

Legal Protection for the Debtor and Credit or Pledge of Shares on Credit Banking in Indonesia

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Abstract

The purpose this research is to investigate, analyze and conclude arrangements pledge of shares in Indonesia, and to find new ideas and develop legal doctrine that stock as collateral to provide legal certainty, which in turn will provide legal protection for the parties. Security measures to minimize the incidence of the problem can be done by betoken / include clauses in the agreement to protect the interests of creditors and debtors with the limitations that exist. Revise the rules regarding pledge of shares by the government as a set function is needed. Pledge of shares is not systematically arranged, scattered in several regulations. It is there for necessary regulation sledge of shares otherwise regulated or there needs to be compiled so there are no multiple interpretations about the rules of pledge of shares.

Three important reasons to do research on the legal protection of the pledg or and the pledgee holder of shares in the bank in Indonesia;

First; Conditions of pledge of shares inadequate, currently, no specific pledge provisions and detailed, they are spread conditions, incomplete and unsystematic;

Second, the absence of rule of law, because the freedom of contract in the agreement pledge to raise a dispute that could lead to disorder and injustice, for example in the case; parate execution even harder to implement existing provisions granted to lenders pledge for the payment of the receivables take precedence over other creditors. There are multiple interpretations of the provisions of the Civil Code of the execution of pledge and the lack of a common interpretation of the execution of pledge of shares in the Indonesian legal uncertainty, so there is no legal protection for debtors and creditors in the pledge agreement.

Third, Shares has economic value as an object of loan guarantees, which give the right to charge or payment and settlement amount of money given to the holder of the bond. The absence of legal certainty about the pledge raises counter-productive to attempt to raise capital through the market. Mortgage stocks are often problematic in its implementation, the absence of coordination and even there is a contradiction between the existing regulations regarding the pledge so hard to give legal protection to the parties in the agreement of pledge.

Quoting the slogan of the Board of Lombardy solve the problem it creates new problems. Government in this regard must be responsive in order to establish a specific law of pledge for the welfare of the people of the country in accordance with the purpose stated in the Preamble to the Constitution of the Republic of Indonesia Year 1945.

The problem, of course, shows the need for the completion of the provision of pledge of shares in terms of both formal (laws and regulations) and in terms of substance (the community) so that it can provide a way out for the realization of this pledge in shares of mutual benefit to the parties (win-win contract), on the one hand to provide legal certainty and justice on the other side. Although it is realized to combine the rule of law and justice, an act that is possible, necessary provisions of the legislation which is expected to accommodate different interests proportionally, then the dilemma apparent contradictions and imbalances between the rule of law and justice are expected to be minimized. Even be a necessity to realize the mutual pledge of shares of the parties (win-wincontract), thus the relationship can be a fair and mutually beneficial. Not the other way, to the detriment of one party or even ultimately to the detriment of the parties to a pledge. Article 1155 of the Civil Code regulating the parate execution pledge of shares contains multiple interpretations and cause legal uncertainty, which in the end the lack of legal protection for both the the debtor and creditor shares pledgorpledge holder.

Uncertainty is also derived from the vague and contradictory regulations pledge to each other. Causing uncertainty in the application of the law by government institutions, especially the courts. Decision No. 332 / Pdt.P / 2001 / PN Jak.Sel to setting No. 334 / Pdt.P / 2001 / PN.Jak.Sel application Deutsche Bank Aktiengesellschaft, by share pledge agreement, the lender has the right to sell all of the shares that have been pledged in private or "non-public". In contrast to the determination No.PTJ.KPT.01.2005 to setting No. PTJ.KPT.04. 2005 jo. Decision no. 33 / Pdt.P / 2002 / PN. Jaksel to setting No. 36 / Pdt.P / 2002.PN.Jaksel, lenders sold pledge privately held shares on the basis of the contract (have the right parate execution) but after that it keeps asking for the determination of the court that the sale is valid. In addition, the Supreme Court of Indonesia in its decision no. MARI 115PK / PDT / 2007 as amended. Call 517 / PDT.G / 2003 / PN.JKT.PST, sale shall be made by way of public auction or by any other means specified by the court decision, which was final and binding. The third difference is due to the determination and decision of the purposes of the legal issues "unless otherwise specified" in Article 1155, paragraph (1) of the Civil Code.

