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Legal Certainty on the Transfer of Rights to the Powned of Scripless Share Towards a Payer Who Does Breaching

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Abstract

Shares currently available in Indonesia are scripless shares (scripless shares). In the scripless pledge of shares, in the process of transferring rights to the pledger who defaults, there is a difference in the mechanism for transferring rights. The difference in the mechanism for the transfer of rights results from the absence of concrete rules governing the pledge of shares or the transfer of rights over the pledge of scripless shares, especially for the pledger who defaults. Article 60 of the Company Law is correct in stating that shares can be used as an object of pledge, but does not regulate the provisions regarding the transfer of rights to pledge scripless shares when the pledger defaults. The problems to be examined are: (1) Can scripless shares be qualified as pawn objects?; (2) How is the legal certainty regarding the transfer of rights over the pledge of scripless shares to the pledger who defaults? Scripless shares are included in the type of movable property in accordance with

the provisions of Article 60 paragraph (1) UUPT. Shares can be pledged as collateral by pledge or fiduciary guarantee in accordance with the provisions of Article 60 paragraph (2) UUPT, Article 61 UUPM and Point 2.2 Kepdir KSEI No.: KEP-012/DIR/KSEI/0807 concerning Amendments to Regulations on Central Custodian Services. Legal certainty of the transfer of rights to pledge of shares, carried out through the pawnbroker selling directly the pledged object in the form of scripless shares through the Indonesian stock exchange, on the basis of the agreement and approval of the default pledger to give power of attorney to the pledgee to sell/release these shares to the Indonesia Stock Exchange and transact based on the price on the Stock Exchange. Agreements and agreements between the pawn giver and the pawn receiver are set forth in a letter of agreement to sell and a power of attorney to sell which cannot be withdrawn as stipulated in Article 1156 of the Civil Code.

Keywords: Legal Certainty, Transfer of Rights, Pledge, Shares

Introduction

As a rule of law, the people of Indonesia demand that the government improve and organize the performance of a good, quality government that is based on a principle. As one of the aspirations of the Indonesian nation's struggle is the realization of a just and prosperous society based on Pancasila and the 1945 Constitution. people have the right to recognition, guarantees, protection and fair legal certainty as well as equal treatment before the law".

National development is a reflection of the will of the Indonesian state to always improve the welfare and prosperity of the Indonesian people in a fair and comprehensive manner. In the context of carrying out national development, in particular in efforts to achieve development targets, various supporting facilities are needed, including in the form of a legal order that encourages, mobilizes and regulates various development activities in the economic field. Indonesia as a country based on law, all dimensions of national and state life are based on statutory regulations which aim to produce legal certainty for all residents, especially in the economic sector.¹

One of the efforts to drive national development in the economic field is supported by the presence of companies. Capital is one of the most important core of any company. Every company certainly needs cash as capital to run its business. A company obtains capital based on three things, namely: (1) capital or funds from the owner of the company itself, (2) loans with a fairly high interest risk or (3) through offering shares with low risk and relatively low costs. The same thing was expressed by Sumantoro in his book which said: "*in the event that funds from own capital are not sufficient then one way that can be taken*

¹ A A S Iswari and I M Sarjana, *Peralihan Hak Milik Atas Saham Dalam Transaksi Efek Melalui Scripless Trading Di Pasar Modal*, Kertha Semaya: Journal Ilmu Hukum, 2017, p.2

later is by offering shares on the capital market".²

The capital market is part of the financial services sector and is an alternative financing in the world of investment whose growth has increased from time to time. The development of the capital market cannot be separated from regulations and is guided by world capital market organizations such as the International Organization of Securities Commission (IOSCO), including the implementation of a scripless trading system that aims to create fair, effective and efficient trading and reduce systemic risk.³ Currently, shares in Indonesia are scripless shares. Scripless shares are shareholdings where now shareholders no longer hold shares in physical form, but in the form of a share account. Thus, in stock transactions, settlement of securities transactions that occur on the stock exchange without the physical delivery of certificates.⁴

The scripless trading system recommended by IOSCO is accommodated in Article 55 Paragraph (1) of Law Number 8 of 1995 concerning Capital Markets which stipulates that "Settlement of Exchange Transactions can be carried out by completing bookkeeping, physical settlement, or other methods stipulated by Government Regulations (PP)". Ownership of share securities is stated in the form of electronic data in the securities account at PT. Indonesian Central Securities Depository (hereinafter referred to as PT. KSEI). Securities owners no longer physically hold securities and every sale/purchase transaction of securities between exchange members is carried out by book transfer.⁵ Proof of share ownership in the form of a written confirmation of a share account issued by PT. KSEI.⁶

A company in the form of a Limited Liability Company, whose ownership is divided into shares/shares. In other words, shares/sero is proof of ownership of a company. This is in accordance with the provisions contained in Article 1 point 1 of Law Number 40 of 2007 concerning Limited Liability Companies. Shares are an instrument for the participation of a person or institution in a company.⁷ This provision is in accordance with the rules contained in Article 31 paragraph (1) UUPT which reads: the company's authorized capital consists of all nominal shares.

