E-ISSN: 2962-2816 | P-ISSN: 2747-1985
JOURNAL OF LAW, POLITIC AND HUMANITIES (JLPH)
https://dinastires.org/JLPH dinasti.info@gmail.com +62 811 7404 455
DOI: https://doi.org/10.38035/jlph.v4i5
Received: 29 July 2024, **Revised:** 8 August 2024, **Publish:** 14 August 2024

The Principle Freedom of Contract In Share Repurchase Agreement (Repo) Transactions In The Capital Market

Eni Dasuki Suhardini[1], Dini Ramdania[2]
[1] Universitas Langlangbuana, Indonesia, eni.d.suhardini@gmail.com
[2] Universitas Langlangbuana Indonesia, dini.ramdaniadr@gmail.com

Corresponding Author: eni.d.suhardini@gmail.com

Abstract: Transactions involving share repurchase agreements (repo) are one way for issuers to raise more money in order to boost the productivity of their businesses. The repo agreement, which is binding on both parties, is built on the idea of contract freedom. Even though the OJK has established repo transaction guidelines for financial service institutions, there are still some parties who don't carry out their commitments in accordance with what has been previously agreed upon in practice. The model for managing share repo transactions offers a sense of justice for shareholders, repo holders, and third parties. The obligations of repo holders in the event that the repo shares are sold to third parties. A normative-juridical approach is used to solve these issues, with the specification of analytical-descriptive research that examines facts and the implementation of repo transactions based on the provisions of the capital market laws and regulations. This research is supported by primary and secondary data obtained through document studies and interviews, which are then analyzed with kualitatif-juridical techniques. Based on the result of the research, it is possible to say that, although there are still some parties in practice who fail to uphold their obligations, the principle of freedom of contract has essentially been implemented for parties in share repo transactions between issuers in accordance with the Civil Code and POJK; If the shares repoed to him are transferred to a third party before maturity, the share repo holder is subject to civil liability to the owner or a third party.

Keyword: Principle, Repo, Share.

INTRODUCTION

The capital market as one of the supports for the implementation of national development can anticipate various changes and developments that occur in carrying out its functions. The existence of the capital market is expected to be able to mobilize the potential of the community to participate in development as well as create equal distribution of income and democratization of the economy and can speed up the process of community participation in owning company shares so that they can be used productively.[1]

[1] Nasarudin (et all), *Aspek Hukum Pasar Modal Indonesia*, Edisi Pertama, Cetakan Ketujuh, Kencana Prenada Media Group, Jakarta, 2011, Hlm 2

The existence of law plays a very important role in creating people's welfare and is a basic milestone for a law-based state to realize the concept of a welfare state in the state. The state plays a role in maintaining and advancing the economic and social welfare of its citizens.[2] Achieving the goals of people's welfare with the existence of the capital market is closely related because through the capital market the people can actively participate in improving their economy, one of which is through share repurchase agreement (hereinafter referred to as repo) transactions and the government is obliged to provide certainty in investing through regulations and policies.

The government as a state administrator must be able to create laws and regulations that side with the people,[3] every government policy in the form of regulations or legislation will be able to open up opportunities to create prosperity for the community. So it can be felt that the existence of law plays a very important role in creating people's welfare. This is a basic milestone for a law-based country to realize the concept of a welfare state in the state. The state has a key role in maintaining and advancing the economic and social welfare of its citizens.[4]

Achieving the goals of people's welfare with the existence of the capital market has a very close relationship because, through the capital market, the people can actively participate in improving their economy, and the government is obliged to provide certainty in investing through regulations and policies. Article 33 of the 1945 Constitution is the constitutional basis for business actors in the national economy making the welfare of society their ultimate goal.[5] The type of investment that can be chosen by a businessman or those who have excess funds is by investing either directly (direct investment) or indirect investment (indirect investment) in the capital market.[6]

Trading activities in shares, debt securities and share repo transactions in 2019-2020 increased from IDR 1,809.82 T to IDR 4,013.11 T and in December 2023 stock market transactions were recorded to increase to IDR. 10.75 T[7], this shows that the capital market is a means for issuers to increase capital. However, share transactions between issuers are not registered with the Financial Services Authority (OJK) because they are not reported, even though the OJK has issued Regulation Number 9/POJK.04/2015 concerning Repurchase Agreement Transaction Guidelines for Financial Services Institutions which is effective starting January 1 2016. Furthermore, Article 1 paragraph (1) POJK Repo states that: "A repurchase agreement transaction, hereinafter referred to as a repo transaction, is a securities sale and purchase contract with a promise to buy or sell again at a predetermined time and price."

