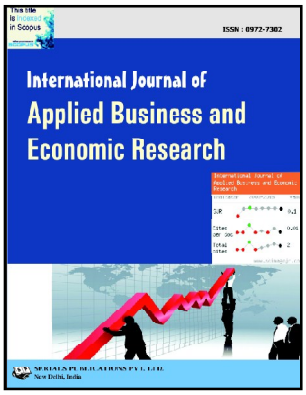

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The Importance of Comprehensive Trusts Law in Indonesia

Gunawan Widjaja[1]

[1]*Lecturer at Faculty of Law Universitas Tarumanagara.*

Abstract: The globalization of international business has arosen new challenge to legal scholar. Different legal systems were used to regulate specific business institutions. Conflict of laws are something that cannot be avoided. To avoid as well as to solve further disputes, legal research were conducted. One among several institutions that was deeply studied wass trusts institution, which was historically known as a part of common law legal tradition.

The aim of this research is to prove that Indonesia needs a comprehensive Trusts Law (Trusts Act). The so called Trusts Act will be very usefull to fill in the gap between existing regulations with the recent development of international business transaction involving trusts.

This research is a normative legal research. It used secondary data by conducting literature research. A comparative legal research was used in order to understand the concept of trusts from common law countries point of view, and the trusts-like institution in Indonesia as civil law countries.

The results of the research proveed that the trusts concept can be incorporated into the Indonesian law. Some trusts-like institutions have existed through several laws and regulations. However there are no general concept of trusts-like institutions which can be used universally as the guidance to conduct international financial transactions in Indonesia. Not all international financial transaction can be tailored to follow the existing laws and regulations. Finally the research concluded that Indonesia needs a comprehensive Trusts Act. It recommended to the law makers to make and promulgate the Trusts Act.

Keywords: Trusts, trusts-like institution.

1. INTRODUCTION

1.1 Background

By the end of 20th century, globalisation has influenced world business activities. The world become borderless. Economic, financial and business transactions were conducted as if there is no barriers in legal issues. These businessmen forgot that whatever changes they made to economic activites will somehow

influenced the legal sub system in human kind. Law could not and may not be separated from human activities, including business.

Indonesian legal system, which historically belonged to civil law legal tradition (the romano germanic – continental system), nowadays are very much influenced by the common law legal tradition (the Anglo Saxon system). Among many reasons, one of the the very basic reason was because as ASEAN countries, Indonesia is sorrounded by Singapore, Malaysia, Brunei Darussalam, New Zealand, and Australia which belong to common law legal tradition.

The choice of law of common law countries may somehow arise difficulties in its implementation in civil law countries. There are several common law institutions that historically and traditionally do not exists in civil law legal tradition. One among them is TRUSTS. Even in common law countries, trusts is not part of common law. Trusts belongs to equity. Therefore it is believed that trusts cannot be found in civil law countries. Many conflicts have been brought to court and arbitration in Indonesia just in order to acknowledge the existance of trusts institutions in Indonesia.

1.2 Objective

The aim of this reseacrh is to find out whether a comprehensive Trusts Act should be establised in Indonesia.

1.3. Implementation

The existance of this comprehensive Trusts Act shall be usefull to minimize and reduce potential conflict on the applicability of trusts in Indonesia. At the end, hopefully this will assist economic growth in Indonesia.

2. STUDY REFERENCES

2.1 Equity and Common Law

In common law countries, trusts is a part of equity. Trusts exists because of equity, without equity there is no trusts. Trusts is a biggest contribution of equity (Sydenham, 2000). Historically, equity is a system that exists outside of common law. At the beginning equity is an ethical principle developed by Court of Chancery before 1873. Court of Chancery has jurisdiction to make decission over disputes which cannot be satisfactorily decided in court of common law. Court of Chancery is not part of Supreme Court, it is part of executive function. Head of the Chancery was responsible directly to the Royal Kingdom (Evans, 1995). Since Judicature Act was promulgated in 1873, court of chancery and court of common law were organized under Supreme Court (Pearce and Stevens, 1998).

From its early day, equity has 12 principles which become the prepositions that are used by the court of chancery to make their decissions (Martin, 1985) (Todd and Lowrie, 2000). Those principles are (Hudson, 2002):

(a) Equity will not suffer a wrong to be without a remedy;

(b) Equity follows the law;

(c) Where there is equal Equity, the law shall prevail;

(d) Where the equities are equal, the first in time shall prevail;

(e) He who seeks Equity must do Equity;

(f) He who comes to Equity must come with clean hands;

(g) Delay defeats Equity;

(h) Equality is Equity;

(i) Equity looks to the intent rather than the form;

(j) Equity looks on that as done which ought to be done;

(k) Equity imputes an intention to fulfil an obligation;

(l) Equity acts in personam.