The provisions of Article 60 paragraph (1) UUPT states: "shares are movable objects and give the rights as referred to

in Article 52 UUPT to their owners". Based on the article above, it states that shares are a category of movable objects, so that by itself they also provide material rights. Material rights are absolute rights to an object, and are civil rights. This right gives direct power over an object and can be maintained against anyone. In addition, material rights give power over an object and can be defended against anyone who violates these material rights.⁸

Shares in accordance with their nature as movable objects and have material rights, they can be used as collateral or collateral for a debt, in accordance with the provisions of Article 60 paragraph (2) UUPT which states that: "shares can be collateralized by pledge or fiduciary as long as it is not specified otherwise in the budget". Based on the wording of the article, it can be concluded that shares can be pawned. The definition of pawning itself is a right, which is obtained by a debtor or creditor, over a movable object handed over to him by a debtor or debtor or by another person on behalf of the debtor, which gives power to the creditor to take payment of his receivables from the goods sold. submitted by the debtor in priority over other debtors, if the debtor defaults on his debt obligations.⁹

The implementation of the pledge has the nature of accessoir, namely the existence of the lien depends on the existence of the principal agreement, in other words the implementation of the pledge can occur if there is a principal agreement or what is called a credit agreement which forms the basis for the pledge.¹⁰ The agreement stated and determined the credit start date and maturity date. In addition, pawning is collateral by controlling the pawn object. A lien is considered to have occurred when the handover of authority over the item used as the object of pledge has been carried out, to the party receiving the pledge by the party giving the pledge.

Shares are movable objects when they are used as the object of pawning, then the implementation of the pledge of shares is carried out by means of the company handing over the share certificates which are the object of the pledge to the party that lent the capital (Pledgee). Based on the provisions of Article 60 paragraph (3) of the Company Law, it is stated that every pledge of shares needs to be recorded in the register of shareholders and a special register.¹¹ Shares are movable objects when they are used as the object of pawning, then the implementation of the pledge of shares is carried out by means of the company handing over the share certificates which are the object of the pledge to the party that lent the capital (Pledgee).¹² Based on the provisions of Article 60 paragraph (3) of the Company Law, it is stated

² Sumantoro, *Aspek-Aspek Hukum Dan Potensi Pasar Modal Di Indonesia* (Jakarta: GhaliaIndonesia, 1988). p.25

³ IOSCO, (2017), Objectives and Principles of Securities Principle (Resolution2/2017). h 266, <https://www.iosco.org/library/resolutions/pdf/IOSCORES63.pdf>, diakses 01 Juni2023

⁴ Dimas Pasha Hafidz & Mohammad Rafi Al Farizy, *Perlindungan Hukum Pemegang Saham Terhadap Tindakan Penarikan Kembali Saham Ditinjau Dari Undang-Undang Perseroan Terbatas*, Jurnal Ilmu Kenotariatan, Vol. 4, No. 1, 2023, p. 68.

⁵ Yuli Kurniawan and Ninis Nugraheni, *Tinjauan Yuridis Lembaga Jaminan Untuk Saham Dalam Perdagangan Tanpa Warkat (Scripless Trading)*, Perspektif Hukum, Vol.12, No. 2,2012, p.65

⁶ Muhammad Ridawarista, *Implikasi Hukum Pembuktian Kepemilikan Saham Dalam Transaksi Efek Saham Melalui Sistem Perdagangan Tanpa Warkat (Scripless Trading)*, Jurnal Hukum Universitas Brawijaya, No. 11, 2008, p. 11.

⁷ Muhammad Nasarudin and Indra Surya, *Aspek Hukum Pasar Modal Indonesia* (Jakarta: Prenada, 2006).p.188

⁸ Subekti, *Pokok-Pokok Hukum Perdata* (Jakarta: Intermedia, 1992).p.62

⁹ Aulia Abdi, *Pelaksanaan Gadai Saham Dalam Sistem Perdagangan Tanpa Warkat* (Semarang: Program Studi Kenotariatan Fakultas Hukum Universitas Diponegoro, 2008).p.16

¹⁰ Kartini Muljadi and Gunawan Widjaja, *Hak Istimewa, Gadai, Dan Hipotek* (Jakarta: Kencana, 2005).p.138

¹¹ Dimas Pasha Hafidz & Mohammad Rafi Al Farizy, *Op.Cit.*, p.70.

¹² Esti Setyowati & Dhifa Nadhira Syadzwin, *Peran Notaris, Restrukturisasi, Perusahaan Non Badan Hukum*, Jurnal Ilmu Kenotariatan, Vol. 1, No. 2, 2020, p. 4.

that every pledge of shares needs to be recorded in the register of shareholders and a special register.

