

BANK LIABILITY IN TRUSTEE AGREEMENT IN INSOLVENCY STATUS
TANGGUNG JAWAB BANK DALAM TRUSTEE AGREEMENT PADA KEADAAN
KEPAILITAN

Franciska Mifanyira, Indah Dwi M. J., Mega Dwi A

Fakultas Hukum Universitas Airlangga
Jalan Dharmawangsa Dalam Selatan, Surabaya 60286.
E-mail: fransiska.mifanyira.sutikno-2017@fh.unair.ac.id; Telp.: (031) 5023151

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ABSTRACT

A trust agreement is a special agreement in banking gives the bank the right and authority to manage the customer's assets as stated to the agreement The assets of trust assets are the property of the customer, the management of the assets must be separately carried out to implement the Prudential Principle and Pacta Sunt Servanda in banking contract. This Legal Research use normative positivist with the using of Statute and Conceptual Approach along with three research sources. This Legal Research focus on the Legal Consequences in the Trustee Agreement and Liability of Bank in the case of Bank include the Settlor's asset as the Insolvency Asset. The Research result are Bank only as a manager of Asset so every legal conduct must have approval of Settlor so If the asset is included the Insolvency Asset is a contract and law violation so it should be fixed by the contractual dispute settlement

Key Words: banking; legal protection; liability; liquidation; trust agreement,.

ABSTRAK

Perjanjian kepercayaan adalah perjanjian khusus dibidang perbankan yang memberikan hak dan wewenang kepada bank untuk mengelola aset pelanggan sebagaimana dinyatakan dalam perjanjian. Aset kepercayaan adalah milik pelanggan, pengelolaan aset harus dilakukan secara terpisah untuk menerapkan Prinsip Kehati-hatian dan Pacta Sunt Servanda dalam kontrak perbankan. Penelitian Hukum ini menggunakan metode positivis normatif dengan menggunakan undang-undang dan pendekatan konseptual bersama dengan tiga sumber penelitian. Penelitian Hukum ini fokus pada konsekuensi hukum dalam perjanjian perwaliamanatan dan Pertanggungjawaban Bank dalam kasus Bank termasuk aset Settlor sebagai Aset Kepailitan. Hasil Penelitian adalah bank hanya sebagai manajer Aset sehingga setiap tindakan hukum harus memiliki persetujuan Settlor sehingga jika aset dimasukkan Aset Kepailitan adalah kontrak dan pelanggaran hukum sehingga harus diperbaiki dengan penyelesaian sengketa kontrak.

Kata Kunci: perbankan; perlindungan hukum; tanggung jawab; likuidasi; perjanjian.

INTRODUCTION

The Indonesian Banking System has developed with the implementation of the Indonesian Banking Architecture (API) and Basel Principles for Effective Banking (Sjahdeni, 2008). The era of globalization creates the society dependence on banking as an intermediary institution (Usanti & Shomad, 2017) but actually the banking institution also provides and maintain the functions in managing customer assets (trust service). Trustee Service is one of the banking services legalized by the authority which allows the customer to bank receives deposits and manages the financial assets. At first glance, trust service seems similar as investment management services as regulated in Law Number 8 of 1995 on Capital Market related the authority of banks as managers of customer's wealth. Trustee Service is one of the banking services legalized by the authority which allows the customer to bank receives deposits and manages the financial assets. Banks is not same as investment manager as long as bank subjected to banking law as legal standing, implementation of its obligations. Banking law and banking rules should not be separated relating to the management of trust assets while investment managers are subject to capital market laws and regulations of financial service authorities and financial managers personally have different codes ethics and mechanisms and standards for asset management. Bank Indonesia or Indonesia Central Bank (Without year) has distinguished the ethic code of Banking operational staff and management into five ethics such as: (a) Integrity and professionalism; (b) Avoid the conflict of interest; (c) Independency and neutrality; (d) Fair and just; (e) Keeping the society custom of behaviour.

There are several provisions distinguish Trust Services from other banking services. Trust service is separated from the banking unit, the asset management is limited to financial assets and there must be a prevention of customer assets to be included in bankruptcy asset if the bank declared insolvent. In relation to the threat of liquidation, the Bank as one of the major actors in the Indonesian economic system has a possibility to face the banking health problems leads to liquidation. The existence of liquidation risk might be examined by the valuation of capital, assets,

management, earning, liquidity and sensitivity (Kasmir, 2014) and the establishment of a Bank Indonesia Regulation concerning failed banks that have systemic impacts and that have no systemic impact. With the risk of failure, legal issues such as Position and Legal Effects between Banks and Customers in Trust Agreements and the existence of Forms of Customer Legal Protection, especially if Trust Assets are set to be included in bankruptcy assets. In the event that the bank has been liquidated, the bank will be taken over its controls and regulations of banking assets by the curator or third party appointed by laws and Regulations until the bankruptcy process is completed. These problems are complex with a range of problems implementing the Laws and Regulations Regarding Banking, Failing Banks, Bankruptcy and Customer Protection of Banking Service.