Pursuant to Article 1155 of the Civil Code there are two ways to sell items pledge, first, by selling public, and second, by selling non-public if it has been agreed. When the object is shares, then the provisions of Article 55 and Article 57 paragraph (1) of the Constitution of the Republic of Indonesia Number 40 of 2007 on Limited Liability Companies (the Company Law of 2007) must be considered. The provision requires the parties to consider the transfer of the shares is determined by the constitution and by-laws and regulations, which require that the shares to be offered to the other shareholders in advance or right to subscribe shares in advance (preemptive right). In this case if the pledge agreement is a reflection of the freedom of contract can exclude the provisions of the law and the articles of association of the company, (whether the agreement entered into by the debtor and the creditor in the case of the sale of the power of self-assurance of things not violate provisions in the Company Law of 2007), with the assumption that if there is no agreement in the General Meeting of Shareholders (AGM), or in this case there has been a abuse of situation.

Furthermore briefly whether the agreement made between the debtor and creditor of pledge of shares agreement (the share pledge agreement) and the articles of association of the company may exclude preemptive rights set forth in Article 55 of the Company Law of 2007.

If the debtor cannot pay off the debt within the time limit specified by the collateral pledge of shares, whether the creditor must initiate a case to court in order to obtain a court decision, or simply just apply to the court to obtain a court order to make the sale of shares as collateral to pledge. Arrangements that exist in this regard are not clear.

If creditors making claims against the debtor, then what is meant in Article 1155 of the Civil Code to facilitate the repayment of the debt of the debtor that has passed the time limit will not be reached. So it can be said that these provisions cannot be applied as it is. Moreover, because the legislation provides an opportunity for the sale of the shares pledged in general can be auctioned or sold enough personally or under the hand then cause legal uncertainty for the parties to the share pledge agreement. With the freedom of contract given Article 1155 of the Civil Code which give rise to differences in the interpretation of results in the absence of legal certainty and ultimately lead to the absence of legal protection for debtors and creditors in a stock pledge agreement.

In today's business world of credit is a common happening. Creditor, especially banks experienced will wherever possible seek a guarantee, with the hope he will get his money back on time. If payment of the debt is not the case, he would try to obtain repayment from the debtor who fails to riches. The law provides various forms of guarantee agency that can be used banks as creditors to lend and debtors to obtain funds as well. One of them is a pledge. Pledged is a guarantee agency for moving objects. Because the stock is moving objects for security institutions is a pledge of shares. So if someone obtained a credit / debt to the bank, he can ensure that stock as collateral for the debt if the specified time cannot be paid by him. The nature of pledge of shares in this case only complement and strengthen the confidence and the ability of the debtor and the collateral position essentially is a project funded by the credit facilities provided creditors.

At the beginning of the beginning of the Civil Code in force in Indonesia May 1, 1848 in Government Gazette (stb) 1847-23 mortgage guarantee agencies (pand) is sufficient to meet the needs of the underwriting practices. At that time traffic underdeveloped credit and was pledged thing, especially in the form of art or jewelry. Things like that certainly is not the thing for their business. Industrial development and trade directly affect the development of pledged guarantee agencies. One such development is the emergence of the implementation of pledge of shares, which is one way to raise capital for the company.

The fund can be obtained from the owner of the company itself and of the debt, or it can be said that the source of corporate funds can come from both internal and external. One alternative external funding is by pledging shares as collateral, or offering the shares on the stock market.

Conditions prevailing in the Indonesian Civil Code are a product of the Dutch colonial government as a mere imitation of *Burgelijk Wetboek* in The Netherlands. On the basis of the provisions of Article II of the Transitional Provisions of the Constitution of Republic Indonesia 1945 (Constitution 45) of the Civil Code shall remain valid. Supreme Court Circular No. 3 of 1963 (known as the SEMA 3/1963) become the legal basis for the judge in the case will impose or not a clause or provision contained in the Civil Code, and the provisions are considered no longer relevant to the advancement of age. Civil Code does not constitute an *Wetboek* but *rechtsboek*. Thus formal judicial Civil Code shall remain in force until there is a new provision in particular pledge.