The meaning of "determined" in these provisions is determined and agreed upon by the parties. Referring to these provisions, it is clear that repo transactions are a manifestation of the principle of freedom of contract. A repo transaction is an agreement in the capital market that arises from the development of agreements based on the principle of freedom of

[2] M. Iqbal Asnawi," Implikasi Pengelolaan BUMN Persero dalam Kerangka Welfare State Berdasarkan Mekanisme Perseroan Terbatas", *Jurnal Hukum Samudra Keadilan,* Vol II Nomor 1 Januari -Juni 2016, Hlm 128

[3] Yohanes Suhardin, dikutip dalam M.Iqbal Asnawi, "*Implikasi Pengelolaan BUMN Persero Dalam Kerangka Welfare State Berdasarkan Mekanisme Perseroan Terbatas*",*Jurnal Hukum Samudra Keadilan,*Vol II Nomor 1 Januari-Juni 2016, Hlm 128

[4] M.Iqbal Asnawi, Asnawi, "*Implikasi Pengelolaan BUMN Persero Dalam Kerangka Welfare State Berdasarkan Mekanisme Perseroan Terbatas*",*Jurnal Hukum Samudra Keadilan,*Vol II Nomor 1 Januari-Juni 2016, Hlm 128

[5] Yeti Sumiyati," *Peranan BUMN dalam Pelaksanaan Tanggung Jawab Sosial Perusahaan untuk Meningkatkan Kesejahteraan Rakyat*", *Jurnal Hukum IUS QUIA IUSTUM* No.3 Vol 20 Juli 2013, Hlm 467

[6] Irham Fahmi, *Pengantar Pasar Modal*, Alfabeta, Bandung, 2012, Hlm 4

[7] Siaran Pers Sektor Jasa Keuangan, Otoritas Jasa Keuangan, https//ojk.go.id, diakses tanggal 18 Maret 2024 pukul 13.30.

contract as contained in Article 1338 paragraph (1) of the Civil Code, which reads: "All contractual agreements that are legally made are valid as law for those who make them."

This is interesting to examine because share repo transactions between issuers (in particular) are carried out based on the principle of freedom of contract, in which there is a share sale and purchase agreement between the share owner and the repo holder, which gives the share owner the right to buy back his shares within a specified period of time. agreed. However, in practice there are still repo holders who do not implement the agreement, such as what happened in the sale of shares by the repo holder to a third party without the knowledge of the share owner before maturity, resulting in losses for the share owner as happened in the PT Hanson Internasional Tbk share repo transaction. between Benny Tjokro and Platinum Partner Value Arbitrage Fund (repo holder), whose shares were then sold to Goldman Sachs before maturity. Another case is that the repo shares of PT Global Mediacom Tbk were sold unilaterally by Nomura PB Nominees Ltd to a third party. Another case of suspected failure to pay in a repo transaction is PT shares. Indo Pureco Pratama Tbk (IPPE). How does the principle of freedom of contract apply in the cases above.

METHOD

The normative juridical approach method, with analytical descriptive research specifications that not only describe problems but also analyze facts and implementation of repo transactions based on capital market statutory provisions supported by primary and secondary data obtained through document studies and interviews, then analyzed using analytical juridical techniques.

RESULTS AND DISCUSSION

Result

Case of PT Hanson International Tbk shares

1. Share Repo Transactions

   In August 2014, there was an agreement to sell 575 million shares of PT Hanson International Tbk based on a repo agreement between Benny Tjokro as one of the directors of Newrick Holding Ltd and Platinum Partners Arbitrage Fund. At that time there was an agreement between Newrick Holding Ltd and Platinum Partners Arbitrage Fund that the repurchase date was August 31 2015, and this repo agreement was governed and interpreted according to the laws of the state of New York, United States. On 15 December 2015 Newrick Holding Ltd sold back 150 million shares of PT Hanson International Tbk to Platinum and entered into a second repo agreement (Repo II) with a repurchase date on 16 December 2016.
2. Re-repo Shares to Third Parties

   Goldman Sachs (third party) purchased 425 million shares of PT Hanson International Tbk from Platinum through 3 (three) transactions, namely February 2015, March 2015 and December 2015 on the Indonesia Stock Exchange. In this case, Goldman Sachs was not aware of the repo transaction between Newrick and Platinum.
3. Legal Implications of Re-repo Shares to Third Parties

   On August 30 2016 PT Buana Ficomindo Registrar as the Securities Administration Bureau, issued Letter No.284/MYRX/FBR/VIII-2016 notifying that the shares of PT Hanson International Tbk had transferred ownership to Goldman Sachs International.
4. First Owner Losses in Stock Re-repo

   Newrick (Benny Tjokro) claims to be the legal owner of shares in PT Hanson International Tbk and asks for the return of the shares purchased by Goldman Sachs from Platinum and demands material compensation of IDR 320,875 billion and immaterial compensation of IDR 15 trillion (equivalent to with US$ 1.17 billion).
5. Judge's Considerations in Decision Number 618/Pdt.G/2016/PN.JakSel