One of banking service which offered to the society is the trust agreement. Trust agreement basically gives bank rights on behalf of customer to manage the assets for specific terms and conditions. Stated that trust service has been divided into two kinds such as private trust and public trust (Wahanu, 2015). Private trust are implemented to the private sector legal relationship such as Bank and Customer in the Trustee Agreement, meanwhile the public trust is implemented to the wide business or wide importance such as government needs on public project. Both of Trust Agreement still need the role and function of Bank as intermediary and asset manager. In Indonesia every conventional and or sharia bank could has the Trustee Agreement after being approved by Indonesia Financial Service Authority. Bank should at least preparing the administration Document and or report related but not limited to: (a) Human resources to operate the trustee agreement; (b) General informations of trustee agreement or design of trustee agreement; (c) Trustee agreement terms and conditions for both parties; (d) Trustee agreement assets and or obligations which could be managed by bank; (e) Another factors that related to the trustee agreement.

Legal research related to trust as banking service has been discussed in some researches such as first research by Tri Handayani and Lastuti Abubakar (Handayani & Abubakar, 2014) titled "Implications of Trust Service in Banking Activities related to the Renewal of Indonesian Civil

Law" resulted some conclusions such as the concept of trust in banking is derived from the Common Law System so that the functions of banks are more limited as paying agents, investment agents and lending agents; the validity of the Trust Agreement should apply to Article 1320 of Indonesia Civil Code or *Burgerlijk Wetboek* and also Trust Agreement clauses; in the future the concept of trust agreement will be adjusted to the Indonesian legal system through limited dual ownership. The purpose of this legal research are to analyze the customer and bank legal relations in the trust agreement and legal consequences relating to the rights and obligations of both parties and the implications of customer protection in the presence of bankruptcy assets.

Based on the introduction, the legal issue might be occurred and analyzed in this paper are the legal consequences of trustee agreement between bank and the other party and the second legal issue concern about the bank liability in the case of being declared as insolvent along the trustee agreement.

There would be limitations in analyzing this paper such as the Bank as the legal research subject would be limited to conventional bank and private – owned and not designed as state owned bank. The bank could be foreign bank but it shall be operated in Indonesia for doing trustee agreement.

RESEARCH METHOD

The legal method used in this study are normative and positivist method that used law and regulations as the main source of legal research. This method would be enhanced by several another materials such as primary, secondart and third legal materials.

The legal approaches used in this paper are statute approach and the conceptual approach towards implementation of banking services and liability and/or bank liability for negligence and violation of trust agreements enhanced by in-depth analysis of standardization and mechanism for selecting and separating customer's assets from bankruptcy asset. The legal resources used in legal

research consist of primary legal materials, secondary legal materials and third legal material. The primary legal materials used are laws and regulations along with theories and legal concepts, while secondary legal materials include journals and legal books to complete the analysis that has been done. Third material would be taken from internet sources and electronic dictionary.

The data used in the research the literacy of national legislation as the main rule in this study. Other data used are examples of trust agreements and or standard clause rules made between banks and customers in a trust agreement to study and analyze the form of bank liability to customers as long as the trust agreement runs and what certain factors influence the termination of the agreement the trust. The data used do not use sample or field studies because this legal research is juridical normative legal research. The analysis that has carried out will follow the approaches and methods of legal research, continued by collecting and analyzing the laws and regulations governing the trust agreement followed by the use of secondary and tertiary legal sources.

RESEARCH RESULTS

1) Legal Consequences of a Trust Agreement

A Bank is a legal entity and business entity which are created not only for maintaining people needs in money providing or investment through the banking products but banks has already developed in Indonesia for giving many services. Because banking is exist in the business sectors, means that bank could make, modified and also create any banking agreement based on society needs. The creation of new services would not be any problem as long as the administration procedures and operational principle are appropriate to the bank establishment purposes. Banking agreement should not also limited as long as the contract substance are based on the contract rules and principle. Since Indonesian *Burgerlijk Wetboek* acknowledge freedom of contract principle, means that Bank and Customer could give their consent to agree upon any form of contract excluded the *Burgerlijk Wetboek*.

There is some principles of contract that also have to be implemented after the consent to bind themselves into a contract is there would be a legal effects upon the parties. Muhammad Sadi (Said, 2017) stated that legal effects of a legal relationship divided into some possibilities such as: (a) The new creation of legal condition; (b) The comparison between rights and obligations; (c) The consent to rule some sanctions term and conditions.

Based on banking law, bank has a right to do some activiries included to operate some operational banking instruments and/or services such as deposits, savings, credits, notes, bill of exchange, banker acceptances, commercial papers, treasury bills, bonds and another services related to the functions as intermediary institution. Sharia bank also has similar service even though there are differences related to the sharia principles implemented into the operational conducts. But in this legal paper, the subject used to be analyzed is only conventional bank than sharia bank. Bank, especially conventional Bank has the freedom to manage the operational standards relating to the service preparation and service execution to the society since Bank has a legal standing as the corporate or company. This kind of legal standing should implemented in the freedom of making and legalizing the services but also the term and conditions of the service using as long as adjusted to the company law and regulations and also banking related law and regulations. Still this freedom is not the absolute freedom since Bank also stands as financial institution under the supervision of Financial Service Authority (OJK) which constantly and completely supervise and examine the administration and or establishment of the service to prevent any legal violations.