In the field research, the researcher selects a sample of respondents who used a total of ten (10) respondents consisting of five (5) private banks and five (5) government banks. With a sampling technique in the study using a sampling technique (purposive sampling) with the criteria of the respondents as a performer and found the conclusions of the research in the field is that the pledge is not administered at Bank Indonesia, the central bank.

Based on the research results can be described in normative legal safeguards for debtors and creditors give pledge holders of shares in bank credit in Indonesia, it can be concluded that, the regulation of pledge of shares unsystematic, fragmented in several rules and regulations that exist among any conflict with one another, different interpretations of the provisions requires Completion in casuistic that it is difficult to apply as it is. This occurs because the civil law reform done partially.

Liens regulated in the Civil Code, the presence of the difficulty in answering the problems, because the legislators when creating regulations about the lien only focus on the tangible objects only. So it is necessary to establish a law that specifically regulates pledge more comprehensive.

There is a contradiction between the characteristics of tangible movable property liens and scrip shares in the stock market due to the requirement that requires the lien is a lien for the legitimate transfer of mortgaged goods under the authority of the creditor. In fact pledge of shares in a scripless trading system is much more efficient and safer when compared with the pledge of shares is physical. Since the implementation of the pledge of shares in a scripless trading system both the pledgor and the lien holders do pledge only by giving instructions to the competent institutions alone, and stocks moved electronically from one account to another account, without the need to issue shares of collective custody. With the release of objects that should be the object of the lien debtor and control of power delivered to the creditor or a third party as a condition of its validity in accordance with Article 1152 of the Civil Code, causing a lien against tangible movable goods become less popular than the pledge of shares in a scripless trading system in the stock market. Procedures for implementing the pledge of shares in a scripless trading system, has qualified *inbezitstelling* outlined in the code of civil law, and guarantee the most appropriate institutions to ensure stock is a pawn. Thus the pledge provision in code of laws still relevant civil law pledge of shares used for the pledge of shares is primarily physical.

The amount of the guarantee issue pledge of shares on the stock exchange due to the current pledge provision still refers to the provisions stipulated in the Civil Code, which is inherited from the Dutch colonial government were less relevant to the changes and dynamics of the Indonesian nation.

Code of civil law does not recognize stock scripless, then the way bail is sought on specific provisions governing it. The law also does not provide limited liability underwriting the regulation of stock scripless. Just pointing out that on how the transfer of shares traded in the stock market, regulated in legislation in the field of stock markets. So as to further facilitate and ensure legal certainty regarding the implementation of pledge of shares in a scripless trading system, should be made a rule specifically pledge of shares in the form of legislation with reference to the observance of the Civil Code and the Company Law of 2007, and other applicable provisions in stock markets, or by amending several articles of the regulations on the pledge of shares contained in the Civil Code and the Rules of the Central Securities Depository.

There are factors that can hinder the sale of the pledged shares if the debtor cannot pay off the debt at a specified time limit, as set forth in Article 1155 of the Civil Code. This can happen if it turns out the shareholders in making or implementing the company's articles of association in accordance with Article 57 of the Company Law of 2007 requires that the first must offer to the other shareholders, and must receive prior approval from the company organs.

The principle of freedom of contract (*contractvrijheid*) set forth in the provisions of Article 1338 paragraph (1) of the Civil Code, contract law shows that adhere to the open system, which provides an opportunity for all parties to make an agreement. Such provisions actually provide legal certainty for the parties who entered into an agreement, in which case the agreement pledge of shares in banking credit. Article 1338 subsection (3) has an opportunity to provide a sense of justice by way of any implementation of the agreement must be in good faith. Assurance that justice can also be guided by the provisions contained in Article 1337 of the Civil Code, that an agreement in this case the stock pledge agreement will be canceled if it is contrary to law, good morals or public order. Therefore, good faith is required from the beginning of the manufacture of pledge of shares agreement until the end of the agreement.

Freedom of contract provided by the statutory provisions to the parties in the pledge of shares, there is still a limitation. Although the parties to the pledge agreement can specify how sales are under hand (private sale) or in public, then it should not be approved without the permission of the judge in the form of determination is not the verdict. In other words, although the share pledge agreement is an implementation of the freedom of contract given the legislation, but the parties cannot make the agreement to the detriment of the other party in the agreement they create and the freedom it should be no limits.

