

Repurchase Agreement (Repo) Buyers' Protection after the Issuance of the Regulation of the Financial Services Authority Number 09/POJK.04/2015

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Abstract

This paper aims to find out the Repurchase Agreement (Repo) buyers' protection in the capital market, after the issuance of the Regulation of the Financial Services Authority Number 09/POJK.04/2015 on the Guidelines for Financial Services Institutions Repurchase Agreement Transactions (POJK Repo). Repo transaction is initially considered as loan transaction and lending securities instrument between two parties based on an agreement. Then, on a predetermined date, the same return on securities will be given at the agreed price. However, after the issuance of the POJK Repo, the repo transaction qualifies as a sale and purchase transaction with a repurchase agreement. As a result, the initial understanding that repo is a loan and lending transaction is no longer valid. In the Global Master Indonesia Repurchase Agreement (GMRA Indonesia), the repo seller's responsibility is unclear when the value of the securities held by the Repo Buyer Party cannot fulfill the value that must be paid by the Seller on the repurchase date. Therefore, despite the fact that Indonesia has had repo transaction guidelines, the GMRA Indonesia as mandated by the Financial Services Authority Number 9/POJK.04/2015, the responsibility of the repo Seller has not been regulated explicitly.

Keywords: default, REPO, repurchase.

Perlindungan Pihak Pembeli dalam Transaksi *Repurchase Agreement* (Repo) di Pasar Modal Pasca Diterbitkannya POJK No. 09/POJK.04/2015

Abstrak

Penulisan ini bertujuan untuk mengetahui bagaimana perlindungan transaksi bagi Pembeli dalam Repurchase Agreement (REPO) di pasar modal, setelah dikeluarkannya Peraturan Otoritas Jasa Keuangan Nomor 09 / POJK.04 / 2015 tentang Pedoman Transaksi Repurchase Agreement Lembaga Jasa Keuangan ("POJK REPO"). Transaksi REPO pada awalnya dianggap sebagai transaksi peminjaman dan peminjaman instrumen surat berharga antara dua pihak berdasarkan perjanjian, kemudian pada tanggal yang telah ditentukan, pengembalian atas efek yang sama akan diberikan pada harga yang disepakati. Namun, setelah penerbitan POJK REPO, Transaksi REPO memenuhi syarat sebagai transaksi penjualan dan pembelian dengan janji pembelian kembali. Akibatnya, pemahaman awal bahwa REPO adalah transaksi pinjaman dan peminjaman tidak lagi berlaku. Namun, dalam

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Perjanjian Pembelian Kembali Global Master Indonesia (GMRA Indonesia), belum jelas bagaimana pertanggungjawaban REPO Penjual, jika nilai dari surat berharga yang dimiliki oleh Pihak Pembeli REPO tidak dapat memenuhi nilai yang harus dibayarkan oleh Pihak Penjual pada tanggal pembelian kembali. Oleh karena itu, meskipun Indonesia telah memiliki pedoman transaksi REPO yaitu GMRA Indonesia sebagaimana diamanatkan oleh POJK No.9 / POJK.04 / 2015, tetapi pertanggungjawaban pihak Penjual REPO belum diatur secara eksplisit.

Kata kunci : gagal bayar, pembelian kembali, REPO.

A. Introduction

Advanced and rapidly developing capital market is the dream of many states. Capital market has a big role for a state's economy because the capital market runs two functions at once: the functions of the economy and financial. Capital market has economic functions because the market provides facilities or vehicles that bring together two interests, namely the people who have excess funds (the investors) and the people who need funds (the issuers, the parties that issue securities). The capital market provides facilities to transfer funds from parties that have excess (lenders) to the parties who need funds (borrowers).

The capital market enables the parties who have excess funds to invest the funds in the hope of obtaining returns. On the other hand, the issuers (in this case, the companies) can utilize the funds for investment purposes without having to wait for the availability of funds from the company's operations. Capital market has a financial function because it provides the possibility and opportunity to obtain returns for the fund owners, according to the characteristics of the chosen investment.¹

The influence of the stock situation on the benchmark of the issuer's success makes many companies look for other alternatives or other ways to increase the falling stock prices. One of them is by conducting a securities sale transaction with a promise to repurchase in a certain time or commonly referred to as a repurchase agreement (repo).²

According to Fleming and Garbade,³ a repurchase agreement is expected to be issued at a higher price on a later date. A repo is thus broadly similar to a collateralized loan. It means that a repo transaction is a sale of securities with an agreement to repurchase the same securities at a higher price at an agreed time. The repo transactions are broadly similar to guarantees. In Indonesia, it is common

¹ Tjiptono Darmadji and Hendy M. Fakhruddin, *Pasar Modal di Indonesia: Pendekatan Tanya Jawab*, 2nd edition, Jakarta: Salemba Empat, 2006, p. 2.

² Trinanda Kristo Marthinus, (et.al.), "Tanggungjawab Penerima Saham Repurchase Agreement (REPO) dalam Pengembalian Saham Pada Transaksi Repo Saham dengan Metode Sell/Buy Back REPO", *Diponegoro Law Journal*, Vol. 5, No. 2, 2016, p. 2.

³ Michael J. Fleming and Kenneth D. Garbade, "Current Issues in Economics and Finance: The Repurchase Agreement Refined GCF Repo", *Federal Reserve Bank of New York*, Vol. 9, No. 6, 2003, p. 1.

in the community to interpret the repurchase agreement as a debt transaction with securities (mortgage securities), it is common to understand it as borrowing-lending transactions, and collateral transactions. In addition to the many different understandings, there are no regulations in Indonesia that clearly regulate repurchase agreement.