2.2 Trusts and Equity

As mentioned above, equity was not part of common law. However further development has shown that equity contributed a lot for the development of legal institution in English. Trusts is one among several other contributions.

In equity, Trusts is created where the absolute owner of property (the Settlor) passes the legal title in the property to a person (the Trustee) to hold the property in Trust for the benefit of another person (the Beneficiary) in accordance with terms set out by the Settlor (Hudson, 2002). This means that Trusts is a relationship recognized by equity which arises where property is vested in (a person or) persons called the Trustees, which those Trustees are obliged to hold for the benefit of other persons called cestuis que Trust or Beneficiaries (Martin, 2001).

Pettit (1989) in Equity and the Law of Trusts, quotes that:

> A Trust is an equitable obligation, binding a person (who is called a Trustee) to deal with property over which he has control (which is called the Trust property) either for the benefit of persons (who are called the Beneficiaries or cestui que Trust) of whom he may himself be one, and anyone of whom may enforce the obligation, or for a charitable purpose, which may be enforced at the instance of the Attorney-General, or for some other purpose permitted by law though unenforceable.

This means that Trusts is a unique institution that involved three parties, *i.e.*:

(a) Settler (Settlor);

(b) Trustee; and

(c) Beneficiary.

In trusts, settlor entrusted his ownership of one or more property (trusts property or trusts corpus) to Trustee which then become the legal owner of the trusts corpus; and the beneficial of trusts corpus to Beneficiary which then become equitable owner of the trusts corpus. Trustee is not allowed to make benefit, use or utilize inwahtsoever form of the truststs corpus, and shall deliver to the Beneficiary the right to use and to benefit from the trusts corpus.

In common law, trustee has the right to do all and any legal action before the law, such as sell, encumberance, pledge, mortgage, give away the trusts corpus. But in equity, trustee must be responsible to

the beneficiary for all and any legal action trustee has taken in common law. This explained that trusts can only be defended in court of equity dan not court of law. Trusts is a product of equity (Sydenham, 2000).

Gary Watt (1999) in Briefcase Equity and Trusts mentions that:

A Trust has the following characteristics

(a) the assets constitute a separate fund and are not part of the Trustee's estate;

(b) title to the Trust assets stands in the name of the Trustee or in the name of another person on behalf of the Trustee;

(c) the Trustee has the power and the duty, in respect of which he is accountable, to manage, to employ or dispose of the assets in accordance with the terms of the Trust and the special duties imposed upon him by law.

The reservation by the Settlor of certain rights and powers, and the fact that the Trustee may himself have rights as a Beneficiary, are not necessarily inconsistent with the existence of a Trusts.

Besides trusts that was created by the will of the parties, there are also constructive trusts which is created by the will of law. In constructive trusts, trusts is created whenever one or more person was (were) ordered by court decission to hold certain properties in trusts for other people (Hudson, 2002).

Until today, trusts is used in many business activities. In financial market, such as money market dan capital market, trusts is widely used in most of derivatives and securitization process. In construction business, statutory trusts is created to protect the interest of small contractors from any payment made to main contractor. For debentures, trusts is created to protect bondholders. Even trusts is created as Un-incorporated Business Trusts Organization to be used as alternatives for corporations.

3. RESEARCH METHOD

3.1 Scope of Reseach

The scope of this research is to prove the importance of the existance of trusts institution in Indonesia to supprot business activities and therefore Indonesia needs a comprehensive Trusts Act.

3.2 Types and Source of Data

Data used in this research are secondary data, which include primary legal sources, secondary legal sources, tertiary legal sources and others. Data were obtained through literature review.

3.3 Method of Analysis

This research is a normative legal research using comparative legal study. The meaning of comparative is to compare different legal institutions to seek for similarities in their function. This research will focus to compare trusts developed in common law countries, and certain institutions in civil law countries which have functions similar to trusts (the trusts-like institutions). These research aimed to find that actually in civil law countries there existed some trusts-like institutions, with their own regulations. The comparative legal study will therefore prove that there will be some general characteristics in either common law trusts

and civil law trust-like institutions, which will and can be used as the basics to create comprehensive trusts-like institutions in Indonesia.

3.4 Operational Definitions

All operational definitions used in this research will follow the definition given by laws and regulations as currently enforced and mentioned in this research.

IV. RESEARCH RESULTS

4.1 Indonesian Civil Code as General Rule

Indonesian Civil Code (ICC) acknowledges ownership over a property which function like trusts. It is regulated in Article 526 and 527 of ICC. The summary of those two articles explained that (a) property can be owned by one legal entity; or by two or more person registered as a personal property. This means that two or more person can own property to be registered using only one person name, which will act on behalf of all the actual owners. In such a case, the legal owner, which name is regitered as the owner, is functionally acting as trustee for and on behalf of all the beneficial owner. This condition may exist by law, in case of inheritance, or created by agreement in case of partnership. This condition only applies to immovable property; and movable property in form of intangible property which must registered with certain name (*benda tidak berwujud atas nama*).