Among the used services and/or banking instruments by the customer, there is one of unique service which is differ the bank with another financial institutions. That service is trust agreement in Indonesia Banking System has stated as “*perjanjian penitipan disertai pengelolaan.*” Based on Indonesia term, there is two legal conducts agreed between bank and customer. First agreement is bank has given rights to receive the assets by the customer and second, the bank also given authority to do management activities towards the assets. Compared with another financial

institution such as cooperation and financing company, Bank has different mechanisms and operational procedures in this service especially when bank shall bear and prevent the risk occurred by the management conduct. This management conduct in trustee is not quite same as the investment manager function in the stock market to manage the investment instrument since trustee agreement could also related to the property management excluded the stock market system. Trust is a banking service created by bank and legalized by law and regulations to given rights for a bank to manage, operate, regulate and/or supervise the flow of funds from business activities of a Customer. Trust services was originally held by trust companies or trust banks abroad. In the development of banking system, conventional banks are given rights to do so for the importance of assets diversifications in the business sectors. Based on Indonesia Banking Law, Trust is included into Bank Business Activity related to any specific agreement to manage any securities. Trust Agreement is special since it is related to the contract regime which needs any modifications in terms and clause even though it has already regulated by law. Since Bank is given rights to receive and manage the assets, it should be obvious that Bank is neither the owner nor beneficial owner.

World Bank made Operational Manual related to the Trust Agreement Procedures Number BP 14.40 on July 2008 as Revised on July 2015. Based on Section Initiation Number 1 of Trust Agreement giving freedom of any legal persons individually or another defined purposes as long as Bank could manage the administrastion and trust agreement enforcement (The World Bank,2015). Not Only reflecting the benefits to the Customer who used the service, but trust service income received by Bank could be used to develop this trust through patnership since the risk of trust agreement related not only for customer's assets but also the law implementation rank on Bank. The gaining and enjoying any flow of funds through business activities or provided by financial institution were human right for every Indonesian citizen. Those rights might be applied concretely Fby investing and/or saving funds. The increasing number of public funds sources, especially financial instruments but located not in Indonesian jurisdiction make the state face the obstacles

providing welfare of society. Internationally, trust service related to the fund management divided into several varieties such as Programmatic Trust Funds and Freestanding Trust Funds which distinguish and differ the Fund management mechanism based on the legal subject and the purposes of trust (Finance, 2009).

Trustee agreement is an agreement considered as the Un-named Agreement or *onbenoemde overeenkomsten*. This is a common theory since Indonesia Civil Code is only regulated the common and simple agreement related to the daily life and not intended to maintain the existence of specific business contract.

All parties that enter into an agreement have the right to make and ratify agreements that are different from each other especially in the presence of freedom of contract or the *Autonomy Partij*. Based on Article 1319 *Burgerlijk Wetboek*, it can be concluded that "all agreements, both named and unnamed, are subject to the provisions of Book III *Burgerlijk Wetboek*". Furthermore, the freedom to make agreements with names, forms and desired clauses can refer to Article 1338 Paragraph (1) *Burgerlijk Wetboek*, stated that "all agreements made legally apply as laws for those who make them". so that in this case both legal entities and individuals who have legal skills capable of making an agreement outside the provisions of *Burgerlijk Wetboek* as long as appropriate to laws and regulations and public order. The development of the trust agreement has developed the kind of un-named agreements.

Trust agreements are based on open systems and principles of freedom of contract. Contract Law adheres to an open system to provides the widest possible freedom choice and consent for the community to enter into agreements and enforcement which would not violate laws, public order and morality. The Freedom of Contract as factor maker of Trust agreement is regulated in Article 1338 paragraph 1 *Burgerlijk Wetboek* which written:

"All agreements made legally apply as laws for those who make them". By emphasizing the words 'all', the article seems to contain a statement to the public that we are allowed to make agreements in the form of anything or anything, and the agreement will bind them to make it like a law."

The Concept of Trust Agreement is quite clear on division of customer and bank's rights and obligations towards Trust Assets and how the agreement could give each parties mutual benefits. In particular, agreements as a form of mutual consent to do or not to do something in *Burgerlijk Wetboek* can be divided into Conditional Agreement or *Voorwardelijk Verbintesis*, Agreement with timeliness or Mutual allegations, Optional Agreement, Liability agreements that can be divided, Agreement that can be divided and Engagement with Punishment Threat (Sunyoto, 2015).

The *Ratio Legis* or legal considerations regarding the making and ratification of banking services is none other than the interests of economic development in the country. Referring to this understanding, it can be concluded that the legal politics of making trust agreements is not merely to meet individual and business needs but in the broad sense the existence of trust services also has an impact on the management of existing funds in a state.

Article 6 Letter (i) *juncto* Article 9 of the Banking Law explains that all legal relationships between customers and banks, especially the use of banking services are based on agreements. The nature of the legal relationship between banks and customers is more accurately said as a trust relationship before entering the trustee agreement.