In Indonesia, before 2016, there was no regulatory certainty. After the OJK issued the Regulation of Financial Services Authority Number 9/POJK.04/2015 on the Guidelines for Repurchase Agreement Transactions for Financial Service Institutions (POJK repo Transactions), the repo transaction status was clarified as a sale and purchase or lending transaction. In Indonesian law, a hybrid agreement can be called an *innominaat* agreement or an unnamed agreement. Repo transactions, according to the POJK, require changes in ownership of securities. On the one hand, it is a breakthrough, but on the other hand raises problems.⁴ Even though the repo transaction has adopted the Indonesian Global Master Repurchase Agreement (GMRA Indonesia) as a reference that must be adhered to by the Financial Services Institution in conducting Repo transactions, it has not yet explicitly regulated the protection of repo buyers in the event of a default (repurchase)) by the seller.

B. Buyers' Legal Protection in Repurchase Agreement (Repo) Transactions in Capital Market Before the Issuance of the Regulation of Financial Services Authority Number 09/POJK.04/2015

In general, the definition of a Repurchase Agreement is "a repurchase agreement, as the term is used in the financial markets, is an acquisition of funds through the sale of securities, with a simultaneous agreement by the seller to repurchase them at a later date". They are a secured means of borrowing and lending short-term funds. RP's frequently are made for one business day (overnight), although longer maturities are not uncommon."⁵

It means that repurchase agreement, a term used in the capital market, is the acquisition of funds made through the sale of securities/bonds, together with an agreement by the Seller to buy back securities/bonds in the future. A Repurchase Agreement is a safe, short-term funding tool. Repurchase Agreement is usually carried out for one business day, although it is not uncommon for a longer period.

In Indonesia, initially, the definition of repurchase agreement can be found in the Appendix of the Decree of the Chairman of the Capital Market Supervisory Board and Financial Institution Number Kep-132/BL/2006 dated November 28, 2006, also known as the Regulation Number VIII.G.13, on Accounting Treatment for Repurchase Agreement (Repo) by Using a Master Repurchase Agreement. It refers

⁴ Norman Edwin Elnizar, "Transaksi Repo Berkembang, Perlindungan Investor Perlu Diperkuat", <http://www.hukumonline.com/berita/baca/lt5960923b04d42/transaksi-repo-berkembang--perlindungan-investor-perlu-diperkuat>, accessed on December 2017.

⁵ Norman N. Bowsher, *Repurchase Agreement*, United States: Federal Reserve Bank of St. Louis, 1979, p. 17.

to a securities sale transaction with the promise of buying back at a predetermined time and price.

Then, still in the same regulation, the Master Repurchase Agreement (MRA) is a master agreement that is used to conduct repo transaction issued by party that have obtained business licenses from the Capital Market Supervisory Agency and Financial Institution to conduct trading in Debt Securities Countries (SUN) outside the Stock Exchange. Therefore, the MRA stipulated in the Regulation is limited only to issuers and/or securities companies that have been listed on stock exchanges and securities that can be used limited only to SUN and or Bank Indonesia Certificates (SBI).

MRA is a form of development of the Global Master Repurchase Agreement (GMRA), which is the legal basis for the perpetrators of repo transactions in Indonesia. The International Capital Market Association (ICMA) has developed GMRA since 1990. ICMA then issued the first GMRA in 1992 and revised it in 1995, 2000, and finally 2011 so that Repo transactions can be in line with development of times.⁶ ICMA is formerly called The Bond Market Association (TBMA)/International Securities Market Association (ISMA). The international association composes and publishes the Global Repurchase Master Agreement (GMRA).⁷

In its development, the MRA that has existed since 2005 faces legal constraints. For instance, parties to transaction dispute in the court. There is a risk that Indonesian judges may characterize repo sell/buy back transactions as collateralized borrowing. A cursory repo transaction is similar to a pawn guarantee agreement where goods guaranteed by bank to BI are in the form of securities. In a repo transaction, bank acts like a "pawn customer" while the BI acts as a "pawnshop company". After a repo agreement is due, bank must redeem (repurchase) its securities at the repo nominal value plus the repo interest rate obligation determined by the BI at the beginning of the agreement.⁸ Pawn has almost similar characteristics with repo. However, repo is not a pawn because the principal agreement in repo transaction consists of buying and selling, while the main agreement of pawn is debt.⁹

The existence of these problems caused the MRA that had been issued to regulate the implementation of repo transaction in Indonesia that could not run effectively. In the end, parties who want to do a repo transaction will make an agreement to conduct a repo transaction. The provisions stipulated in the MRA

⁶ Global Master Repurchase Agreement (GMRA), <https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/repo-and-collateral-markets/legal-documentation/global-master-repurchase-agreement-gmra/>, accessed on December 2017.

⁷ See Chapter I point 4 on the Circular of the Finance Service Authority Number 33/SEOJK.04/2015 on *Global Master Repurchase Agreement Indonesia*.

⁸ R. Serfianto D. Purnomo, Cita Yustisia dan Iswi Hariyani, *Pasar Uang & Pasar Valas*, Jakarta: PT Gramedia Pustaka Utama, 2013, p. 172.