The problems that arise with the implementation of pawning scripless shares are, if scripless shares as trunkless movable objects and in the form of electronic data in PT.KSEI's securities accounts are to be used as pawning objects, then in plain view this is not possible and cannot be implemented, given that in the pawning process, there are absolute conditions that need to be met, namely the Inbeztstelling requirement. The condition is that the pawn goods must be taken out of the power of the pawn giver.¹³ This provision is based on Article 1150 of the Civil Code which basically states that in the execution of a pawn, movable objects as pawned objects should be handed over to the pawn recipient or a third party.

Based on the description of the case above, the researcher is interested in examining the legal certainty of the transfer of rights over the pledge of scripless shares to the pledger who defaults. Bearing in mind the importance of legal certainty for the transfer of pawned goods to shares in accordance with the rule of law. However, in the rule of law and its implementation there is a legal vacuum which leads to legal uncertainty regarding the mechanism for transferring the rights to pledge scripless shares. Therefore, researchers raised the problem, namely: 1). Can scripless shares qualify as pawn objects? and 2). How is the legal certainty regarding the transfer of rights to pledge scripless shares to the pledger who defaults?.

Methodology

The research method is the science/research regarding the flow of research conducted by researchers in order to reach an explanation of the problem.¹⁴ Legal research means that in order to find answers to legal problems, a thorough and careful re-finding of legal materials is required.¹⁵ The type of research used in this research is normative juridical research. The research approach is because it makes it easier for researchers to find answers in this study, so the approach used is the Legislative Approach, Conceptual Approach and Case Approach.

Discussion

1. Scripless Shares Can Qualify as Pledge Objects

Economic activity requires capital to be able to move, as well as companies in running their business need capital that comes from internal funds and external funds. Internal funding is the strength of the funds that come from obtaining the company's operational activities. Meanwhile, external funding is that these funds are not obtained from the company's operations, but are obtained from other parties outside the company.

One alternative to external funding is to offer shares on the capital market. Scripless shares are shareholdings where currently the shareholders no longer hold shares in the form

of physical sheets, but in the form of a share account. Thus, in stock transactions, settlement of securities transactions that occur on the stock exchange without the physical delivery of certificates. Ownership of share securities is stated in the form of electronic data in the securities account at PT. KSEI. Due to the different types of shares currently available in Indonesia, of course, it is necessary to carry out an analysis related to whether scripless shares can be used as objects of pawning, considering that the main requirement for pawning is that the pawned goods must be taken out of the power of the pawnbroker or what is often called the Inbeztstelling condition.

With regard to scripless shares, the provisions of Article 60 paragraph (1) UUPT state that shares are movable objects and grant the rights as referred to in Article 52 to their owners. As for Article 52 paragraph (1) UUPT that shares give the owner the right to:

- a) attend and vote at the GMS;
- b) receive dividend payments and the remaining assets resulting from liquidation;
- c) exercise other rights based on the Company Law

When returning to the sound of Article 60 paragraph (1) UUPT which states that scripless shares are movable objects, scripless shares fulfill the qualifications as objects of pawn objects in the form of movable objects, in accordance with the provisions of Article 1150 of the Civil Code that pledge is a right that is obtained by a person who is indebted to an movables. In addition, provisions that allow shares to become pawned objects have been regulated in Articles 1152 and Article 1153 of the Civil Code which essentially state that incorporeal movable objects can become pawn objects, namely bills or receivables, letters at the appointment and bring the letters. The information above shows that "letters on appointment and letters on carry" can be pledged objects, and these letters can be interpreted or categorized as shares.

The provisions of Article 60 paragraph (2) of the Limited Liability Company Law state that shares can be pledged as collateral or pledged as collateral or a fiduciary guarantee as long as it is not specified otherwise in the articles of association of a company. Article 61 of the PM Law also states that "Securities in Collective Custody, except for Securities on Mutual Fund accounts, can be lent or guaranteed. Point 2.2 of KSEI Kepdir No.: KEP-012/DIR/KSEI/0807 concerning Amendments to Central Custodian Services Regulations ("Kepdir KSEI") stipulates that account holders can pledge Securities in their Securities Accounts as debt collateral. The sound of the two rules above, can clarify that shares can be used as collateral objects for the types of collateral for movable objects, namely mortgages and fiduciaries.