The principle of trust as a principle must held firmly in the management of the banking industry, since trust agreement would be related to the existence of the customers' asset to managed. The use of the principle of trust as the legal basis for banking agreements between customers and the banking parties is not solely because the customer's assets will be managed by the bank but in this case the banking system is also strengthened and based on the Prudential Principle relating to the banking image in society. With the importance of banking functions in the social life of society, it is not impossible for banks to create any guidance and standard form of agreements to facilitate Prudential Principle this act is permissible as long as there is an mutual consent and agreement as provided in Article 1320 *Burgerlijk Wetboek* (Indonesia Civil Code). Meanwhile Ross Cranston et al (Cranston, 2017) stated that the banking should explain and rule the

prudential principles as the complex guidance and rules to keep the financial and or assets owned by Bank safe and solvent, Prevent the misconduct and failing potentions, to give the guidance in the event of restructurisation and or resolution and also prevent the system wide risk which could affect to the bank existence. The Basel III Banking System in Indonesia also implemented the Prudential Principle in establishing and also maintaining the existing Bank with strengthening the quality and level of capital and dividing the Core Tier Into 3 level.

Trust agreements made and agreed upon among customers based to Bank Indonesia Regulation Number 14/17/PBI/2012 established on 23 November 2012 *juncto* Bank Indonesia's Circular Letter Number 15/10/DPNP *juncto* Financial Services Authority Financial Services Authority Regulation Number 25/POK.03/2016 on July 15, 2016 *juncto* Regulation Number 27/POJK.03/2015. The agreement affected to legal position of the depositors of funds called "settlor" (customer) and recipient bank called "trustee" (bank) and also the third parties as beneficiaries (customer or other parties). The bank has new authority as a paying agent, investment agent and financing for and on behalf of the settlor. In other words, the Bank has fulfilled its obligations as agent and letter of attorney recipient based on the form of rights and obligations and authority as in accordance with Article 1317 *Burgerlijk Wetboek*. Bank shall not carry out activities or legal actions that exceed the limits of its authority as stipulated in Article 1338 *Burgerlijk Wetboek* and the Principle of *Pacta Sunt Servanda*.

Bank Indonesia (2013) also pointed some obligations for bank in establishing it is own trustee service with several documents to show intentions and serious commitment such as Principle Permission and Letter of Confirmation from Indonesia Central Bank (Online, 2013). The administrative terms and conditions are regulated not only for maintaining the legality of the Trust service but also designated as a filter in prevention of illegal activities similar as Trust being used by bank. Administrative conditions should be first tier and first filter for executing and conducting the service before Bank could entering the second tier; Agreement or contract.

Banks are required to be careful because agreement which has made can affect the risk and reputation of the bank. The Risk also related to management of customer assets in the form of other financial instruments. Banks must ensure that the source and legality of ownership of these assets were not originated from criminal acts, especially the corruption and money laundering crimes. If the bank failed to implied the legality of customers' asset leads to the legality of the trust agreement. Bank would not be charged if it proved to receive the criminal assets from the Customer unless the authorities find the contrary facts leads to the acknowledgement of bank itself of the criminal assets being saved and managed by a customer. In the other hand, bank absolutely has obligations to examine carefully the identity of customer and also the specifications of every assets. This examinations affected to the bank decision whether it would agree for implying the agreement or simply refuse the customer.

Trust agreement might be concerning in the bank role to manage the asset, but the agreement core is not related to the trustee function. Trustee function would not be happened if there is no customer which is willing to give the bank rights to manage it. Trustee agreement core is likely related to the assets of the customer as the object of agreement while the functions of bank as trustee is related to the rights and obligations that have concluded by each parties. The customers' asset that have indicated as the results and or tools for doing crimes would affect to the sustainability of the contract. Based on Article 1320 *Burgerlijk Wetboek*, an agreement could be terminated by law as null due to the violation of law related to the assets. In this case bank could gain several loss so it could plead for loss claim to the Court and or arbitration based on the contract. Still, the assets shall be customer's own assets and free of criminal background lied in it.

The legal examination by bank to prevent money laundering in trustee agreement also reflected by Indonesia Central Bank Regulation Number 19/10/PBI/2017 which implied Legal Due Diligence divided into 4 (four) variety such as customer identification conduct, Identity verification based on informations collected, doing on going due dilligence and examine the source and or the

legal relationship between assets and customers' background. This regulation also divided the legal standing of assets' holder and beneficial owner on the asset. Beneficial owner usually recognized for it is position to control and command the asset while settlor is a party who actively doing agreement with Trustee.

Trust assets that has been taken and deposited by bank are not owned by the bank because bank has no legal standing to own it. Banks are only holders of *bezit* rights (right to hold but not own) or material rights of Settlers which are strengthened by trust agreements as agent and as a recipients of power. This separation of trust property with banking assets is an implementation of the principle of "public order" in the agreement. Trust agreement and trust service among the states often vary and adjusted to the law, but in the meaning of the protection and separation of customer's asset from the bank asset is a must, especially when the asset which vary from property, securities and another derivatives instrument. There must be a good connection and or good coordination between bank, customers and or linked assets instrument as long as the bank manage the assets. Nevertheless, the Asset which could be included in the agreement is only financial assets and not for property assets.

There is no exact regulations explicitly differ the banking asset and customers included as Public Order's factor since this agreement is only bound and implied by contracting parties. But Society know the importance of separations since Bank should have engaged many Trustee Agreements. Soedikno Mertokusumo (Mertokusumo, 2010) explains that the public order is a limitation and regulator of the rights and obligations of each party, so that later it will not harm one another. Besides that Muhammad Djumhana (Djumhana, 2006) emphasized that in order to prevent the mixing and use of customer funds in trust service businesses, banks shall applied off balance sheet arrangements by not displaying customer assets in bank balance sheets.