⁹ Aljefri Febrizarli, "Aspek Hukum Transaksi Repurchase Agreement (REPO) Sebagai Alternatif Pendanaan Bank Untuk Memenuhi likuiditasnya dengan Skema Mini Master Repurchase Agreement (MINI MRA)", *Undergraduate Thesis*, Universitas Indonesia, 2015, p. 66.

itself are also different from GMRA, which has been applied globally so that foreign parties do not want to conduct repo transaction with banks or other financial institutions in Indonesia.¹⁰

Therefore, in general, the Repurchase Agreement in the Capital Market follows an engagement scheme carried out by two parties to buy and sell with the right to buy back which is subject to Book III of the Civil Code concerning Engagement. According to Subekti, a repo agreement is a contract that is based on a bond or a promise. The seller is given the right to take back the goods that have been sold by returning the purchase price that has been received along with all costs incurred by the buyer to hold the purchase and delivery, as well as the costs necessary for corrections and expenses that cause the goods to be sold to increase in price.¹¹

Reviewing repo agreement properly, it is actually an agreement in which a seller is given unilateral power (outside judge's power) to cancel the agreement and demand the return of the goods as seller's property.¹² Sale and purchase agreement with buyback right in practice are often used to cover a loan agreement with a provision of material guarantees that should be made in the form of mortgage, especially for immovable objects such as land or buildings.¹³

Before the Regulation of the Financial Services Authority Number 9/POJK.04/2015 on the Guidelines for Repurchase Agreement Transaction, repo is identified as "securities loans". Securities owners (seller) "lend" their securities to get cash or other types of assets. The party that "borrows" the securities (buyer) will give up a discounted amount worth of the interest agreed upon beforehand. If there is a dividend or interest inherent in securities, borrower will give the interest/dividend to the owner of the securities (seller). Therefore, in the practice of capital market, It is one of fund sources. In other words, it is a "loan". Consequently, the settlement of repo transaction is highly dependent on the provisions of share of repo agreement. Thus, investor can anticipate risks.¹⁴

At that time, there was no clear guideline or standard of repo agreement and its legal consequences. Even though, there had been the Decree of the Chairman of the Capital Market Supervisory Board and Financial Institution Number Kep-132/BL/2006 dated November 28, 2006, which is also known as the Regulation Number VIII.G.13 on Accounting Treatment for repurchase agreement (Repo) by using Master Repurchase Agreement. However, it should be noted that the provisions of the regulation are valid to issuers and/or securities companies that are members of the trading administration of Sovereign Debt Instruments outside the Stock Exchange, which have obtained business licenses from Capital Market

¹⁰ *Ibid.*, p. 68.

¹¹ Subekti, *Aneka Perjanjian*, Bandung: PT. Citra Aditya Bakti, 1995, p. 28.

¹² *Ibid.*

¹³ *Ibid.*, p. 80.

¹⁴ Sintya Liana Sofiyan, "Analisis Yuridis Mengenai Transaksi Jual Beli Saham dengan Hak Membeli Kembali (REPO) dengan Menggunakan Saham yang Diperdagangkan di Bursa Efek Indonesia", *Postgraduate Thesis*, Universitas Indonesia, 2010, pp. 74-75.

and Financial Institution Supervisory Agency. There are no clear rules for other types of repo.

Therefore, form of repo agreement that is not regulated by the regulations is only based on the Civil Code. Parties who have bad intentions may circumvent form of agreement. In addition, apart from the aforementioned regulations, no institution can impose sanctions on parties who fail or have no good faith. Therefore, there was no protection for repo buyers if the repo seller failed to repurchase. In addition, repo buyers are also increasingly disadvantaged if the value of repo object falls, decreases, or does not match the value of the original repurchase agreement. In the end, the only way that repo buyer can take is only to file a lawsuit to the court, to demand the buyer's right.

C. Buyers' Legal Protection in Repurchase Agreement (Repo) Transactions in the Capital Market After the Issuance of the Regulation of the Financial Services Authority Number 9/POJK.04/2015 on the Guidelines for Repurchase Agreement Transaction

On June 25, 2015, the Financial Services Authority (OJK) issued a regulation containing guidelines of repurchase agreement (repo) transaction for financial services institutions. This Regulation was issued to provide standard guidelines for repurchase agreement transactions (repo) that refer to internationally applicable practices and provide legal certainty for financial service institutions that carry out repo transactions. The regulation took effect on January 1, 2016.¹⁵ The Regulation revoked and declared the inability of the Decree of the Chairman of the Capital Market Supervisory Board and Financial Institution Number Kep-132/BL/2006 dated November 28, 2006 on the repurchase agreement (repo) accounting treatment using the Master Repurchase Agreement (MRA), along with the Regulation Number VIII .G.13 as the attachment.

The principal arrangement of the Regulation of Financial Services Authority Number 9/POJK.04/2015 on the Guidelines for Repurchase Agreement Transactions for Financial Services Institutions (POJK Repo) includes the following.¹⁶

- a. Every Financial Service Institution that conducts Repo Transactions on Scripless Securities that are regulated and supervised by the Financial Services Authority as well as those that are registered and settled, are conducted through Bank Indonesia and/or the Depository and Settlement Institutions, must follow the Regulation.
- b. Every Repo Transaction must result in changes in ownership of securities and must be made based on a written agreement.
- c. The written agreement on Repo Transaction must apply the Indonesian Global Master Repurchase Agreement (GMRA Indonesia) issued by the Financial

¹⁵ Financial Services Authority (OJK), "Siaran Pers OJK Keluarkan Aturan Transaksi Repo No. SP 58/DKSN/OJK/7/2015", Jakarta, 2015, p. 1.

¹⁶ *Ibid.*

Services Authority or other party recognized by the Financial Services Authority, unless the repo transaction is carried out by:

- (1) state institutions that implement fiscal or monetary policies; and/or
- (2) using Sharia principles.