The panel of judges granted part of Benny Tjokro's lawsuit against Goldman Sachs, that Goldman Sachs must return the shares of PT Hanson International Tbk that it had purchased from Platinum to Benny Tjokro as the owner of the shares. Based on the District Court's decision, Goldman Sachs filed an appeal and the decision was that the consideration of the First Level Panel of Judges was taken over and used as the basis for the consideration of the Panel of Appeal Level Judges and added the following considerations: That ownership of shares or other securities is a material right to which the principle applies that the person entitled to it has the power/authority to defend or demand it from the hands of anyone and anywhere (Droit de Suit); That the shares of PT. The Defendant / also as Appellee can trace the origin of the legal owner, because buying and selling by a seller who is not the owner is not permitted; That buying and selling with the right to buy back, which is commonly called "Repo" on shares of PT. Hanson International Tbk between the original Appellee, Plaintiff/also as Appellant as the seller and Platinum Partners Value Arbitrage as the buyer, in principle the shares were used as collateral for the sales received by the original Appellee, Plaintiff and Appellant from Platinum.[8] The South Jakarta District Court's decision (number 618/Pdt.G/2016/PN Jkt Sel was confirmed by the Jakarta High Court's decision. Currently the case is still being examined at the cassation level at the Supreme Court.

PT share repo case practice. Global Mediacom Tbk

1. PT share repo transaction. Global Mediacom Tbk

   On November 22 2017 PT Global Mediacom Tbk deposited 254 million MNCN shares in Citibank Custodian under a repo agreement with the Nomura PB Nominies Ltd account
2. Repo share to a third party

   On December 7 2017 Nomura sold 7 million shares and on December 8 2017 sold 12 million shares.
3. Legal implications of re-repo of shares to third parties

   PT. Global Mediacom Tbk (issuer code BMTR) submitted a request to KSEI and KPEI, to block the shares of PT Media Nusantara Citra Tbk (issuer code MNCN)
4. Shareholder losses in a stock re-repo event

   PT Global Mediacom Tbk applied for replacement money worth Rp. 16 Billion
5. Settlement of stock re-repo problems

   Management of PT. Global Mediacom Tbk chose a settlement effort by asking the securities company (broker) that sold the shares to complete the transaction using a cash replacement scheme in the amount of Rp. 16 Billion

PT share repo case practice. Sekawan Inti Pratama Tbk (SIAP)

1. Share repo transactions

   One of the shareholders carried out a repo transaction in 2015, when SIAP's share price rose.
2. Repo transaction failed to pay

   At maturity according to the agreement, SIAP shares are not repurchased by shareholders.
3. Implications of share repo transactions are not repurchased

   The legal implications of not buying back SIAP shares and then selling them to the market (forced sell), if no one covers it, then the brokers have to pay temporarily.
4. Losses due to failure to pay

[8] Direktori Putusan Mahkamah Agung RI https://putusan3.mahkamahagung.go.id dikses pada tanggal 26 Pebruari 2021

Due to failure to pay, the JSE delisted SIAP shares on July 17 2019

5. SIAP case resolution

   There were 3 brokers who were temporarily suspended, namely Danareksa Sekuritas, PT. Reliance Securities and PT. Millennium Danatama Securitas due to their involvement in a fictitious stock trading scandal, as a result Danareksa Sekuritas suffered huge losses because it was banned from operating.

Practice of the PT Mahkota Jupiter Investama share repo case

1. Share repo transactions

   Share repo transaction between PT Mahkota Jupiter Investama and PT Mahkota Property Indo Senayan and PT Mahkota Property Indo Permata

2. Share repo transactions mature

   PT Mahkota Jupiter Investama is holding back the disbursement of investments in shares of PT Mahkota Property Indo Senayan and PT Mahkota Property Indo Permata which have matured in January 2020 and investments which have matured in January 2020 must be extended.

3. Legal implications of holding maturing shares

   As a result of PT Mahkota Jupiter Investama holding back maturing shares and extending investment, losses were suffered by 7,500 customers

4. Losses arising from PT Mahkota Jupiter Investama

   7500 customers experienced losses of up to Rp. 8 trillion, where they have invested for 4 years, at the beginning of the investment the interest payments went smoothly, but since 2019 there has been a failure to pay. Currently, customers are waiting for clarity to obtain rights and justice from PT.Mahkota Investama.

Discussion

The buyer gets legal ownership, but economic ownership (beneficial ownership) remains with the seller. This is the main subject of the author's study regarding repo share ownership rights, especially in the event of failure to resell, because the repo object has been transferred to a third party. The repo mechanism is similar to a pawn because it does not require certain collateral[9]

The capital market is a source of financing that is really needed by business actors who need additional capital, as well as alternative financing for the investing community. Andrew M. Chisholm provides the definition that capital markets are places where those who require additional funds seek out others who wish to invest their excess.[10] The same definition was also put forward by Alan N. Rechtschaffen that the capital market is a meeting place for parties who have excess capital capacity (investors) with parties who need additional capital, both short-term and long-term capital.[11]

The capital market is part of the financial market which is a unified system consisting of the following elements: a) the market where securities are transacted (securities market); (b) intermediary institutions/that assist with securities transactions (securities intermediaries); (c) capital market authority or supervisor (capital market regulator)[12] In order for the system

[9] Herdina Kusumasari Saputro,dkk," *Perlindungan Hukum Bagi Investor Dalam Gagal S erah Transaksi Repurchase Agreement (Repo) di Indonesia", Jurnal Hukum*, FH Univ Brawijaya, Maret 2019, Hlm 1

[10] Andrew M. Chisholm, *An Introduction to Capital Market, Products, Strategies, Participants*, John Wiley & Son. Ltd., New York, 2002, Hlm.1.