In order for justice and the rule of law in order to create legal protection for both the creditor and the debtor to do the efforts in making the Pledge of shares based on freedom of contract, among others;

1. In making the pledge agreement should be avoided the possibility of termination of the debtor's pledge before the debt is paid off.
2. Extension of pledge agreements must not conflict with the provisions of the articles of association of the company that issued the shares pledged.
3. Execution of shares on behalf cannot be done through an auction, because assignment of rights shares must be notified in writing to the management company and the board of directors must be enrolled in the register of shareholders.
4. Make a new deal after the debtor is declared in default by the court. With this new agreement, so there is a balance between the creditor and debtor position of the pledge agreement, loan agreement, because in that case the debtor has the right to say anything to their wishes.
5. In the execution of pledge by the sale closed, the transfer of shares must comply with the specific provisions governing the shares, particularly on offer prior to the other shareholders (preemptive right). Non-compliance with these provisions result in a violation of the law, which means the transfer of the shares is not valid.
 - a. In relation to the preemptive right provisions contained in the Company Law of 2007 is a provision that is coercive, legal consequences are a collateral pledge, preemptive right cannot be waived by agreement of pledge. Preemptive right can only be waived with the conditions specified in the limited Article 57 paragraph (2) of the Company Law of 2007 or if it has been removed by the owner of the right preemptive itself.
 - b. Paragraph of Article 1155 (1) gives the possibility for the parties to enter into agreements other than those set out in these conditions, but when the thing was pledged is stock, then the stock pledge agreement should not be contrary to Article 1155 paragraph (2) and taking into account the Company Law 2007 about preemptive right, except when the rights granted in the Company Law of 2007, is not used by other shareholders.
6. Creditor / mortgage holder shall require the agreement of pledge to the other shareholders in writing, expressly waive the right to purchase shares will be was pledged, and they agreed that if the debtor / pledgor of default, the mortgage holder may sell the pledged shares without the need offered prior to the other shareholders.
7. In the execution of pledge of shares through sales in the open, in principle, the auction office will not accept applications for auction if there is no permission from judges. Before a judge issued a permit, the judge will call the party entitled to make an offer. If the parties do not exercise their right to make an offer, it must relinquish its rights remain with the determination by the court. This is necessary to avoid a lawsuit from mortgage lenders do not accept the execution of pledge. Lawsuit of the pledgor can cause legal uncertainty for both mortgage holders and the company issuing the shares, and the purchaser of such shares.
8. Creditors must be acting in good faith at the time of applying to the court to be able to sell the pledged shares to a balance and fairness to the debtor's debt payments without determining the price of shares is sold by the arbitrary way.

9. Creditors receiver mortgage agreements should require the pledge to him was given the power that cannot be withdrawn by the pledgor to notify the board of directors of the company on the agreement of pledge and that pledge of shares listed company directors concerned in the DPS and the special register of the company to ensure the validity pledge totals. Thus, the creditor obtains written evidence of the registration of the lien of the directors of the company whose shares are pledged.
10. Require the agreement pledge to empower the mortgage holders, to the name of the pledgor of shares, to attend and vote at the AGM of the company for unpaid debts in full. This is a protection for mortgage holders to ensure the debt of the debtor is paid.
11. Creditor requires the written consent of all members of the organs of the company whose consent is required by the articles of association of the company, to give approval to the mortgage holder to sell the pledged shares for debt and the debtor has not paid off, the composition of the organ in question cannot be altered without the prior written consent the creditor / lien holder.
12. The pledge agreement governed the situation when prices decline very sharply, causing the stock price is not sufficient anymore to guarantee fulfillment. This arrangement is intended to provide certainty to the redemption of the debt of the debtor. For example, by adding the objects to pay off bond debt, when in fact, no longer able to guarantee the debt of the debtor sufficient due to the decline in share prices as collateral.
13. Require the agreement pledge to empower the mortgage holders, to the name of the pledgor of shares, to attend and vote at the AGM of the company for unpaid debts in full.

The freedom of contract can be provide flexibility for creditors and the debtors to resolve factors that may prevent the sale of shares as collateral in order to meet debt repayment when the debtor defaults, it is limited by good faith, law, morals and public order.