Article 60 paragraph (2) UUPT, Article 61 UU PM and Item 2.2 Kepdir KSEI No.: KEP-012/DIR/KSEI/0807 confirms that shares can be used as pawn objects given their nature as movable objects as long as they are not prohibited by a limited liability company and not including securities in mutual funds. This statement was also conveyed by M. Yahya Harahap in his book entitled Limited Liability Company, that shares can be pledged as collateral in accordance with their figure as movable objects provided that shares can be pledged as collateral or fiduciary guarantees. Based on the description above, it is clear that scripless shares as movable objects can be pledged as

¹³ Silvana Liana Febry Adam, *Analisis Yuridis Peran Dan Fungsi PT. Pegadaian (Persero) Sebagai Lembaga Perkreditan Masyarakat Di Indonesia*, Lex Administratum, Vol. 3, No. 5, 2015, p. 67–68.

¹⁴ Marzuki, Peter Mahmud. *Penelitian Hukum*. (Jakarta: Prenada Media Group, 2019).p.32

¹⁵ I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum - Google Books*, vol. 206 (Jakarta: Prenada Media Group, 2016), p.75

collateral or pledged as collateral and meet the qualifications as pawn objects.

The implementation of the pawn has the nature of *accessoir*, namely the existence of the lien depends on the existence of the principal agreement, so that the implementation of the pledge can occur if there is a principal agreement, namely a credit agreement which is the basis for the grant of a pledge.¹⁶ The agreement states and determines the credit start date and loan maturity date. The description above explains that a pawn agreement using scripless stock objects basically cannot stand alone by only using a pawn agreement. A pledge agreement appears when there is a principal agreement between the debtor and the creditor in the form of a debt agreement, which then has a pledge agreement with the object in the form of shares.

After the existence of a credit agreement between the creditor and the debtor using collateral in the form of shares, then proceed with making a pledge agreement. In the event that scripless shares are used as pledge collateral, the pledged shares must be recorded in the share register and special register in accordance with the provisions of Article 60 paragraph (3) UUPT. The purpose of the registration is so that other interested parties can find out the status of the shares pledged.

In addition, Article 1153 of the Civil Code requires that if the lien on immovable movable objects, except for letters of reference or letters of delivery, be placed with notification of the mortgage, to the person against whom the mortgaged rights must be exercised. The provisions of Article 1153 of the Civil Code are clarified by the provisions of Article 60 paragraph (3) of the Company Law and Point 2.2 of the KSEI Directors' Decree No.: KEP- 012/DIR/KSEI/0807 concerning Amendments to the Central Custodian Services Regulations ("Kepdir KSEI") which states that each -every share that is to be used as the object of pawn object, it is obligatory to submit a written application for Securities collateral to the Indonesian Central Securities Depository. Each application to pledge Securities must contain information including: amount, type of securities, party receiving collateral and other collateral requirements".

One of the other conditions for the implementation of the pawn is the guarantee by controlling the object of the pawn object. According to the provisions of Article 1152b of the Civil Code:

"lien on movable objects and on receivables placed by bringing the pledged goods under the authority of the creditor or a third party, about whom both parties have agreed".

Thus, a lien is considered to have occurred when the handover of authority over the goods used as the object of the pawn has been carried out from the pawn giver to the pawn recipient or to a third party that has been agreed upon. After the pawn agreement is made, the implementation of the pawn agreement between the debtor and the creditor is continued with the delivery of the pawn object from the debtor to the creditor as the main condition for the occurrence of a pawn. If this condition is not carried out, the implementation of the pledge cannot be carried out, considering that it does not meet the main requirements for the implementation of the pledge, which is known as

inbezitstelling. Article 1152b of the Civil Code states that *inbezitstelling* is an absolute requirement that must be met in pawning.¹⁷

Proof of share ownership is not in the form of physical shares, but in the form of share accounts held through Securities Companies, Custodian Banks, and Depository and Settlement Institutions. The shares owned by the shareholders are recorded on behalf of the shareholders in a separate account record from the Securities Company's finances.¹⁸ So, proof of someone's share ownership in the form of a written confirmation in the form of an electronic certificate and a share account issued by PT. KSEI.¹⁹ If scripless shares are to be used as pawn objects, then one of the main conditions that must be met is the *inbezitstelling* requirement. The condition is that the pawned goods must be taken out of the power of the pawnbroker and handed over to the pawnbroker or an agreed third party.

The mechanism for pawning scripless shares certainly has a different mechanism from pawning shares by script, considering that scripless share ownership is in the form of electronic data stored collectively at PT. KSEI. Therefore, in order to fulfill the *inbezitstelling* requirement for pledge of shares, KSEI Directors Decree No.: KEP-012/DIR/KSEI/0807 concerning Amendments to the Regulations for Central Custodian Services, has stipulated the method which can be carried out to fulfill the *inbezitstelling* requirement. The method can be done in two ways, namely through:

a. Withdrawal of Shares from Collective Custody

The mechanism for implementing the pledge of shares by withdrawing shares from the collective safekeeping of scripless shares is regulated in Article 3.4.2 to Article 3.4.4 of the Decree of the Directors of PT. KSEI Number: KEP012/DIR/ KSEI/0807 concerning Amendments to Central Depository Services Regulations. The information and provisions of Article 3.4.2 to Article 3.4.4 explain that if you wish to withdraw shares in the form of collective custody in the implementation of a scripless pledge of shares, the account holder or debtor must first submit an application for withdrawal of securities to PT. KSEI through C-BEST (Central Depository Book Entry Settlement). Based on the provisions of Item 2.2 of the Sentra Custodian Services Regulations, it is explained that each application to place collateral as collateral must contain information including the amount, type of securities, party receiving the collateral and other collateral requirements. At the request of the account holder, PT. KSEI requires registered companies (issuers) or Securities Management Agencies (BAE) to issue a number of share certificates in the name of account holders or other parties mentioned in the application. In addition, shares that have been issued through share certificates are then handed over to the pledge recipient or to an agreed third party.

¹⁷ Abdi, Aulia. Op Cit, p. 76.

¹⁸ Yuli Kurniawan and Ninis Nugraheni, "Tinjauan Yuridis Lembaga Jaminan Untuk Saham Dalam Perdagangan Tanpa Warkat (*Scripless Trading*)". Perspektif Hukum 2: 63–82, 2017

¹⁹ Adam, S.L.F, *Analisis Yuridis Peran Dan Fungsi Pt. Pegadaian (Persero) Sebagai Lembaga Perkreditan Masyarakat Di Indonesia*. Lex Administratum. Vol. III, No. 5, 2015, p. 68

¹⁶ Kartini Muljadi, dan Gunawan.Widjaja, Op Cit, p.100.

b. Without Withdrawing Shares from Collective Custody

The procedure for pledging shares without withdrawing shares from collective custody can be carried out by securities owners at PT. KSEI²⁰ The procedure for pledging shares without withdrawing shares from collective custody is carried out in a number of ways:

1. The owner of the securities as the pawnbroker, submits a letter of notification and a request for blocking of the shares to be pledged to the Issuer or the Securities Administration Agency (hereinafter referred to as the BAE).
2. The owner of the securities as the mortgager gets a confirmation letter from the issuer or BAE that the pledge of shares has been recorded and approved by the issuing company and BAE.
3. The securities owner as the pawnbroker submits a letter of instruction for recording the pledge of shares and a request for blocking at C-BEST (Central Custodian Entry - Settlement Book Entry) to the securities company.
4. A securities company issues a letter of application for the registration of collateral for the pledge of shares and submits a letter of application for the blocking of the shares pawned in C-BEST to PT. KSEI.
5. The securities company then obtains a confirmation letter for the listing of pledge of shares from PT. KSEI which confirmed the complete recording and blocking of pledge of shares in C-BEST.
6. The securities company will submit a letter confirming the registration of pledge of shares from PT. KSEI to customers, as the party that guarantees the shares.
7. As long as the shares are in collateral status, said Securities cannot be withdrawn or transferred.

With regard to the types of shares that can be mortgaged, basically the UUPT and UUPM do not mention and do not regulate what types of shares can be pawned. However, currently Indonesia, based on the Company Law, only recognizes the classification of shares in the form of registered shares, namely shares where the owner is clearly written. The name of the owner of the shares on behalf of must be recorded in a special book that contains a list of company shareholders and is registered at PT. KSEI. So in other words, shares that can be mortgaged only have one type, namely shares on behalf of.

2. Legal Certainty Regarding the Transfer of Rights to Pledge of Scripless Shares Against Pledge Providers who Do Default

The life of a developing society requires legal certainty in any sector, especially in the economic field.²¹ The legal certainty of the transfer of rights over the pledge of scripless shares is the most important matter at issue in this research, because it relates to how the transfer of rights over the pledge of scripless shares should be carried out when the

debtor defaults. It is stated that the default (negligence or negligence) of a debtor is as follows²²:

1. Does not do what he is willing to do;
2. Carry out what was promised but not as promised;
3. Does what it promises but is too late;
4. Do something that according to the agreement is not allowed to be done

Default relates to the debtor's inability to do what he can and will do, namely to pay off his debt, so that what is called bad credit arises by the debtor to the creditor. Non-fulfillment of obligations by the debtor is caused by two possible reasons, namely due to the fault of the debtor, either intentionally or not fulfilling obligations or due to negligence and due to coercive circumstances, namely human circumstances or influenced by natural conditions. In pawning, if the pawn giver defaults, the Civil Code has determined the mechanism for transferring the right to pledge shares.²³

These mechanisms include:

- a. By selling through auction to obtain payment of article 1155 of the Civil Code)
- b. By asking the judge so that the sale of pawned goods is carried out by means and intercession of the judge (article 1156 paragraph (2) of the Civil Code).
- c. With the permission of the judge, the pawned goods remain and become the property of the pledgee with the amount determined by him.