[11] Alan N. Rechtschaffen, *Capital markets, Derivatives and The Law*, Oxford University Press, Inc., New York, 2009, Hlm.4.

[12] FrankJ. Fabozidan Pamela Peterson Drake, Capital Markets, Financial Management, and In vestment Management John Wiley & Sons, New Jersey, 2009 (selanjutnya disebut Frankj. Fabozzi 1), Hlm.4.

established in the capital market to run fairly, in an orderly and orderly manner, activities in the capital market need to be regulated and stated in capital market law.

The word "all" in the article indicates that people can make any agreement, not limited to the types of agreements regulated in the Civil Code, and the agreement will be binding on the parties making it.[13] The term "all" also contains a principle known as the principle of partial autonomy. The principle of freedom of contract means a person's freedom to make any kind of agreement and contain anything in accordance with their interests, within the limits of decency and public order.[14]

Adam Smith stated in the previous chapter that by implementing the principle of justice as the rule of the game, spontaneous reciprocal benefits will be created for each actor.[15] Even though a free market economy upholds individual freedom, this economy must be run with the principle of justice as the main rule of the game, and give it a proper place. It is very central to the government's role in upholding justice.

A repo transaction is assumed to be a sale and purchase agreement with a promise to buy back in general, where everything is adjusted to the agreement made by the parties.[16] This kind of agreement is a reflection of the freedom of contract that is utilized by sellers and buyers, so that with this freedom the parties can make variants of the sale and purchase agreement that are different from what usually occurs. This is permissible and legal as long as the parties agree, bearing in mind that there is another goal that is specifically to be achieved.

At the level of application of the principle of freedom of contract, it has been implemented in share repo transactions, the implementation of which is preceded by negotiations and then the results are stated in a written agreement between the owner and the share buyer. The repo holder is bound not to sell the shares in the repo to other parties, while the share owner has the obligation to buy back the shares after maturity according to the agreement. Contract Law adheres to an open system, which gives the widest possible freedom to the public to enter into agreements containing anything as long as it does not violate public order and morality. The parties are allowed to regulate their interests in the agreement that will be agreed upon, but if someone does not regulate something themselves, then the matter will be subject to law, as regulated in the GMRA.

However, in the case of shares in PT Hanson, PT Global Mediacom, PT Sekawan Inti Pratama and PT Mahkota Jupiter Investama, this was not implemented. The application of the principle of freedom of contract for parties in stock repo transactions is basically in accordance with the principles contained in Article 1338 of the Civil Code, because a principle is something that can be used as a basic basis, a foundation for resuscitating/returning something, in this case a stock repo transaction. Where legal principles provide a spirit of validity or power or material rights to legal norms in relation to formal power.

Based on its binding force, the implementation of legal rules is actually enforced by external powers, while the implementation of religious and moral rules basically depends on the person concerned himself. Legal rules provide rights and obligations (attributive and normative), while religious rules and moral rules only provide obligations.

The open system contains the principle of freedom to make agreements, reflected in Article 1338 paragraph (1) of the Civil Code, which also reflects the principle of pacta sunt

[13] H.Toto Tohir Suriaatmadja dan Ujang Charda, *Transformasi Hukum Perdata Indonesia Dari Kodifikasi Ke Sektoral*,Fakultas Hukum Universitas Subang, 2017, Hlm. 131

[14] Ghansam Anand, "*Prinsip Kebebasan Berkontrak Dalam Penyusunan Kontrak", Yuridika*, Volume 26 No. 2 Mei- Agustus 2011, Hlm. 89.

[15] Adam Smith dalam Rustam Dahar KAH , *Teori Invisible Hand Adam Smith Dalam Perspektif Ekonomi Islam*, Jurnal Economica, Volume II / Edisi 2/ Nopember 2012, Hlm. 57

[16] Christa Andystone Ginting dkk,"Perlindungan Investor Dalam Transaksi Repurchase Agreement (Repo) Saham Yang Gagal Bayar", *Diponegoro Law Journal* ,Vol 6 No.1 2017.Hlm. 5.

servanda, thus the agreement made by the parties constitutes the law for those who make it, and implies that denial the obligations contained in the agreement constitute an act of breach of promise or breach of contract.

Stock repo transactions are one of the activities that take place in the capital market, and are included in a sale and purchase agreement with the right to repurchase, namely a sale and purchase agreement in which there is an agreement that the seller is given the right to buy back the shares they have sold, by returning the price. the purchase that has been received is accompanied by all costs that the buyer has incurred for carrying out the sale and purchase and delivery in accordance with Article 1519 of the Civil Code. If the seller intends to buy back the shares, this must be agreed beforehand.