The repo transaction itself adopts a true sale or sell-buy back outright. There should be a transfer of title, namely a transfer and changes in ownership of the securities transacted. With the change in ownership, the securities that are transacted are not a guarantee in the transaction so that they are not subject to characterization, which eliminates the principle of the change of ownership. The transfer of ownership of securities that form the basis of the repo transaction will be followed by the transfer of rights attached to the securities, such as dividends, coupons, voting rights, pre-emptive rights, and the utilization of the rights attached to these securities. These distinguish repo transactions from transactions that use securities as collateral, for instance: pledging shares.¹⁷

After the issuance of the Regulation, a repo transaction is defined as a sale of securities or purchase contract with the promise of buying or reselling at a predetermined time and price.¹⁸ The effect of this Regulation also binds Financial Service Institutions that conduct repo transactions. The institutions must comply with the provisions of the Regulation.¹⁹ These provisions apply to repo transactions without Scripless Securities, which are regulated and supervised by the Financial Services Authority, and those registered in and the settlements are conducted through Bank Indonesia and/or the Depository and Settlement Institution.²⁰

In addition, the scope of implementation of the POJK Repo Transactions is also broader compared to the previous Regulations. In the POJK Repo, Financial Service Institutions are required to follow the provisions of the POJK Repo Transaction.²¹ The Financial Services Institution in question is an institution that carries out activities in Banking, Capital Market, Insurance, Pension Fund, Financing Institutions, and other Financial Services Institutions sectors as referred to in the Law Number 21 of 2011 on the Financial Services Authority (the OJK Law).²² Other Financial Services Institutions referred to in the OJK Law cover mortgages, guarantee institutions, Indonesian export financing institutions, secondary housing finance companies, and institutions that carry out compulsory management of public funds. It also includes providers of social security programs, pensions, and

¹⁷ Trinanda Kristo Marthinus, (et.al.), "Tanggungjawab Penerima Saham Repurchase Agreement (REPO) dalam Pengembalian Saham Pada Transaksi Repo Saham dengan Metode Sell/Buy Back REPO", *op.cit.*, p. 6.

¹⁸ See Article 1(1) of Financial Services Authority Regulation Number 09/POJK.04/2015 on Repurchase Agreement Transaction Guidelines Financial Services Institution [*Peraturan Otoritas Jasa Keuangan Nomor 09/ POJK.04 /2015 tentang Pedoman Transaksi Repurchase Agreement Lembaga Jasa Keuangan*] (OJK Regulation No. 09/POJK.04/2015).

¹⁹ See Article 2(1) of OJK Regulation No. 09/POJK.04/2015.

²⁰ See Article 2(2) of OJK Regulation No. 09/POJK.04/2015.

²¹ See Article 2(1) of OJK Regulation No. 09/POJK.04/2015.

²² See Article 1(3) of OJK Regulation No. 09/POJK.04/2015.

welfare, as referred to in legislation concerning mortgages, guarantees, Indonesian export financing institutions, secondary housing finance companies, and compulsory management of public funds, as well as other financial service institutions, which are stated to be supervised by the OJK based on legislation.²³ It shows that parties who must submit to the POJK Repo are wider and not only limited to Issuers and/or securities companies that are members of the Sovereign Debt trading outside the Stock Exchange, which have obtained business licenses from the Capital Market and Financial Institution Supervisory Agency.

The POJK Repo also regulates the coverage of repo transaction object to be wider than the Regulations of Capital Market Supervisory Board and Financial Institution. As explained above, repo transaction, according to POJK Repo, are contracts of selling or buying securities with the promise of rebuying or reselling at a predetermined time and price. The object referred to in transactions is securities. Securities include debt securities, commercial securities, shares, bonds, proof of debt, participation units in collective investment contracts, futures contracts for securities, and any derivatives of securities, as referred to in the Law Number 8 of 1995 on the Capital Market.²⁴ Therefore, the object of repo transactions in the POJK Repo Transactions is wider than the provisions set up by the Capital Market Supervisory Board and Financial Institution, which are only limited to Government Securities (SUN) and Bank Indonesia Certificates (SBI) only. The POJK Repo is also different with the Decree of the Chairman of the Capital Market Supervisory Board and Financial Institution Number KEP-132/BL/2006 dated November 28, 2006, namely that each repo transaction must be based on a written agreement, which at least contains:²⁵

- (1) transfer of securities ownership rights;
- (2) obligation to adjust securities value with a mark-to-market value;
- (3) initial margin and/or securities haircut in the repo transaction;
- (4) maintenance of margins including substitution of margin effects;
- (5) the rights and obligations of the parties related to the ownership of securities in the repo transaction including the timing of their implementation and tax obligations;
- (6) failure event;
- (7) the procedure for resolving the failure event and the rights and obligations that follow it;
- (8) agreement subject to Indonesian law;
- (9) the position of the financial services institution in the repo transaction as an agent or acting for itself; and

²³ See Article 1(10) of Law Number 21 of 2011 on Financial Services Authority [*Undang-Undang Nomor 21 Tahun 2011 tentang Otoritas Jasa Keuangan*].

²⁴ See Article 1(5) of OJK Regulation No. 09/POJK.04/2015.

²⁵ See Article 4(1) *jo.* Article 4(2) of OJK Regulation No. 09/POJK.04/2015.

(10) procedure for confirmation of repo transactions and/or material changes related to the repo transaction.

In addition, the written agreement mentioned above must apply GMRA Indonesia issued by the Financial Services Authority or other parties recognized by the Financial Services Authority.²⁶ The GMRA Indonesia is a standard written agreement on repo transaction compiled based on the 2000 version of GMRA and its attachments issued by ICMA and has been adapted to Indonesian conditions, which include specific characteristics of the repo market, applicable laws, and market requirements.²⁷

The GMRA (Global Master Repurchase Agreement) is a standard Repo Transaction agreement issued by the International Capital Market Association. The GMRA Indonesia consists of²⁸

- (1) Global Buyback Agreement (GMRA);
- (2) Appendix of Domestic Transactions in Indonesia (Indonesia Annex);
- (3) Annex I Supplemental Terms & Condition;
- (4) Annex II Confirmation;
- (5) Buy/Sell Back Annex;
- (6) Equity Annex; and
- (7) Agency Annex.