Freedom of contract cannot be made the basis for any person to enter into a contract that excludes a specific provisions governing an example for the execution of the pledge through direct sales, pledgee and buyers must follow the terms of purchase as stipulated in the Civil Code and the regulations other relevant legislation, while sales through auctions in addition to fulfilling the requirements should also comply with the provisions of the auction.

The absence of coordination with the regulations of pledge of shares, and there are judges who vary in the same things that legal certainty is not achieved, and ultimately cannot provide legal protection for debtors and creditors in the pledge agreement.

1. In the case of the execution of pledge addition to Section 1155 of the Civil Code and Article 1156 of the Civil Code must also consider the terms of the transfer of the company's shares are listed in Article 55, 56, 57, 58 and Article 59 of the Company Law of 2007. In addition, it also should be concerned about estimates of the Company which are different from one another on the transfer of shares.
2. Multiple Interpretations posed by Article 1155 of the Civil Code and Article 1156 of the Civil Code relating to the execution of pledge creates legal uncertainty. Open the possibility of different interpretations of the rule, of course, makes it difficult for the parties entered into a pledge to fill the existing laws to answer the problem of pledge.
3. In the context of Article 1155 of the Civil Code, the situation and the position of the parties in the intersection causing erratic and conditions of uncertainty. Uncertainties will continue as long as the Supreme Court of the Republic of Indonesia inconsistent. Having definite rules in order to protect the parties entered into a pledge to create a sense of peace and justice for all stakeholders.
4. Execution scripless pledge of shares not as simple the object of pledge of movable tangible, so there must be a disclosure requirement. Notice must be given to the debtor in advance in accordance with Article 1156 of the Civil Code. This must be done to protect mortgage borrowers on the goods sold, the value of the goods can only be determined at the time of sale or execution.
5. In the case of shares pledged is a controlling shareholder, the execution must be notified in advance to the debtor or other parties concerned. As it relates to the operation of the issuer's management, but the execution is the same as defined in the Civil Code. Execution or sale of such shares shall comply with public company acquisitions as specified in the Company Law of 2007, the Government Regulation No. 27 of 1998 on the merger, takeover, and consolidation Company Limited, and Rule No. IX.H.1. In this case it is not necessary to use the rules of the Tender Offer (Rule No. IX.F.1), because this procedure is excluded by the 11 e Rule No. IX.H.1., In the case of any determination or judgment which has the force of law anyway.

In the event the recipient does not want to mortgage the tender offer, it is necessary to apply the setting to the judge in order to execute the pledged of shares. In execution, it could be the pledgee to sell the pledged shares by the pledgor is supervised by the bailiff and the receiver mortgage.

6. When the shares are was pledged not controlling shareholders, the execution can be carried out directly by parate execution, with the auction as agreed by the parties, or to apply to a judge to give the pricing of the shares to be sold. Especially with regard to pricing by the judge, it is important for the objectivity can be maintained. The judge in this case may appoint professional appraiser to do a valuation of the share price objective.
7. In the event that the position of creditors and shareholders held by persons / entities are the same, there is some sort of conflict and contradiction when shareholders as owners of the company filed a bankruptcy petition against the company. Bankruptcy law provides that the eligible to submit for bankruptcy is the only concurrent creditor; the creditors have no collateral material. While the creditor separatists (preferred creditor) is a creditor holding collateral, such as mortgage holders, mortgages, the pledge and fiduciary, therefore, not entitled to file for bankruptcy. Thus, the actual the creditor can execute rights movement; including the sale of collateral it holds its own as if nothing happened bankruptcy. As a shareholder, received the payments when the bankruptcy liquidation. With a record when there are remaining assets, shareholders will not get anything. Indeed there is a conflict of interest, because if debtor is liquidated the creditor also has to bear the risk.
8. The absence of an explanation of the law on the sale of shares at the best price, so that the best price is the stock price is determined at the time of sale or the execution is in accordance with the market price. Faced the reality of fluctuating prices, it must be identified and the benchmark price is realistic. Benchmark is considered to anticipate fluctuations in the real price of shares on the market, not the nominal price or offering price. Therefore, the real price of a day is not expected to escape the influence of the change, the real prices were used as the basis for determining the benchmark stock price estimates as loan collateral.
9. Lastly uniform interpretation of the provisions of the pledge of shares to fill the existing law is absolutely necessary.