As the recipient of the power of attorney and agent, the bank only has the right to receive safekeeping and management services, namely service fees. Using the customer assets without legal

basis and legal standing is an absolute implication of Legal Obligation of Bank based on Prudential Principle and Violation Contracting Parties related to the guarantee of safety management in Trust Agreement. In the event of a loss arising from the management of Trust Agreement by Bank, bank is obliged to compensate based on several terms and conditions, it is necessary to determine which assets will be a guarantee for the implementation of the Bank's responsibilities.

The Trust Agreement affects third parties. The existence of bank's power and authority as managers of customer assets (financial instruments) are related to the financial instrument. Financial Instruments in Indonesia are offered and traded as securities as stipulated in the Capital Market Law and Regulations - Financial Services Authority Regulations. The bank as an agent has the right to invest in the name of the settlor as long as it brings the benefits and benefits of the agreement. The essence of this authority must also be regulated completely, in detail and clearly as stipulated in Article 7 paragraph (1), paragraph (2) and paragraph (3) of the Financial Services Authority Regulation Number 27 of 2015 directly through Trustees or Investment Managers in accordance with the type activities or instruments used in the Trust agreement. Investment Manager are those whose business activities manage securities portfolios for customers or manage collective investment portfolios for a group of customers, as referred to in the Law on Capital Markets.

When using an Investment Manager than trustee, the investment manager should have a separated agreements of the settlor and trustee to prevent overlapping of authority and also the incompatibility of the rights and obligations of each parties. The other party affected by the existence of this trust agreement is the party that has an obligation to the settlor and the party entitled to fulfill the obligation on the settlor. For a party that has an obligation on the settlor it will not affect the performance of the trustee in implementing the agreement as long as the settlor receives the fulfillment. If the settlor has an obligation to pay the debt to a third party using a financial instrument, it will be handed over to the Trustee as a debtor's agent, the authorization does not affect the repayment of debt or liability due to the absence of the settlor responsibility to the

bank. Even though a bank acts as an paying agent representing a settlor, it does not mean a Novation (Debt Upgrading) or Delegation (Transfer of Debtor Status). But in this case the settlor has an obligation to notify the trust agreement to the creditor as part of the Good Ethics. Regarding debt repayment or the obligation to use trust assets would not be a problem as long as the bank and the customer consider the risks regarding the payment deadline and there has been communication with the creditor as the recipient of the repayment.

2) Bank Liability with the Inclusion of Bankruptcy Assets

The Contract between Bank and Customer in Trustee Agreement creates rights and obligations between them. As stipulated in the law and regulations, Bank as a Trustee has to comply to several restrictions upon it functions such as:

- a. Trustee agreement and operational made and executed separately from another banking service. The limitation is an absolute obligation beared to the Bank as the Service Provider. This Separated management of Trustee and Bank is to provide the legal certainty of exact number of Bank Asset that would be divided due to some legal problems such as insolvency.
- b. Trustee only manage financial assets. Financial Asset could related to the financing and investment asset which is used by the customer and settlor along with the agreement. In this agreement settlor could set the obligations and rights of the Bank to manage the financial asset independently or cooperate and coordinate to the private auditor or management as long as not make the Bank as the main Trustee get loss or damage.
- c. Settlor financial assets has to be separated from trustee asset. This separation should be regulated and also stated in the Trustee agreement along with the proof and clear distinction among the assets.

- d. Trustee agreement made in written evidence. The Specific of written Agreement which is elaborated in the Indonesia Law and Refulations related to the Banking Agreeemet mainly concerned and made in the Notarial Deed to bind the parties.
- e. Trustee has to maintain the secrecy of settlor's identity and or another confidential information related to the trustee Agreement. The Asset management not only need a profesional Bank which is experienced to do management for years but also need a Bank which understand and implement such a ethic code of a manager. The Bank has given rights to manage and arrange the asset's list document but Bank is prohibited to open any confidential informations except the information is asked by the authorities.

Specifically, Trustee has several obligation such as

- a. Making and dismissing settlor account. The Account should be integrated to the Bank account as the trustee since the financial management and financial report is related to the Bank Account Efficiently.
- b. Saving financial asset's income to settlor's account. The Income gained by the Bank as the Trustee Service is not same as the Income of the Bank. The Agreement of the Bank Income should be agreed in the Trustee Agreement and be separated.
- c. Paying settlor's obligation to third parties on behalf settlor's name. The management service is not limited to the financial management but also the chances of the Bank to help the settlor to manage the cash flow of the settlor's asset. Some transactions along with the Trustee Agreement could not be fixed alone by the Settlor so Trustee is asked to help managing and fulfilling the obligation of the financial obligation. The parties as the obligation receiver should be informed completely along with the financial management. Since the Asset is still be the Settlor's legal ownership, it means the payment and the usage the asset should be under the supervision and approval based on the agreement.
- d. Manage and arrange documents related to financial assets of settlor.