If the pawn giver defaults, the pawn recipient as the creditor under the provisions of Article 1155 and Article 1156 paragraph (1) of the Civil Code is given the right to transfer rights to the pawned object, which also applies to the transfer of rights to pledge scripless shares. However, in the scripless pledge of shares in the process of transferring rights to the pledger who defaults, there is a difference in the mechanism for transferring rights.

The difference in the mechanism for transferring the right to pledge scripless shares is caused by differences in understanding regarding the provisions of Article 1155 of the Civil Code, so that in practice the transfer of rights to the pledge of scripless shares to the pledger who defaults is not carried out in accordance with the provisions of Articles 1155 and 1156 of the Civil Code, but is carried out by means of private selling or private sales. Differences in understanding regarding the wording of Article 1155 of the Civil Code results from the absence of concrete rules governing the pledge of shares or the transfer of rights over the pledge of scripless shares, especially for the pledger who defaults. In Article 60 of the Company Law it is true that it states that shares can be used as a pledge object, but in Article 60 of the Company Law it also does not regulate the provisions regarding the transfer of rights to pledge scripless shares, especially for pawn givers who default.

UUPT which does not regulate the mechanism for the transfer of rights to the pledge of scripless shares to the pawn giver who defaults and the absence of specific rules regarding this matter causes the Supreme Court's decision to be inconsistent. The inconsistencies in the Supreme Court's decision include:

²⁰ Zylvia, T, Rambu-Rambu Penggadaian Saham, *FOKUS KSEI*, Januari 2015, p. 5

²¹ Khafid Setiawan, Bhim Prokoso, Moh Ali, *Notaris Dalam Pembuatan Akta Kontrak Yang Berlandaskan Prinsip Kehati-hatian*. Jurnal Ilmu Kenotariatan. Volume 2 Issue, 2021, p. 44

²² Komariah, *Edisi Revisi Hukum Perdata* (Malang: UMM Pres, 2004), p.7

²³ Tan Thong Kie, *Studi Notariat, Serba-Serbi Praktek Notaris*, (Jakarta: PT. Ichtiar BaruVan Hoeve, 2000), p. 44-45

1. Supreme Court Decision Number 240 PK/Pdt/2006 dated February 20, 2006 in a case between PT Aryaputra Teguharta and PT BFI Finance Indonesia Tbk. The judge's consideration stated that:
 - a) The right to transfer rights over the pawned object is on the pawn recipient as long as the pledge agreement is still valid, so that with the end of the validity period for the pledge extension in the said case, the right to transfer rights over the object of pledge of shares also ends.
 - b) The Panel of Judges is of the opinion that the transfer of rights to the object of pawning scripless shares cannot be carried out by private selling because it is contrary to the provisions of Article 1155 of the Civil Code which stipulates that the transfer of pawned goods must be carried out by selling in public or by auction, so that the mortgage giver/debtor is not harmed.
 - c) The series of acts of selling the shares owned by the pawnbroker to a third party and using them as a source of payment of his debts to his creditors is an unlawful act.
2. Supreme Court Decision Number 115 PK/Pdt/2007 dated July 19, 2007 in a case between PT Ongki Multicorpora and PT.BFI Finance Indonesia Tbk. The judge's consideration stated that:
 - a) The pledge of shares agreement will continue to apply with an extended system as long as the debt has not been paid off.
 - b) The Panel of Judges is of the opinion that the provisions regarding the transfer of rights to the pledge of scripless shares must be made by selling them in public or by means of an auction which can be violated. This is based on the initial sentence of Article 1155 of the Civil Code which reads: "If the parties have not agreed otherwise...".
 - c) In addition, the sale of PT OM shares that were mortgaged was to write off PT OM's receivables from Ongko Group's debt guaranteed by PT OM because PT OM had received approval at the EGMS as evidenced by the signing of the Consent to Transfer (Agreement to Sell) and the Irrevocable Power of Attorney to Sell. (Power of attorney to sell irrevocably).
3. Supreme Court Decision Number 145 PK/Pdt/2017 Dated April 4 2018 in the case between PT.Geria Wijaya Prestige against Gaston Investments Limited. The judge's consideration stated that:
 - a) The pawnbroker has the right and authority to exercise his own rights to collect and take legal actions in order to obtain payment of his receivables directly to the pawnbroker without having to go through intermediaries, namely Facility Agents and Collateral Agents.
 - b) The pawnbroker has the right and authority without the need to get the help/approval of the pawnbroker to make sales either in public/auction or privately of all the shares pawned.

Based on the three Supreme Court Decisions described above, it appears that the judges have their own analysis relating to the transfer of rights over the pledge of scripless shares to the pledger who defaults. The different analysis in each Supreme Court Decision is basically caused by the

absence of rules that concretely regulate the mechanism for the transfer of rights to pledge scripless shares, especially for mortgage lenders who commit defaults.