Some suggestions for improving the development of academic and practical law, to provide justice for the parties to enter into an agreement pledge of shares the credit of the banking sector in Indonesia, among others:

We recommend that law reforms of pledge of shares is systematically collected in a compilation that are in a system that has a foundation in the form of a unified legal principles, and the need for changes or revisions to several chapters on setting pledge of shares in the Civil Code.

To further facilitate and ensure legal certainty regarding the implementation of pledge of shares in a scripless trading system, should be made a rule pledge of shares specifically with reference to the observance of the Civil Code and the Company Law of 2007. In addition to the need to amend some provisions, among others;

1. Amend Article 1150 of the Civil Code by refining the definition of pledge is "an agreement made between the creditor and the debtor in which the debtor turn over moving objects to creditors to secure repayment of a debt lien, when the debtor fails to perform his feat."
2. Amend paragraph 1 Article 1155 of the Civil Code with the following formula; "If the debtor / pledgor breach of contract after a specified grace period past, or if not specified a period of time, after being given a warning to pay, the creditor / pledge holder by law is given the right to conduct pledge on his own authority (parate execution) with how to sell the pawned goods in public (auction) according to local custom on terms which would be made, with the intent of obtaining repayment of the amount receivable with interest and all costs associated with the execution, of the sale of the pledged revenues."
3. Amend Article 1156 of the Civil Code to formulate as follows: "In the event that the debtor / pledgor of default, the creditor / pledge holder may apply to the Chairman of the Court, that the judge set the execution pledge way through the sale under the hand (not through the auction) with the terms and conditions set by the judge with justice and balanced, to settle all obligations of the debtor to the creditor, or / and the judge may specify that objects remain on the mortgaged permitted pledge holder by means of its own pledge holder to buy goods pawned at a price set judges in their establishment."
4. Article 3.6.2. Rules of the Central Securities Depository should be amended, that in the event the debtor pledgor, want to cancel the share pledge agreement, the creditor is required to obtain approval of pledge holder.

5. It is necessary to repair the definition of acts, in the formulation of an agreement on Article 1313 of the Civil Code, namely:
 - a. Act shall be construed as a legal act, the act is intended to create legal consequences;
 - b. Adding the words "or mutually bound themselves" in Article 1313 of the Civil Code.

That the formulation becomes: "Agreement is a legal act, in which one or more persons bind themselves or mutually bind themselves to one or more"

It is suggested that stakeholders in the agreement pledge of shares to remain bow to the restrictions that have been defined rules exist for each side did not lose interest in the pledge.

The government should streamline some of the rules and regulations of the pledge of shares so that there is law certainty, which in turn gives legal protection to the parties to the agreement pledge of shares.

1. Suggested in the case of a debt settlement with the pledge collateral was not made with the auction.
2. It is advisable to ensure certainty and creates a sense of security for the debtor and creditor, in the case of pledge of shares, to members of debtors and creditors in the pledge of shares is required to report transactions on a daily basis to IDX.
3. To the judge in the court throughout Indonesia, upon receiving the petition pledge of shares to the provisions of the particular of shares of preemptive right stipulated in the Company Law of 2007.
4. The judge must consider the fairness of the balance between debtor and creditor holders of the pledge lenders by setting example among other creditor cannot determine the price of arbitrary objects warranty. Allowing creditor to buy their own the objects of the pledge at the price set by the judge, assisted by the Appraisal for a set price.
5. In delivering the decision, the judge must be able to provide legal certainty to give the same results in the same thing. Thus it would not be confusing and may ultimately provide certainty and legal protection for debtor and creditors.
6. To the Bank as the holder of the pledge creditor and debtor pledgor, it is advisable to establish early on in the creation pledge of shares agreement is about preemptive right, so it will be easier to execute the pledge of shares if the debtor defaults.
7. Government in this regard should create stronger legislation focused on the importance of a proportional relationship between the debtor and the creditor in the pledge of shares agreement.
8. Government as a holder mandate as a legislator its implementing regulations should be made of Article 60 of the Company Law of 2007 and the implementing regulations of Article 57 paragraph (1) of the Company Law of 2007, and determines special provisions assignment and execution procedures pledge of shares.