In the POJK Repo, it is explained that parties making agreement can agree on a change in the Repo Transaction agreement clauses based on GMRA Indonesia, insofar as it does not conflict with the Regulation.²⁹ However, there are exceptions in the case that a Financial Service Institution conducts repo transactions with state institutions that implement fiscal or monetary policies. In such condition, the financial service institution is not required to apply GMRA Indonesia.³⁰

The application of GMRA Indonesia in a written agreement of repo transaction is carried out with conditions not to change the Global Buyback Agreement (GMRA). Changes can only be made on the attachment of the Global Repurchase Master Agreement (GMRA), according to the needs or agreement of parties with the provision to not violating the Regulation of Financial Services Authority Number 9/POJK.04/2015 on the Guidelines of Repurchase Agreement Transactions for Financial Service Institutions.³¹

²⁶ See Article 5(1) of OJK Regulation No. 09/POJK.04/2015.

²⁷ See Chapter II point 2 on the Circular of OJK Number 33/SEOJK.04/2015 on *Global Master Repurchase Agreement Indonesia*.

²⁸ See Article 5(2) of OJK Regulation No. 09/POJK.04/2015.

²⁹ See Article 5(3) of OJK Regulation No. 09/POJK.04/2015.

³⁰ See Article 5(4) of OJK Regulation No. 09/POJK.04/2015.

³¹ See Chapter II point 6 on the Circular of OJK Number 33/SEOJK.04/2015 on *Global Master Repurchase Agreement Indonesia*.

It is different from before the issuance of the Regulation of Financial Services Authority Number 9/POJK.04/2015 on the Guidelines of Repurchase Agreement Transaction for Financial Service Institution, after the issuance of the POJK Repo, provided a series of obligations that must be fulfilled for Financial Service Institutions before conducting Repo Transactions as follows:³²

- a. The financial institution has a director and/or employee authorized to carry out Repo Transactions;
- b. The financial institution has employees who have adequate knowledge and experience in repo transaction and understand the regulations related to repo transaction;
- c. The financial institution ensures the existence of securities and/or funds for settlement of repo transactions;
- d. The financial institution ensures that each repo transaction is carried out by the director or authorized employee as referred to in letter a;
- e. The financial institution has adequate internal policies, procedures and controls.
- f. The financial institution has risk management in handling risks arising from Repo Transactions;

Then, the financial services institution that carries out repo transaction is obliged to:³³

- (1) do bookkeeping and recording and have adequate documentation on conducted repo transaction;
- (2) apply accounting treatment in financial service institutions financial statements in accordance with applicable financial accounting standards; and
- (3) properly register the identity of the parties of repo transaction.

To minimize or to handle risks arising from repo transaction, financial services institution is required to:³⁴

- (1) determine the initial margin and/or haircut amount for securities in repo transaction in accordance with the credit risk against the repo transaction and the risk of the securities;
- (2) maintain margin maintenance in accordance with repo transaction agreement at any time if the securities value based on its fair market price shows a change in the material decline value as agreed;
- (3) ensure written, physical, or electronic confirmation related to the repo transaction agreement, issued;

³² See Article 6(1) of OJK Regulation No. 09/POJK.04/2015.

³³ See Article 6(2) of OJK Regulation No. 09/POJK.04/2015.

³⁴ See Article 7 of OJK Regulation No. 09/POJK.04/2015.

- (4) monitor the net exposure of all repo transactions they have and take certain actions to settle obligations against the partner of repo transactions on a daily basis;
- (5) minimize all settlement risks arising from repo transactions by using a settlement system provided by Bank Indonesia and/or the Depository and Settlement Institution; and
- (6) has a mechanism that allows rapid identification of conditions that result in a failure event and/or a mechanism that provides notification of failure to fulfill repo transaction obligations to partner of the Repo Transaction.

Furthermore, every financial services institution that conducts repo transactions on debt securities must report the intended repo transaction to the Financial Services Authority through the Recipient of the Securities Transaction Report. Deadline and procedures for submitting reports are subject to laws and regulations in the capital market sector on the Reporting of Securities Transactions.³⁵

Regarding the reporting, it has been expressly regulated in the Regulation of the Financial Services Authority Number 22/POJK.04/2017 on the Reporting of Securities Transactions. It regulates that repo transaction must be reported electronically by using the system and/or facilities provided by PLTE.³⁶ The PLTE itself is a party appointed by the Financial Services Authority to provide systems and/or facilities and receive Securities Transaction reporting.³⁷

If a party violates the Regulation of the Financial Services Authority Number 9/POJK.04/2015 on the Guidelines of Repurchase Agreement Transactions for Financial Service Institution, including those that cause violations, the Financial Services Authority has the authority to impose administrative sanctions in the form of:³⁸

- (a) written warning;
- (b) penalty, the obligation to pay a certain amount of money;
- (c) restrictions on business activities;
- (d) suspension of business;
- (e) revocation of business license;
- (f) cancellation of consent; and
- (g) cancellation of registration.

For the imposition of sanctions in letter b, c, d, e, f, or g, it can be imposed with or without the imposition of administrative sanctions in the form of a written warning. Sanctions in the form of fines, namely the obligation to pay a certain

³⁵ See Article 10(2) of OJK Regulation No. 09/POJK.04/2015.