Trustee is forbidden to conduct some activities such as

- a. Use settlor's asset for the private interests. This kind of legal conduct of using the settlor's asset along with the agreement absolutely violate the law and the usage considered as the criminal conduct or even breach of conduct depends on how both parties agreed it.
- b. Conducts some activities which violate the Trust Agreement. The Conducts shall not occurred based on Trustee initiative but also the Settlor shall not order and or request Trustee to do so.
- c. Trustee shall not use Settlor account which is designed by Foreign Banks.

Before a legal problem occurs, the bank and the customer can make adjustments through an agreement. Whereas if a legal problem occurs, the party who violates the agreement must be held accountable as a legal obligation. A bank should prepare the mechanism in preventing and dealing with the risk related to the agreement such as legal and operational risk. Audit is a one of some procedure stated in law and regulations to ensure the procedure implementation. Audit in Trust Agreement divided into two varieties such as Internal Audit and External Audit. Internal Audit is concerned to the administrative requirement of a bank on Core capital, Minimum Capital, Bank Health condition Meanwhile External Audit of a Bank concerned about (BIS, 2014) Difficulties of Internal Audit, Material and Financial misstatement, Significant Management judgement, Internal Control Efficiency, Reports and disclosures, also interrelation of Managements by Directors and other workers.

Insolvency in the Banking sector is not a new case in Indonesia since the liquidation cases in the crisis time in 1998. The Government and the customer of Bank Service began to realize that Banking system that build and managed by the prudential principle could be violated by the internal parts of Bank intentionally or without any consent based on the external factors. The Liquidation soon began to divided by the Government based on the background and factors lies the legal status. While Liquidation could be systemically affects the National, Insolvency is more simply since the background of Insolvency is when the Bank could not deliver it obligation to pay creditor of amount

of Credit Payment. This leads to the request from the Creditor to bind the Bank in the Insolvency status and being managed by third parties named Liquidator. This Liquidator would manage all of the Bank Asset that listed in the Bank Financial Reports and or another supplementary documents. The Liquidator not only filed the assets of Bank as the payment based on the creditor positions but also manage and choose the assets on the name of Bank to be guaranteed and used in Insolvency Asset known as *Boedel Pailit*. The Insolvency Asset should be meet some characteristic such as: (a) The asset is bank's, as proved by legal ownership document; (b) The asset is part of income received by bank; (c) The asset is considered by the liquidator to give any benefit in the increment.

The process of insolvency is completed and implemented in Insolvency Act. The process would be coordinated held by the bank and liquidator but the legal issue occurred in the event of Insolvency is when the bank without any permission and or approval from the Settlor include the settlor's asset as the part of insolvency asset to save the Bank status for being declared as Insolvent. This condition might be happened since the Settlor has given bank full access to manage and control the settlor's asset on behalf on settlor and bank is not implement the Prudential Code and also the contract.

Munir Fuady (Fuady, 2018) stated that in the event of Insolvency, Bank as Company represented by Directors has to implement "Independency Principle" to fulfill the loss of the Creditor using the Bank Assets except the conditions such as: (a) Directors proved to do misconduct or director violate the law and regulations and or rules in the Company Deed; (b) Directors proved to do Breach of Contract and or *onrechtmatige daad* or Criminal Conduct; (c) Directors proved to violate the Business Judgement Rule and Fiduciary Duty Principle; (d) Directors proved to violate ultra vires principle; (e) Directors proved to violate the Piercing the Corporate Veil Doctrine.

The violations of any terms and or conditions by Bank stated in contract leads to the responsibility and or liability should be bear by Bank. The usage of Settlor's asset fulfill the Bank

Obligation with any consideration is totally prohibited since the Trustee Agreement made and implemented separately by the Trustee Business Activity. The Liquidator should examine and confirm the legality of the asset ownership or else Liquidator would bear liability as the Bank representative. The Liquidator which found the legal violation of a Bank to include the Trustee Asset into the Insolvency asset shall inform the fact to the related parties such as Settlers, Creditors, Trustee and also the Financial Authority Service to proceed the legal liability based on the Trustee Legal Conduct. This responsibility is implemented as a form of Liability.

To Examine which kind of Liability would be bank's, there must be a brief theory to support the liability implementation. Agus Yudha Hernoko (Hernoko, 2010) explained that liability is a series to bear losses caused by mistakes or risks. Y. Sogar Simammora (Simammora, 2010) stated that liability concerned of compensation in the matter of *onrechtmatigedaad*. According to J.H. Nieuwenhuis (1985), liability should be proven among the illegal act (*onrethmatige daad*), cause (*oorzaak*) and guilty (*schuld*). Yahya Harahap (Harahap, 2009) stated that there are legal consequences as a tangible form of the existence of a legal entity, especially a bank. Legal entities not only give birth to the concept of the separation of assets, but also create to other principles namely Liability. Liability begins with a non-compliance with the agreement and results in a loss from one of the parties. Barda Nawawi Arief (Arief, 1990) and Celine Tri (Tri, 2009) divided liability into several types, namely Strict Liability, Vicarious Liability, Theory of Liability due to errors, Presumption Theory to always be responsible, Presumption Theory for not always being responsible and responsibility with restrictions, where its application is casuistic depending on the proof of violation. Liability also related to the matter of power and hierarchy in determining the liable party as well as stated by Sri Soedewi (1980).