As in the case of Beny Tjokro (PT. Hanson Internasional, Tbk) vs Platinum Partner Value Arbitrage Fund, where they agreed and signed a share repo agreement in August 2014 and the agreement will mature in December 2016. However, in February, March, December In 2015, the Platinum Partner Value Arbitrage Fund sold 575 million shares of PT. Hanson Internasional, Tbk to Goldman Sachs International on the Indonesian Stock Exchange, and according to Golden Sachs, they were not aware of any previous repo agreement for these shares. In fact, Goldman Sachs has transferred ownership of PT. Hanson shares in accordance with Letter No. 284/MYRX/FBR/VIII-2016 issued by PT. Buana Ficomindo Registrar as the Securities Administration Bureau.

In the case above, the repo agreement agreed upon by both parties (Benny Tjokro and Platinum Partner Value Fund) was not complied with by either party, which means it has violated the principle of freedom of contract. The main idea of freedom of contract is related to the emphasis on agreement and the intentions or wishes of the parties, and is also related to the view that contracts are the result of free choice. As a consequence of the emphasis on freedom of contract, obligations in a contract can only be created by the intention or will of the parties, which becomes the legal basis for a binding contract to be implemented immediately once they have reached an agreement. The contract is born ex nihilo, namely the contract as an embodiment of freedom of will (free will) of the parties making the contract (contractors). Contracts are exclusively the free will of the parties making the contract. Through the postulate that the contract as a whole creates new obligations and that such obligations are determined exclusively by the will of the parties, freedom of contract has severed the link between custom and contractual obligations. Freedom of contract allows (civil) agreements to waive obligations based on pre-existing customs.

The point of view that the contract is the result of the free will of the parties and the contract is created at the meeting of the will of the parties, then the principle of consensualism was born. Consensus is the core and basis of the concept of modern contract law. This principle basically states the idea that the essential thing in a contract is the will of the parties. Previously, the principle of consensualism was not known. German law initially did not recognize the law of contracts, then real contracts and formal contracts were also recognized. Consensual agreements born of agreement are completely unknown. Contracts based on consensus are actually not purely a product of eighteenth and nineteenth century contracts, because long before that Roman law already recognized contracts based on consensus, but they were not generally applicable and only applied in a very limited scope.

Contracts based on consensus (contractus ex consensus) in the evolution of Roman law developed later. It began to be built and developed in the first century BC. According to Alan Watson, the introduction of contracts based on consensus was the greatest discovery in Roman law. Contracts based on consensus themselves include four types of contracts, namely: buying and selling (emptio vendito); leasing (locatio conductio); civil partnership (societas); and imposing orders or authority on other people (mandatum).

These four types of contracts were common contracts at that time. These contracts are simply born of consensus without having to follow a certain form or physical action required

by a real contract. The four types of consensual contracts above are actually the basis for the generalization of modern contract law.

The paradigm of freedom of contract with its emphasis on individual free will has led to the concept of legal acts (acte juridique, rechtsgeschaft, juristic act) in contracts starting to be elaborated. The contract is perceived not only as an agreement, but also as a legal act. A contract as a legal act is created by a mutualistic interdependent relationship which expresses the will of the parties which directly creates legal consequences for the benefit of one or both parties. The relationship that states the agreement between the parties must be interdependent, without that interdependent relationship, there is no contract. The aim of the parties entering into the agreement must be aimed at creating legal consequences. It is the will of the parties that creates legal relations.

The main idea of freedom of contract is related to the emphasis on agreement and the intentions or desires of the parties. Apart from that, the idea of freedom of contract is also related to the view that contracts are the result of free choice. This is the legal basis for contracts that are binding to be implemented immediately once an agreement has been reached, so that the contract is based on approval of the contract as a result of free will (choice).

The contract is perceived not only as an agreement but also as a legal act. A contract as a legal act is created by a mutualistic interdependent relationship which expresses the will of the parties which directly creates legal consequences for the benefit of one or both parties.

Article 1338 paragraph (1) of the Civil Code indicates that the agreement is binding for the parties making it, and paragraph (2) indicates the power of the creditor and the consequence that the agreement cannot be revoked unilaterally. However, this position is balanced by Article 1338 paragraph (3) which states that there is good faith in implementing the agreement. This provides protection for debtors and the position between creditors and debtors becomes balanced, this is a realization of the principle of balance.

Article 1338 of the Civil Code is related to Article 1320 of the Civil Code, which contains an essential principle in contract law, namely the agreement of those who bind themselves. This principle is also called the principle of autonomy "consensualism" which indicates the existence of an agreement, this principle implies the willingness (will) of the parties to participate with each other, there is a willingness to bind themselves to each other.

This will gives rise to trust that the agreement will be fulfilled. The principle of this trust is an ethical value that is rooted in morals, as stated by Eggens that honorable humans will keep their promises. Freedom of contract in the Islamic legal system, the Qur'an has regulated that transactions are only valid if each party involved in the transaction fulfills its obligations which are a consequence of a transaction (QS Al Maidah: 1; QS Al Isra": 34) then there is the principle of prohibition against usury and uncertainty (QS Al Baqarah: 275; QS An Nisa: 29; QS Al Maidah: 4) Humans make agreements strengthened by the belief that these promises will be fulfilled, if this does not exist then there will be no society whose economy will develop. If certainty does not exist, then the economy will become chaotic. Trust in a promise is a natural requirement, that people who are bound by their contractual promises are not only bound morally, but also juridically.