³⁶ See Article 5 *jo.* Article 6 of Financial Services Authority Regulation Number 22/POJK.04/2017 on Reporting Securities Transactions [*Peraturan Otoritas Jasa Keuangan Nomor 22/POJK.04/2017 tentang Pelaporan Transaksi Efek*] (OJK Regulation Number 22/POJK.04/2017).

³⁷ See Article 1(8) of OJK Regulation No. 22/POJK.04/2017.

³⁸ See Article 11(1), (2), and (3) of OJK Regulation No. 22/POJK.04/2017.

amount of money, can be imposed separately or together with the imposition of sanctions limiting business activities, freezing business licenses, cancellation of approval, or cancellation of registration.

In addition to the protection provided by legislation, investors must also be able to be independent, meaning that investors must bear their own profits and losses due to the investments that have been made. This protection is called minimum protection.³⁹

After the issuance of the POJK Repo, the arrangements for repo transaction became increasingly clear as explained below.

1. The POJK Repo has expressly defined a repo as a securities sale or purchase contract with a promise to rebuy or resell at a fixed time and price. At the time the repo is implemented, the result changes the ownership of securities.
2. The effect of parties from the POJK Repo is broader than the arrangement in previous regulation. In the POJK Repo, the Financial Services Institution conducting repo transaction is subject to the POJK Repo. The Financial Services Institution in question is an institution that carries out activities in banking, capital market, insurance, pension fund, financing institutions and other financial services institution sectors as referred to in the Law Number 21 of 2011 on the Financial Services Authority.
3. The object of the Repo Transaction becomes wider than the previous Regulation, which is only limited to Government securities. The Regulation of Finance Service Authority on Financial Transactions includes debt securities, commercial securities, shares, bonds, debt proofs, participation units of collective investment contracts, futures contracts for securities, and every derivative of securities, as referred to in the Law Number 8 of 1995 on Capital Market.
4. Each repo transaction must be made in the form of a written agreement and implementing the Indonesian Global Master Repurchase Agreement (GMRA Indonesia). Exceptions are made only if the repo transaction involves a state institution that implements fiscal or monetary policy and/or uses sharia principles.
5. The POJK Repo regulates that every financial services institution wishing to conduct repo transactions must fulfill a series of obligations first. In addition, the POJK Repo also requires things to be done to minimize or to handle risks arising from repo transaction.
6. After the enactment of the POJK Repo, each repo transaction conducted by a financial services institution must be based on the POJK Repo. For a party that violates the POJK Repo, including those who caused violation, the Financial Services Authority has the authority to impose administrative sanctions.

³⁹ Djoko Koesnadi, *Perlindungan Minimum Bagi Pemodal*, Jakarta : Pusat Pengkajian Hukum, 1993, p. 47.

Therefore, it is clear that the regulation has provided signs in terms of conducting repo transaction activities for Financial Service Institutions. Protection provided to parties is regulated globally in the Regulation on Financial Transactions. For repo buyers protection, it can be seen from before the transaction. There are obligations that must be fulfilled by a financial services institution, including the obligation to minimize the risks arising from the transaction. The repo transaction must be made in a written and reported to the authorities. The ownership status of repo transaction object is shifted to buyer party. In addition, there is also a fine imposed by the Financial Services Authority if a party violates or causes violations. Thus, the POJK Repo protects buyer to the extent before and during repo transaction. After a repo transaction is done, the POJK Repo only provides administrative sanctions for party who violates the regulation. If the effect that becomes object of repo falls in price and seller cannot repurchase the effect, the POJK Repo has no provisions. It only protects to the extent that it requires the Financial Services Agency to do things to minimize the risks that arise.

D. Buyers Legal Protection Due to Seller's Failure to Pay in Repo

One of the differences between the POJK Repo and the custom is the obligation to shift ownership of securities. Change of ownership makes the transacted securities are not collateral in the transaction. Therefore, the securities are not subject to characterization, which eliminates the principle of ownership change. Transfer of ownership of securities is the basis of repo transaction. The transfer of rights attached to the securities follows it. It consists of dividends, coupons, voting rights, and pre-emptive rights. The utilization of the rights attached to securities follows agreement of parties in repo transaction.⁴⁰

Therefore, after the enactment of the POJK Repo, ownership of securities becomes the property of the buyer. Thus, repo transaction can no longer be categorized as "borrowed loans", but must be interpreted as buying and selling. In addition, securities that are "sold" are also not categorized as collateral. Therefore, if there is a default on the repurchase of securities by seller, buyer has the right and full power of attorney over the securities "purchased" from seller. As a result, buyer can sell the securities to other parties, to receive payments as their rights that cannot be fulfilled by seller.

In Article 3 paragraph (3) of the Regulation of the Financial Services Authority Number 9/POJK.04/2015 on the Guidelines of Repurchase Agreement Transaction for Financial Service Institution, in the event of an event of default in repo transaction, parties are obliged to settle in accordance with the procedure to resolve failure and the rights-and-obligations that follow it, as contained in the Repo Transaction agreement.

⁴⁰ See explanation of Article 3(1) of OJK Regulation No. 09/POJK.04/2015.

Repo transaction, especially for the shares, is an alternative investment for investor. Besides having profits, they also have risks. The most common risk that occurs and is faced by investors in a repo transaction is default, or a situation where seller cannot return investor's or holder's money after the due date. In this case, seller can default. Default is the failure to fulfill achievements or obligations of parties in the agreement, whether it is born from an agreement or because of law.⁴¹

Subekti states that default is negligence, which can be in one of four types:⁴²

1. Not doing what has been done or done.
2. Carry out what was promised, but not as agreed.
3. Do what is promised but late.
4. Doing an act which according to the agreement cannot be done.