Indonesia Law has given opportunity to react to the contract violation to not include the Settlor Asset to any account or any Bank's Business Activity based on Contractual Side. Article 1243 Burgerlijk Wetboek divide the factors of Breach of Contract (Wanprestasi) into several

conducts such as: (a) Debtor (Bank) has not implemented any obligations (zero obligations); (b) Debtor has not implemented the obligation based on contract; (c) Debtor has not implemented the obligations in the right time; (d) Debtor has implemented the obligations, but the implementation along with the breach of rules and regulation in the contract.

For instance, the liability if bank would be determinate in the contract or agreement. If Settlor find any violation of a contract, settlor could proceed the violation through the contract mechanism. The violation of contract could be related to the management and or usage of the settlor's financial assets along with the contract implementation. Since the core of the contract is to manage financial assets, this leads to the obligation for a bank to prevent it mixed to another assets, especially when it comes to the insolvency in Bank operational. There is no possibility of Mixture between Bank assets and customer's asset since the beginning of agreement based on contract terms and conditions and as the implementation of Prudential Principles. the Possibility of inclement of Settlor's assets would happened if Trustee and or Curator.

But In the event that the entry of customer assets as bankruptcy assets are carried out by the competent party in the regulation of bankrupt assets, then the liability is the responsibility of the bank with compensation in accordance with the amount of bankrupt assets entered. whereas in the event that the bankruptcy of assets is carried out by parties who do not have authority in the agreement. The liability that should be charged is not on behalf of the bank but based on individual Liability, namely the bank employee. This also relates to *Respondeat Superior* principle that occurs when a superior or banking official instructs employees with a lower legal position and position to include the assets as bankrupt assets, so that this responsibility belongs to the boss who instructs the employee. The *Respondeat Superior* requires the several factors to prove that the conduct is done in the hierarchy system and it is impossible to the Bank member as perpetrator or violator helper to refuse the order since it would affect his/her sustainable position in the Bank.

Referring to Article 1365 *Burgerlijk Wetboek* is liable on the basis of acts against the law, as well as mistakes made by the maker. Liability without error (Hatrik, 1996), a matter which in some laws is regulated as it should (the liability as long as the person concerned has sufficient financial leverage and the loss cannot be sued for a replacement rather than the third party who is obliged to supervise). In the case of including customer assets as bankruptcy assets In a Trust Agreement that has been made between Trustees and Settlers, both parties are obliged to implement the agreement as well as possible and avoid legal actions that can harm one party. As explained in the introduction that the problems that occur in implementing banking services are nothing but related to the condition of the banking as a service provider. The more Banking got prepared to liquidity risk, the more Bank could distinguish and resolve the insolvency problems.

Where as in the event that the bankruptcy of assets is carried out by parties who do not have authority in the agreement, the liability that should be charged is not on behalf of the bank but based on individual Liability, namely the bank employee. This also relates to the *Respondeat Superior* principle that occurs when a superior or banking official instructs employees with a lower legal position and position to include the assets as bankrupt assets, so that this responsibility belongs to the boss or leader who instructed the employee especially if the employee does not know the consequences law from the implementation of said order thus any legitimate authority that is sourced from the law or agreement can cause responsibility for the executor, in this case the trustee. Referring to Article 1365 *Burgerlijk Wetboek*, the party is liable on the basis of acts against the law, as well as mistakes made by the maker. Liability without error, a matter which in some laws is regulated as it should (the liability as long as the person concerned has sufficient financial leverage and the loss cannot be sued for a replacement rather than the third party who is obliged to supervise. But since the implementation of the Trustee Agreement is exist until the loss payment, the Settlor should use Breach of Contract instead the *Onrechtmatige daad* since the limitations and prohibitions are already stated and ruled in the contract. The Loss payment could be asked by the

Settlor to the Bank which divided into limitation. P.N.H Simanjuntak (2015) stated that loss and or damage payment limitation divided into two kinds such as: (a) The loss and damaged that occurred when the agreement made. This agreement potentio of loss and damaged should be proved before the agreement made; (b) The loss and damaged as the direct legal consequences of breach of contract.

In the event of liquidation, the capability of banks to carry out these activities will be temporarily taken over by Bank Indonesia, the Financial Services Authority and the Curator instead. Because the element of capability is a subjective element in an agreement, the trust agreement in the framework of banking liquidation can be deemed by both parties because the bank will not be able to carry out activities anymore, the authority represents the customer. The responsibility of the Bank in the trust agreement is to carry out asset management activities based on agreements and instructions from Settlor and not be held responsible for losses in management, especially in investments made in the Capital Market or Stock Exchanges (PBI No 14/17 / PBI / 2012 Article 7 paragraph 4). *Ratio Legis* for the release of the bank's responsibility for investment losses is due to the position of the bank only as a proxy that communicate and offer investment to the settlor as the real asset owner. Based on the agreement, provisions can be made regarding the mechanism for the use of customer assets for investment as well as arrangements for granting approval for such actions at a certain time. Other than that in Bank Indonesia Regulation Number 14/17 / PBI / 2012 Article 17 paragraph (1) letter c explicitly reflects the bank's obligation as the proxy to not transfer customer assets to third parties including replacement trustees even though there is an authorization from the settlor to give approval. This rule appears rigid and makes it difficult for customers unless the customer carries out a standard mechanism according to the due process of law in revoking the power that has been received by the first trustee based on a notary deed and revocation of the trust agreement.