This trust should be applied in stock trading on the JSE, which is generally carried out by investors in the negotiated market, including share repo transactions. This negotiation market is in great demand by sellers because sellers can freely offer their share prices to prospective buyers without having to be bound by standardized share prices as in trading on the regular market. In the negotiated market, securities transactions are carried out through individual bargaining without entering selling offers and buying requests into JATS.

The promise to buy back the same shares at the time and price determined by the parties in the share repo transaction, shows that the purpose of the share repo agreement is not only limited to transferring shares from the seller to the buyer, but the parties also have

the aim that the shares has been sold by the seller at a predetermined time and can be repurchased by the seller. Meanwhile, for the buyer, apart from the aim of receiving the transfer of shares, the aim is also that the buyer can resell the shares at the appointed time and receive the agreed amount of money. The share repo transaction agreement is said to end when the parties have carried out their obligations, namely in the first settlement process (1st leg) and the second settlement process (2nd leg), namely at the repurchase maturity date, this is a form of repo transaction using the sell/buy back repo method.

Article 3 paragraph (1) POJK repo contains an obligation to change ownership of securities after a repo transaction occurs. This provision is emphasized in GMRA Indonesia which confirms that the purpose of holding a repo transaction based on GMRA Indonesia is to legally transfer ownership of securities. However, according to the author, not all legal aspects relating to share repo transactions have been specifically regulated in the POJK. One of them relates to the ownership status of shares which are the object of a repo transaction if the shares are apparently resold (re-repo) by the buyer to a third party without the knowledge or consent of the seller.

Furthermore, Article 3 paragraph (3) POJK requires parties to complete their obligations if there is an event of default in a repo transaction. This provision does not specifically regulate re-repo events to third parties. This causes the need to determine other legal provisions that can be applied to answer this problem, so that legal certainty for the parties in this share repo transaction can be provided and felt fairly.

Based on Law Number 40 of 2007 concerning Limited Liability Companies (PT), the transfer of rights to shares is carried out by means of a deed of transfer of rights made by a Notarial deed or private deed. The provisions in the Company Law are in accordance with the provisions in Article 613 of the Civil Code which regulates the delivery of objects that fall into the category of intangible movable objects or securities.

The Civil Code considers shares to be intangible movable objects and based on the provisions in the Company Law, shares that are recognized are only shares in name only. Based on the provisions of Article 613 of the Civil Code, the transfer of securities in the name is carried out by means of a cessie or deed of transfer of rights which can be made by authentic deed or privately. The deed states that these rights are transferred to another person. The shares that are the object of the repo transaction are shares in the name of those traded in the capital market, so the method of transferring rights to these shares is subject to the provisions of the laws and regulations in the capital market sector, namely by using a book-entry transaction settlement system known as C-BEST. as explained in the share repo transaction settlement mechanism on the BEI.

The existence of the right to repurchase basically means obtaining ownership rights to the goods purchased, but by assuming the obligation to at any time within the period of the agreed repurchase right hand over the goods back to the seller. Delivery at the time of completion of the first share repo transaction by book-entry, the buyer has the position as owner of the shares to obtain all rights that were originally owned or vested in the seller. According to the author, in buying and selling with the right to repurchase, because the buyer has the position of 'perfect owner', the buyer has the right to sell and transfer the goods that are the object of the sale and purchase to a third party. However, on the other hand, the repo holder is bound by the agreement until maturity, namely the share owner buys the shares back to him so that his party must have good faith not to sell to a third party or the transfer of shares to a third party must remain bound by the conditions of the party's right to buy back. initial shareholder.

According to the author, the share transfer process of PT. Hanson International Tbk from the securities account belonging to the seller (Benny Cokro) to the securities account belonging to Platimum Partners at the time of completion of the first transaction, so from that moment on there was a transfer of ownership rights to PT shares. Hanson International Tbk

from seller to Platinum as buyer. Thus, Platinum's position is as the perfect owner of PT shares. Hanson International Tbk and obtain all rights previously attached to or vested in the seller, Platinum can transfer or sell PT shares. Hanson International Tbk to a third party, but Platinum is still bound by the promise to resell the shares on the repurchase date which has been jointly determined in the contract with the original seller and Platinum must have good faith if it wants to sell the shares, namely notification or approval from the initial seller who is the initial owner of the shares.

The seller is the owner of the shares and the transfer carried out based on the repo is not a free sale but is only temporary in accordance with the agreement that follows the sale of the shares in question. PT Platinum's action in transferring PT Hanson shares to a third party (Goldman Sachs international) has violated Article 1234 of the Civil Code, namely not doing anything, namely that while it is bound by a repo transaction with Beny Tjokro it is prohibited to transfer or sell Hanson shares to any party. In this incident, Beny Tjokro, based on article 1341 of the Civil Code, can file a lawsuit to cancel the legal action (actio paulina) carried out by PT Platinum which has sold the repo shares to Goldman Sachs (a third party). Legal action in this case is interpreted as a legal action, either unilateral or reciprocal, because it is in the form of a legal action (so it must be active).