In addition, Article 60 of the Company Law on the pledge of shares in Article 60 of the Company Law does not regulate the mechanism for transferring rights to scripless pledge of shares, causing the judge's consideration in the Supreme Court Decision to rely only on the provisions of Article 1155 and Article 1156 of the Civil Code. In other words, the Company Law as a special rule that regulates the pledge of scripless shares does not continue the provisions of Article 1155 and Article 1156 of the Civil Code and does not explain concretely regarding the pledge of shares, causing a legal vacuum that leads to legal uncertainty. According to positive law, the vacuum of law (*rechstvaccum*) is the same as the absence of laws or regulations.

According to Soenardi Pardi, the sale of pledged goods through an irrevocable power of attorney to sell, technically the law is not a mechanism for transferring rights to pledge of shares. This is because, an irrevocable power of attorney to sell is a contract that is subject to the provisions for the cancellation of a power of attorney based on Article 1813 in conjunction with 1814 of the Civil Code. The legal consequence is in the event of bankruptcy or in the event that the attorney withdraws the power of attorney, the power of attorney to sell becomes invalid even though it is irrevocable. In this case the pawnbroker can only file a breach of contract because the pawnbroker violates his promise.²⁴

Basically, the irrevocable power of attorney to sell is made and with no objections from the pledger, it can be considered as protection also needed by the pawnbroker.¹²⁶ The mechanism for transferring rights to pledge of shares by way of private selling in Indonesia is also supported by Jurisprudence in Stipulation No. 332/Pdt.P/2001/PN. Jak.Sel to Stipulation No. 343/Pdt.P/2001/PN.Jak.Sel with applicant: Deutsche Bank Aktieng-esellschaft²⁵ states that the transfer of rights to pledge of shares through private selling does not require the approval of a judge, because there has been an agreement and agreement at the outset between the pledger and the pawnbroker when the pawnbroker defaults, the pawnbroker has the right to transfer the pledge of shares private selling²⁶, this is based on the sound of Article 1555 of the Civil Code.

Another jurisprudence that also stipulates that the transfer of lien on shares through private selling is justified, namely according to Decree No. PTJ.KPT.01.2005 until stipulation No. PTJ. KPT. 04.2005 jo. Determination No. 33/Pdt.P/2002/PN. South Jakarta to Determination No. 36/Pdt.P/2002/PN. South Jakarta, which basically states that the pawnbroker has sold the pledged object underhand on the basis of an agreement between the pledger and the pawnbroker through an irrevocable power of attorney to sell (a power of attorney to sell that cannot be withdrawn), but

²⁴ Soenardi Pardi."The Current Development of the Enforcement of A Pledge of Shares in Indonesia", (Makalah disampaikan dalam Seminar Restatement Eksekusi Gadai Saham, Jakarta 7 April 2010), p.18.

²⁵ Asuan, *Penyelesaian Terhadap Debitur Wanprestasi Dalam Perjanjian Gadai. Solusi*, Vol.18 No.1, 2020, p. 134

²⁶ Satrio, J, *Hukum Jaminan, Hak Jaminan Kebendaan* (Bandung: PT. Citra Aditya Bakti,2002), p. 84

after that still asks for a determination from the court so that the sale is legal.²⁷

In connection with the three decisions above, it is evident that there is a legal vacuum related to the mechanism for transferring the right to lien of scripless shares to a pledger who defaults. UUPT which does not regulate the mechanism for the transfer of rights to pawning scripless shares and the absence of specific rules regarding this matter has led to inconsistencies in the Supreme Court's decision, causing the mechanism for transferring rights to pledge of scripless shares to be carried out with a different mechanism based on the belief that it is profitable for each parties and does not contain legal certainty in the mechanism for the transfer of said rights. According to positive law, the vacuum of law (rechstvaccum) is the same as the vacuum of laws or statutory regulations, in other words, the vacuum of norms is a situation where there is no legal norm in the regulation of a matter.²⁸

Legal certainty does not only exist in the form of articles in the law, but there is also consistency between the decisions of one judge and the decisions of other judges for similar cases that have been decided.¹³⁴ Sudikno Mertokusumo²⁹ interprets legal certainty as legal protection against arbitrary behavior, which means that someone will be able to obtain something as expected in certain circumstances. This means that when laws and regulations have determined a situation, it is hoped that the rights of legal subjects can be protected.

Legal certainty is also a principle in a constitutional state which is used as the basis for legislation, decency and justice in policies formed by state administrators. Normatively legal certainty is when a regulation is made and promulgated with certainty because it regulates logically and clearly, which means it clearly does not cause doubts, and logically becomes a system of norms with other norms. So that there are no norms that clash or cause a conflict of norms and avoid the occurrence of a void of norms.