4.2 Other Specific Laws and Rules

The similar trusts-like ownership function that found in ICC, as explained before) can also be found Capital Market Law (Law No. 8 Year 1995) in form of collective deposit (penitipan kolektif). According to Article 1 point 16 Capital Market Law, collective deposit is defined as deposit services for Securities owned collectively by more than one Parties whose interests are represented by Custodian. Based on the definition, the trusts corpus that can be collectively deposit with Custodian are Securities which is defined under the Capital Market Law. The Custodian shall have the same function as the trustee, which will be the registered owner of the Securities beneficialy owned by the investors of the Securities. The only custodian legally permited under the Capital Market Law is Bank.

The role of Custodian Bank which function as trustee, has been used to create derivatives in capital market securities. Mutual Fund, Exchange and Traded Fund, Asset Backed Securities, Real Estate Investment Fund have been formally created using Custodian Bank as "bare trusts". The other main function of the custodian bank as bare trusts, is to protect the interests of investors of the securities from bankruptcy.

The scriptless trading in Indonesian Stocks Exchange, which uses an electronic book entry system to record and transfer securities, known as Central Depository System (CDS), indirectly also acknowledges the existence of other trusts-like function institutions in Indonesian capital market. The CDS made all the securities issued by every and each Issuer become dematerialized, each of them is identical and become the same in value and function. To make it dematerialized, all the securities were deposit collectively and registered at Indonesian Securities Central Custodian (KSEI) as the only Deposit and Settlement Institute (LPP)[2] legally established under the Capital Market Law. For the purpose of trading, investors are required to open securities account at dealers or brokers. The dealer and broker themselves will open their own

account at KSEI. The trading will be conducted by and between dealer and broker through KSEI. KSEI will overbook the accounts of the dealers and brokers. Investors will be reported through their own account at the dealer of broker. In such way, investors are beneficiaries, and KSEI will become legal owner of the securities, since it is KSEI only who will be registered as the owner of the securities in the Issuer's book.

In money market, Bank Indonesia has issued Regulation No.14/17/2012, which regulates the about Bank Activities as Depositee with right to Manage (as Trust). Besides, there are also other regulations for banks to function like trustee in the issuance of bonds, medium terms notes or other debt intruments, known as Wali Amanat. The term Wali Amanat was first used in Capital Market regulation (then become Capital Market Law). Wali Amanat acts for and on behalf of debt's notes holders. The term Wali Alamat can also be found in Law No.4 Year 1996 regarding Mortgage over Land and Other Properties attached to the Land. The term Wali Amanat later is also used to reflect the function as a representative for equity's holders, which can be found in Presidential Regulation No.80 Year 2011 regarding *Dana Perwalian* (Trusts Fund).

Each institution which function like trusts, based on each laws or regulations has its own trusts corpus, which is different one with the other. Every law and regulation, which create the trusts-like institution has its own purposes. However there are similarity in the function of such laws and regulations. Using comparative legal study, at least there are several same characteristics that can be found in those laws and regulations. In general, there are:

(a) There is always a settlor who delivered and entrusted certain trusts corpus to the person or institution that function as trustee;

(b) The partner, KSEI, custodian bank, broker, dealer, and other institutions that bear the trusts function are all the registered owner and therefore become the legal owner of the trusts corpus;

(c) Eventhough the trusts corpus is registered under the name of the person or institutions that function as trustee, from accounting point of view it is never registered as the asset(s) of the institutions;

(d) It is the investors who is the beneficial owners, who will always become the absolute owner of the trusts corpus upon the termination of the trusts.

Those are 4 similar characteristics that build up the trusts-like institution in Indonesia.

In the event that the 4 characteristic above are to be compared with common law trusts, those 4 characteristic also fall into the definition, purpose and function of a common law trusts. The only different that may be clearly seen is that those trusts-like institutions in Indonesia are created by agreements as well as by laws, meanwhile trusts itself in common law countries is not an agreement.

5. CONCLUSION AND RECOMMENDATION

5.1 Conclusion

From the analysis above it can be concluded that it is very posible to create a comprehensive Trusts Act, that can be used as general rules. A partial acknowledgement of trusts in several rules and regulations is difficult to be used as justification that trusts are legally recognized under Indonesian Laws. Therefore a comprehensive Trusts Act must be made and promulgated to support any and all business transaction in Indonesia.

6.2 Recommendation

This research finally urged the House of Representatives (DPR) of Republic of Indonesia to conclude an Academic Report as the basis to make and promulgate the comprehensive Trusts Act.

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Notes

2. Article 56(1), Capital Market Law