The issue of transferring rights to shares is an important problem in buying and selling shares on the stock exchange because transactions on the exchange take place very quickly so it is very common for the seller to have not received the goods, but then sell them again. Procedures for the transfer of securities are regulated in Article 9 paragraph (2) and Article 55 paragraph (1) UUPM must be determined by the stock exchange, in accordance with the exchange's authority as a self-regulatory organization.

According to the author, even though the sale and purchase of shares is temporary with a right to repurchase clause, if there is a sale of shares then the name of the owner of the shares is changed, so that even if there is a change in the name of the share owner if it is followed by a right to repurchase which follows the agreement, the shares are not actually sold. freely like buying and selling goods in general. So the transfer of shares made by Platinum to a third party (Goldman Sachs International) is considered invalid. Likewise with the transaction carried out in the second case, namely where Nomura sold or transferred MNCN shares belonging to PT. Global Mediacom, without the permission and knowledge of the initial owner, has caused losses to the initial owner or seller. In the second case, this is the same as the first case where the agreement made is only temporary or the object of the sale and purchase is not released in full because at any time it must be handed back to the original owner accompanied by payment of a sum of money and other costs. In this case, Nomura has violated Article 1234 of the Civil Code, which means they should not do anything, meaning they should not sell MNCN shares.

In the third case (PT. Sekawan Inti Pratama Tbk), the shareholder carried out a repo transaction, but until maturity the shares were not repurchased which resulted in the shares being sold to the market (forced sell) and the Indonesian Stock Exchange delisted the shares on June 17 2019, In this case, where the shareholder does not buy back the shares that have matured, the repo holder automatically becomes the owner of the shares. This failure to pay event can occur due to several things, including before the repo transaction process, the share owner increases the value of his shares first and then repo them and when the repo is carried out the value of his shares decreases, of course this will be very detrimental to the repo holder. because the nominal value he has issued is not commensurate with the value of the shares at maturity and this action is against the law. In this case, PT Sekawan Inti Pratama violated Article 1234 of the Civil Code in terms of giving something and doing something, in this case the shareholders of PT Sekawan Inti Pratama were supposed to buy back shares that were due (failed to pay) but this was not done, This resulted in losses for SIAP Dana Mutual Securities because sales and transactions were prohibited.

Meanwhile, in the case of shares, PT Mahkota Jupiter Investama has taken actions that are detrimental to its customers by withholding disbursements that are already due and extending the maturity of future repos, here PT Mahkota Jupiter Investama has committed an act of default by violating the provisions of Article 1234 of the Civil Code by not doing so. its obligations in a timely manner, and commits unlawful acts by violating the subjective rights of its customers, and it must fulfill its obligations under Article 1243 and Article 1246 of the Civil Code.

Based on the cases presented above, according to the author, it is clear that one of the parties in the repo transaction did not carry out its obligations as stated in the agreement. Even if the agreement is made previously with the agreement of the parties which reflects the implementation of the principle of freedom of contract, consensualism. This proves that in the exercise of freedom of contract, consensualism, there must still be good faith on the part of the parties. OJK intervention is really needed to provide a sense of investment security and legal certainty for investors.

For actors in repo transactions in accordance with applicable regulations, on February 28 2019, PT Kliring Penjamin Efek Indonesia (KPEI) launched a third party service or Triparty Repo. Through the Triparty Repo facility, KPEI provides services including maintenance of repo contracts, settlement processes, mark to market processes, margin management, billing and payment of repo rates and income payments (dividends or coupons).

KPEI carries out administrative functions for all transaction processes carried out through the Triparty Repo facility, so that transactions can be carried out efficiently and well monitored. The obligations of sellers and buyers arising from transactions carried out are administered through this facility, including through collection of loan funds and repo rates to sellers as well as collection of returns of securities to buyers at maturity, rights to securities (dividends) will be billed to buyers to be received by seller even though the securities are being guaranteed to the buyer.

According to the author, the obligations contained in these regulations must also be applied to share repo transactions between issuers so that they can provide a sense of justice and certainty for both parties and other parties involved in the share repo transaction process. Based on an interview with Mr. Junaedi as the Regulatory Division at the OJK, that repo agreements between issuers are generally not reported to the OJK so that the OJK does not record the number of repo transactions between issuers. losses due to other parties not carrying out their obligations. So the OJK will only know that a repo transaction has occurred between issuers if there has been a problem in its implementation, so reporting activities for every transaction, including repo transactions between issuers, must be carried out to the OJK so that the OJK can carry out supervision in implementing each transaction and taking action if there is an event that results in losses for players in the capital market.