The POJK Repo in conjunction with the attachment of the Financial Services Authority Circular Number 33/SEOJK.04/2015 on Indonesia's Global Master Repurchase Agreement does not explicitly regulate the legal consequences if seller cannot repurchase securities that are in buyer possession. However, the regulation only stipulates that if seller fails to pay the repurchase price on the date of the applicable repurchase, the party that does not fail (buyer) sends a notification of failure to the failed party.⁴³

Therefore, if the securities that are an object of repo fall in value and buyer cannot repurchase them, it should be remembered that in repo transaction, generally the transaction value will be below guarantee value. One that affects the guarantee transaction value, for example bonds, if the transaction value can range around 70% of the bond value. Therefore, if the value of the bonds pledged is IDR 1 billion, then the value of money that can be borrowed is IDR 700 million. In contrast to repo Shares, the repo value ranges from 50% of the value of the collateral money. Therefore, if the value of the pledged shares is IDR 1 billion, the money to be lent is only IDR 500 million.⁴⁴

Actually, GMRA 2000, as quoted from Euroclear Bank, states that:⁴⁵

If a seller defaults, the risk to the buyer is that, between the last margin payment or transfer, and the post-default liquidation of collateral, the value of that collateral has fallen to less than the sum of the purchase price plus the accrued return on the cash loaned. A key requirement of close out and set off is, of course, the valuation of collateral. The GMRA 2000 offers considerable flexibility to the non-

⁴¹ Abdulkadir Muhammad, *Hukum Perjanjian*, Bandung: Alumni, 1986, p. 20.

⁴² Subekti, *Hukum Perjanjian*, Jakarta: Pembimbing Masa, 1970, p. 50.

⁴³ See the Circular of the Financial Services Authority Number 33/SEOJK.04/2015 on *Global Master Repurchase Agreement* Indonesia.

⁴⁴ Trinanda Kristo Marthinus, (et.al.), "Tanggungjawab Penerima Saham Repurchase Agreement (REPO) dalam Pengembalian Saham Pada Transaksi Repo Saham dengan Metode Sell/Buy Back REPO", *op.cit.*, p. 6.

⁴⁵ Euroclear, *Understanding Repos and the Repo Markets*, Belgium: Euroclear Bank SA/NV, 2003, p. 54.

defaulter in the form of a menu of alternative methods, particularly designed to accommodate illiquid collateral. Thus, the non-defaulter has the choice of:

- a. market quotes;*
- b. the prices actually realised on the sale of collateral or other holdings of the collateral asset; or*
- c. its own judgement of 'fair value' in cases where quotes are not deemed to be 'commercially reasonable'.*

If it is associated with the consequences of seller who cannot fulfill obligation to repurchase securities according to the price agreed in the agreement, the non-defaulter party (in this case the buyer) may sell the securities, as a form of repayment to substitute the obligation of seller to repurchase.

If seller cannot fulfill his obligation to repurchase securities that are repo objects, and still cannot fulfill obligations after being warned, buyer can make a Default Claim to the district court to demand compensation. Investors as parties of buyers can demand material damages in the form of amounts worth of money that should be obtained on the due date based on agreement, and immaterial losses, including profits to be obtained in the future. It is stated in Article 1246 of the Civil Code as follows:

"biaya, rugi dan bunga yang oleh si berpiutang boleh dituntut akan penggantianannya, terdirilah pada umumnya atas rugi yang telah dideritanya dan untung yang sedianya harus dapat dinikmatinya, dengan tak mengurangi pengecualian-pengecualian serta perubahan-perubahan yang akan disebut dibawah ini"⁴⁶

[Costs, losses, and interest that debtor may sue for reimbursement, stand in general for the loss that has been suffered and profit that should have been received, without reducing the exceptions and changes that will be mentioned below.]

Therefore, based on POJK Repo, after the Repo Transaction is conducted, securities that become object of repo will be shifted in its ownership to be the buyers. If in the future the seller fails to repay the securities (default) to buyer, then there will be prior notification from the non-failing party (buyer) to the failed party (seller). If the value of securities that are the object of the repo transaction falls in value so that it does not match the price agreed on in the agreement, then buyer can only resell the securities to obtain payment for their rights. If after being sold, it turns out that the value of the securities has fallen or still does not fulfill the rights of the

⁴⁶ Christa Andystone Ginting, "Perindungan Investor Dalam Transaksi Repurchase Agreement (REPO) Saham yang Gagal Bayar (Studi Kasus PT. Sekawan Inti Pratama Tbk)", *Diponegoro Law Journal*, Vol. 6, No. 1, 2017, p. 8.

Repo Buyer, the POJK does not regulate the protection of buyer up to the time a securities value falls so that the buyer is harmed. The only way to return the loss suffered by buyer is to sue seller by submitting a Default Claim to the district court, to claim compensation for buyer.

E. Conclusion

The regulation of the repurchase agreement was initially regulated by the Decree of the Chairman of the Supervisory Agency of Capital Market and Financial Institution Number KEP-132/BL/2006 dated November 28, 2006 on the Repurchase Agreement (Repo), accounting Treatment Using the Master Repurchase Agreement (MRA), along with the Regulation Number VIII .G.13 (an attachment). The regulation defines repo as a securities selling transaction with the promise of buying back at a predetermined time and price. However, subject and object stipulated in the previous regulations are limited. The limited subject is only valid for issuers and/or securities companies, trading members of securities outside the Stock Exchange that have obtained a Business License from the Supervisory Agency of Capital Market and Financial Institution. On the other hand, the object is limited to Government Bonds (SUN) and or Bank Indonesia Certificates (SBI).