The author's opinion regarding the difference in the mechanism for transferring the right to pledge scripless shares to the default pledger as a result of the Company Law which does not regulate the mechanism for transferring the right to pledge scripless shares to the pledger who defaults, there are no special rules governing the above provisions, and the creation of irrevocable power of attorney to sell (power of attorney to sell that cannot be withdrawn) between the pawnbroker and the pawnbroker, the authors are of the opinion that the mechanism for transferring the right to pledge scripless shares to the pledger who defaults must be carried out in accordance with the provisions of Article 1155 and Article 1156 paragraph (1) Civil Code, in

²⁷ Tony, P, *Penerapan Asas Kepastian Hukum Dalam Peraturan Mahkamah Agung Nomor 1 Tahun 2011 Tentang Hak Uji Materiil Dan Dalam Peraturan Mahkamah Konstitusi Nomor 06/Pmk/2005 Tentang Pedoman Beracara Dalam Pengujian Undang-Undang*, Jurnal Legislasi Indonesia Vol. 13 No. 2, 2016., p. 194

²⁸ Akbar, Rakhmat Irkhamulloh Abbas, *Tinjauan Yuridis Kewajiban Penggunaan Bahasa Indonesia Bagi Tenaga Kerja Asing Di Indonesia*. Jurnal UNESA, Vo. 4, No. 1, 2017, p. 4

²⁹ Tata, Wijayanti, *Asas Kepastian Hukum, Keadilan dan Kemanfaatan Dalam Kaitannya Dengan Putusan Kepailitan Pengadilan Niaga*, Jurnal Dinamika Hukum Vol. 14 No. 02, 2014, p.220

other words, the transfer of rights to the pledge of scripless shares made through a private sell mechanism is not justified.

So in essence, in the event that the pawnbroker wants to get the right of redemption from the defaulter of the lien, then the transfer of rights to the lien of scripless shares is not permitted through private selling. However, the transfer of rights to the pledge of scripless shares is carried out through the pledge recipient selling the object of pledge of scripless shares directly through the Indonesian stock exchange, based on the agreement of the parties that has been specified in the agreement between the two, namely consent to transfer (agreement to sell) and irrevocable power of attorney to sell (power of attorney to sell that cannot be withdrawn) while still complying with the provisions of article 1156 of the Civil Code, namely having obtained approval from the Panel of Judges that the transfer of rights to pledge scripless shares is not carried out through auction, but is carried out through direct sales on the stock exchange to the lender. the pawn gets accountability for repayment from the default pawn giver and the rights owned by the pawn giver are still fulfilled.

Conclusion

Based on the description in the previous chapter, the conclusions in this study include:

1. Scripless shares can be qualified as pledge objects. Evidenced by: (a) scripless shares are included in the type of movable object in accordance with the provisions of Article 60 paragraph (1) UUPT; (b) Shares can be pledged as collateral by pledge or fiduciary guarantee in accordance with the provisions of Article 60 paragraph (2) UUPT, Article 61 UUPM and Point 2.2 Kepdir KSEI No.: KEP- 012/DIR/KSEI/0807 concerning Amendments to Regulations on Central Custodian Services; (c) Fulfillment of the Inbezitstelling requirements for pawning scripless shares, as evidenced by 2 ways: First, converting scripless shares into share certificates and handing them over to the pawnbroker or a third party (withdrawal of shares from collective custody). Second, the pawned scripless shares have been transferred to a separate sub-account and the account has been blocked by PT. KSEI (without withdrawal of shares from collective custody). The shares in a separate sub-account (different from the account of the owner of the pledge) have been transferred from the provider of the pledge to a third party, namely PT. KSEI. Shares that have been converted into share certificates or shares that have been transferred to a sub account and blocked by PT. KSEI cannot be traded as long as it has not been converted back into scripless shares and has not been revoked as regulated in the Decree of the KSEI Directors No.: KEP- 012/DIR/KSEI/0807 concerning Amendments to Central Custodian Services Regulations.
2. Legal certainty for the transfer of rights to pledge of shares, carried out through the pawnbroker selling scripless shares pledge objects directly through the Indonesian stock exchange, on the basis of the agreement and approval of the default pledger to give power of attorney to the pledgee to sell/release said shares to the Indonesia Stock Exchange and transacted based on prices on the Stock Exchange. Agreements

and agreements between the pawnbroker and the pawnbroker are contained in the agreement to transfer (agreement to sell) and irrevocable power of attorney to sell (power of attorney to sell that cannot be withdrawn) while still complying with the provisions of Article 1156 of the Civil Code, namely having obtained approval from the Panel of Judges that the transfer of rights to the pledge of scripless shares to the pawn giver who defaults is not carried out through auction sales, but is carried out through direct sales on the stock exchange so that the pawnbroker gets accountability for repayment from the default pawn giver and the rights owned by the pledge giver still fulfilled.

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