The application of the principle of freedom of contract for the parties in share repo transactions, in the process of making the agreement is in accordance with the principles contained in Article 1338 paragraph (1) of the Civil Code. Apart from that, there are regulations in POJK No. 9/POJK.04/2015 and GMRA Indonesia, where the existence of these regulations aims to create order, meaning that their binding force in their implementation is enforced by the existence of legal rules. Even though it is clear in the principle of freedom of contract, that the agreement made by the parties constitutes the law for those who make it, and implies that if there is a denial of the obligations contained in the agreement, it is an act of breaking a promise or breach of contract. So the existence of stock repo transaction regulations in addition to the principle of freedom of contract is very necessary to create order, certainty and justice.

Islamic law regulates that the original law of muamalat is permissible, unless there is an argument that prohibits it, so that with this rule there is an opportunity to adopt modern transactions (muamalah), as long as they do not conflict with sharia principles. Transaction

parties must always ensure that the transactions carried out do not cause harm to themselves or others. Muamalah jurisprudence in Islam is based on principles that provide free space for mujtahids and theorists to carry out ijtihad in the context of developing contextual muamalah jurisprudence according to developments, such as repo transactions. Repo transactions apply the principle of freedom of contract, in Islam known as the principle of Al Hurriyah (freedom) which is the basic principle of Islamic contract law, meaning that the parties are free to make an agreement or contract. Free to determine the object of the agreement and free to determine with whom to make an agreement, as well as free to determine how to resolve disputes if they arise in the future. However, this freedom is limited by the provisions of the Sharia, that in making an agreement there must be no elements of coercion, error and fraud (Surat Al Baqarah verse 256).

CONCLUSION

The application of the principle of freedom of contract for parties in stock repo transactions between issuers has basically been implemented in accordance with the principles contained in Article 1338 paragraph (1) of the Civil Code. Legal principles are the normative basis for the formation of law. Without legal principles, positive law has no meaning. To become a positive rule, a legal principle requires a juridical form. So, for share repo transactions between issuers, regulations and guidelines are needed. Currently there are regulations in POJK No.9/POJK.04/2015 (for financial service institutions) and GMRA as legal rules that provide binding force for the implementation of stock repo transactions.

REFERENCE

Alan N. Rechtschaffen, *Capital markets, Derivatives and The Law*, Oxford University Press, Inc., New York, 2009

Andrew M. Chisholm, *An Introduction to Capital Market, Products, Strategies, Participants*, John Wiley & Son. Ltd., New York, 2002

Christa Andystone Ginting dkk,"Perlindungan Investor Dalam Transaksi Repurchase Agreement (Repo) Saham Yang Gagal Bayar", *Diponegoro Law Journal* ,Vol 6 No.1 2017

Direktori Putusan Mahkamah Agung RI https://putusan3.mahkamahagung.go.id dikses pada tanggal 26 Pebruari 2021

Frank J. Fabozidan Pamela Peterson Drake, Capital Markets, Financial Management, and In vestment Management John Wiley & Sons, New Jersey, 2009

Ghansam Anand, "*Prinsip Kebebasan Berkontrak Dalam Penyusunan Kontrak", Yuridika*, Volume 26 No. 2 Mei- Agustus 2011

Herdina Kusumasari Saputro,dkk," *Perlindungan Hukum Bagi Investor Dalam Gagal S erah Transaksi Repurchase Agreement (Repo) di Indonesia", Jurnal Hukum*, FH Univ Brawijaya, Maret 2019

H.Toto Tohir Suriaatmadja dan Ujang Charda, *Transformasi Hukum Perdata Indonesia Dari Kodifikasi Ke Sektoral*,Fakultas Hukum Universitas Subang, 2017

Irham Fahmi, *Pengantar Pasar Modal*, Alfabeta, Bandung, 2012,

M. Iqbal Asnawi," Implikasi Pengelolaan BUMN Persero dalam Kerangka Welfare State Berdasarkan Mekanisme Perseroan Terbatas", *Jurnal Hukum Samudra Keadilan*, Vol II Nomor 1 Januari -Juni 2016,

Nasarudin (et all), *Aspek Hukum Pasar Modal Indonesia*, Edisi Pertama, Cetakan Ketujuh, Kencana Prenada Media Group, Jakarta, 2011,

Rustam Dahar KAH , *Teori Invisible Hand Adam Smith Dalam Perspektif Ekonomi Islam*, Jurnal Economica, Volume II / Edisi 2/ Nopember 2012,

Siaran Pers Sektor Jasa Keuangan, Otoritas Jasa Keuangan, https//ojk.go.id, diakses tanggal 18 Maret 2024 pukul 13.30.

Yeti Sumiyati," *Peranan BUMN dalam Pelaksanaan Tanggung Jawab Sosial Perusahaan untuk Meningkatkan Kesejahteraan Rakyat*", *Jurnal Hukum IUS QUIA IUSTUM* No.3 Vol 20 Juli 2013

Yohanes Suhardin, dikutip dalam M.Iqbal Asnawi, "*Implikasi Pengelolaan BUMN Persero Dalam Kerangka Welfare State Berdasarkan Mekanisme Perseroan Terbatas*",*Jurnal Hukum Samudra Keadilan,*Vol II Nomor 1 Januari-Juni 2016.