After the issuance of the Regulation of Financial Services Authority Number 9/POJK.04/2015 on the Guidelines of Repurchase Agreement for Financial Services Institution, the regulation on repo has become clearer. The subject and object are broader. The subjects include Financial Services Institutions including those that are regulated by the Law Number 21 of 2011 on the Financial Services Authority. Likewise the object is securities, which include debt securities, commercial securities, shares, bonds, debt proofs, Participation Units of collective investment contracts, futures contracts for Securities, and any derivatives of Securities, as referred to in the Law Number 8 of 1995 on Capital Market. Before conducting a Repo Transaction, POJK Financial Transactions provides a series of obligations that must be fulfilled by the Financial Services Institution, which is intended to minimize risks arising from Repo Transactions. In addition, Repo Transactions also result in changes in ownership of securities and must be based on a written agreement. After the Repo Transaction is implemented, there must be reporting to the parties regulated by the Financial Services Authority. Not only stop there, the Financial Services Authority will also provide administrative sanctions if there are parties who violate the Repo Transaction POJK and the parties causing the violation.

Indirectly, buyer has been protected after the issuance of the Regulation of Finance Service Authority. This is reflected in the tight requirements imposed by the Financial Services Authority before conducting repo transactions. The Financial Services Authority has given things that must be fulfilled to minimize risks arising from the Transactions. However, this POJK Repo provision is only a preventive measure. If in the future it turns out that the seller has failed to repurchase the securities that are the object of Repo, POJK Financial Transaction has not yet

arranged it. Moreover, it has not yet been regulated if the value of the securities has fallen in value so that the buyer becomes disadvantaged. In the end, the steps that can be taken by Repo Buyers are to submit a Default Claim to the Repo Seller in the district court, to demand his right to return.

References

Books

- Abdulkadir Muhammad, *Hukum Perjanjian*, Alumni, Bandung, 1986.
- Bowsher, Norman N., *Repurchase Agreement*, Federal Reserve Bank of St. Louis, United States, 1979.
- Djoko Koesnadi, *Perlindungan Minimum Bagi Pemodal*, Pusat Pengkajian Hukum, Jakarta, 1993.
- Euroclear, *Understanding Repos and the Repo Markets*, Euroclear Bank SA/NV, Belgium, 2003.
- R. Serfianto D. Purnomo, Cita Yustisia dan Iswi Hariyani, *Pasar Uang & Pasar Valas*, PT Gramedia Pustaka Utama, Jakarta, 2013.
- Subekti, *Aneka Perjanjian*, PT. Citra Aditya Bakti, Bandung, 1995.
- , *Hukum Perjanjian*, Pembimbing Masa, Jakarta, 1970.
- Tjiptono Darmadji and Hendy M. Fakhruddin, *Pasar Modal di Indonesia: Pendekatan Tanya Jawab*, 2nd edition, Salemba Empat, Jakarta, 2006.

Other Documents

- Aljefri Febrizarli, "Aspek Hukum Transaksi Repurchase Agreement (REPO) Sebagai Alternatif Pendanaan Bank Untuk Memenuhi likuiditasnya dengan Skema Mini Master Repurchase Agreement (MINI MRA)", *Undergraduate Thesis*, Universitas Indonesia, 2015.
- Christa Andystone Ginting, "Perlindungan Investor Dalam Transaksi Repurchase Agreement (REPO) Saham yang Gagal Bayar (Studi Kasus PT. Sekawan Inti Pratama Tbk)", *Diponegoro Law Journal*, Vol. 6, No. 1, 2017.
- Financial Services Authority (OJK), "Siaran Pers OJK Keluarkan Aturan Transaksi Repo No. SP 58/DKSN/OJK/7/2015", Jakarta, 2015.
- Fleming, Michael J., and Kenneth D. Garbade, "Current Issues in Economics and Finance : The Repurchase Agreement Refined GCF Repo", *Federal Reserve Bank of New York*, Vol. 9, No. 6, 2003.
- Sintya Liana Sofiyani, "Analisis Yuridis Mengenai Transaksi Jual Beli Saham dengan Hak Membeli Kembali (REPO) dengan Menggunakan Saham yang Diperdagangkan di Bursa Efek Indonesia", *Postgraduate Thesis*, Universitas Indonesia, 2010.
- Trinanda Kristo Marthinus, (et.al.), "Tanggungjawab Penerima Saham Repurchase Agreement (REPO) dalam Pengembalian Saham Pada Transaksi Repo Saham dengan Metode Sell/Buy Back REPO", *Diponegoro Law Journal*, Vol. 5, No. 2, 2016.

Legal Documents

Law Number 21 of 2011 on Financial Services Authority [*Undang-Undang Nomor 21 Tahun 2011 tentang Otoritas Jasa Keuangan*].

Financial Services Authority Regulation Number 09/POJK.04/2015 on Repurchase Agreement Transaction Guidelines Financial Services Institution [*Peraturan Otoritas Jasa Keuangan Nomor 09/ POJK.04 /2015 tentang Pedoman Transaksi Repurchase Agreement Lembaga Jasa Keuangan*].

Financial Services Authority Regulation Number 22/POJK.04/2017 on Reporting Securities Transactions [*Peraturan Otoritas Jasa Keuangan Nomor 22/POJK.04/2017 tentang Pelaporan Transaksi Efek*].

The Circular of the Financial Services Authority Nomor 33/SEOJK.04/2015 on *Global Master Repurchase Agreement Indonesia*.

Global Master Repurchase Agreement (GMRA), <https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/repo-and-collateral-markets/legal-documentation/global-master-repurchase-agreement-gmra/>, accessed on December 2017.