that has been presented above are the writer's considerations to make this paper which titled **Juridical Assessment on the Role of Clearing and Guarantee Institute in Event of Exchange Transaction Default.**

1.2. Formulation of Problem

The formulation of problems are:

- 1.2.1 What are the functions and role of the parties in the Exchange Transaction mechanism?
- 1.2.2 How Clearing and Underwriting Institution's function and role on guaranteeing the Exchange Transaction in case of default or Payment Failure,

²⁶ <<http://pasarmodal.inilah.com/read/detail/1813681/anggota-kliring-tidak-alami-gagal-bayar-pada-2011>>, last accessed 15 February 2012

and the method of default settlement process between the Clearing Member and its client through civil settlement which come after it?

1.3. Objective of Research

The purpose which writer wants to achieve from the making and research in this paper are:

- 1.3.1. To have a complete and concrete understanding of the legal relationships between the parties within Exchange Transaction mechanism.
- 1.3.2. To research and analyze LKP's guaranteeing function in finishing the default or Payment Failure and the method of private civil settlement between the Clearing Member and its client.

1.4. Benefit of Research

1.4.1 Academic aspect

- 1.4.1.1 The writer hoped that this research would become a contribution to the development of legal science in general and specifically to business law and capital market law regarding how to handle a typical default cases on Exchange Transaction.
- 1.4.1.2. This paper would also serve as a source of reference and advanced consideration regarding the similar topic of Exchange Transaction default and LKP's role as Indonesian capital market's guarantee body in a general and specified sense.

1.4.2. Practical Aspect

- 1.4.2.1. This paper could serve as compiled information and guidelines for parties actively practiced in stock exchange trading activities, specifically for investors having intention or already practicing securities trade in stock exchange whose seeking for information regarding legal relationship between parties in Exchange Transaction, and its mechanism or trading system in Indonesia.
- 1.4.2.2. As guidelines for legal practitioners and people in society regarding the settlement process of default case in Exchange Transaction using LKP's guarantee function, and the private settlement between the concerning Clearing Member with its client.

1.5. Writings Systematics

CHAPTER I: INTRODUCTION

On this chapter, the writer elaborate the general bacground to the topic, formulation of the problem, purpose of the research, benefit of the research, and the systematic of the writing.

CHAPTER II: THEORETICAL AND CONCEPTUAL FRAMEWORKS

This chapter will discuss the general concept of securities trading or Exchange Transaction in Indonesian Stock Exchange which consists of legal theories such as: legal position of the parties in the Exchange Transaction; Exchange Transaction

mechanism; securities position as legal object according to Indonesian Civil Law.

CHAPTER III: RESEARCH METHOD

The method of research which the writer used in constructing this paper will be elaborated and discussed in this chapter, which contains the type of research being used; material collecting procedures; characteristic of analysis; and obstacles in the research that the writer faced and how the writer overcome those obstacles.

CHAPTER IV: RESEARCH RESULT AND ANALYSIS

The writer will elaborate the result of research and its analysis, which obtained through materials relevant to the problem or issues formulated in this paper.

CHAPTER V: CONCLUSION

On this chapter, the writer will give a conclusion which is essentially consists the result of research, and suggestion regarding the topic of this paper on what improvements can be made by the government or authorities in relation to securities trading system.