If the loss in management activities arises as a result of the Bank failing to fulfill the obligation to provide the risk management system as described above, then the Bank must be liable based on illegal acts, namely not fulfilling obligations under Article 31 PBI. In addition to negligence in fulfilling risk management, the Bank must bear losses due to failure to fulfill the obligations contained in the trust agreement. Thus, the responsibility of the bank as a trustee can arise due to negligence in fulfilling obligations under the legislation and trustee agreements. In this case, the bank must be responsible for replacing the losses incurred both to the settlor and to the beneficiary. In the event that a bank experiences liquidation, the funds that are still managed and invested must be withdrawn by the bank with the assistance of the Financial Services Authority with the legal consequences of the liquidation. Regarding the existence of a legal mechanism to require capital markets to cancel and withdraw funds that have been invested in third parties are not easy matters depending on what type of investment the bank does. However, if the agreement has been included in the clause concerning the transfer to the new trustee, the transfer of authority will take effect automatically when the bank is declared bankrupt.

The concept of remote bankruptcy in trust according to the common law system is adopted by Bank Indonesia Regulation Number 14/17 / PBI / 2012. As such, trust wealth obtains legal certainty in the settlement of safekeeping agreements with management. In case, if the Bank is liquidated or transferred to safekeeping by its management to a substitute trustee, then the trust property must be returned to the settlor or transferred to the replacement trustee. The bank must be responsible if the loss arises due to the negligence of the Bank in the form of negligence in complying with the obligations arising from the laws and regulations as well as from the trust agreement. Thus, the Bank can be held accountable for losses based either on illegal acts or defaults based on agreements and related laws and regulations in a casually manner. Particularly in the case of banking lending, there is a mandatory provision that must be made on the return of settlor assets either by the bank or with the help of a curator as implemented in Article 46 of Bank Indonesia Regulation Number

14/17 / PBI / 2012. The returned assets must be in accordance with the agreement so that from the beginning of the trust agreement, the bank has prepared a protective shield to repay the trust assets by using the guarantee mechanism of the Deposit Insurance Corporation even though in practice the bank should not use the trust assets beyond the terms of the agreement. Referring to Government Regulation Number 25 of 1999 concerning Bank Liquidations, Liquidation Teams and Banking Organ must coordinate in preparing data and information on assets, bank rights and obligations that have not been completed up to the 5 year period from the date of the liquidation team establishment to the asset auction mechanism banking if the liquidation process takes more than 5 (five) years. This Government Regulation was later replaced by the provisions of the Deposit Insurance Corporation Act which cut the liquidation of 5 (Five) Years into 2 (Two) Years with an extension of 2 (Two) times - each at the longest 1 (One) Year.

What if the return of the settlor property in the agreement is made before the liquidation takes place? referring to the concept of separation of trust property and banking, this can be done as long as there is a notification to the liquidation team regarding the validity of the property rights of the assets or assets not mixed with the assets of the bank. Such verification is based on a trust agreement and attachment of evidence documents and administration for the ownership of trust assets on behalf of customers or settlors. To prevent fraud and misuse of trust property and banking assets in the liquidation process, the government requires the deactivation of status and legal actions of directors and or commissioners until the liquidation process is completed.

As is well known that the legal relationship that occurs in a trust agreement is a contractual agreement that binds the parties to the agreement. but in this case the government can take legal actions to protect the interests of the customers in the trust agreement considering that banking activities have become a broader public need so government intervention is needed to determine policies or regulations relating Trust Agreement so that the interests of legal subjects within the Trust can be protected. The government could taking part in the making of regulations as a legal

umbrella in terms of bank business activities in Trust Agreement. In addition to using the mechanism for making legislation, the government also actively acts through the hands of the Financial Services Authority in managing assets through investments in the Capital Market. But in this case the supervision that can be carried out by the Financial Services Authority can be ineffective with the many oversight responsibilities given to the Financial Services Authority. So that in this case there is a need for delegation of authority and good coordination between the capital market authorities, banks, especially active reporting on the development of such trust services in detailed monthly or annual reports. In contrast to the capital market mechanism that provides protection with the prospectus and trustee in bonds, in this case there is a need for regulation regarding the authorities to carry out internal and external oversight of the interests of customers, especially to check whether the bank has taken legal action caution.

Legal research related to Trusts has been discussed in research, namely first research by Tri Handayani and Lastuti Abubakar (Handayani & Abubakar, 2014) does not discuss legal protection against legal and contractual violations committed by banks in the event that the bank enters the customer's assets into bankrupt bankruptcy. so that there is still a need for integrated models and mechanisms made by the government regarding banking supervision in the management of customer assets.

CONCLUSION

From this legal research, it can be concluded that the trust agreement is a special agreement in banking that gives the bank the right and authority to manage the customer's assets in accordance with the agreement. because trust assets are the property of the customer, the management of these assets must be carried out separately to implement the prudential principle in banking. The inclusion of customer assets in the trust agreement as bankrupt assets is a violation of the agreement

and violation of the law so that the action is to use the mechanism of civil law based on the principle of Liability.

The disadvantage of this research is that the examples of trust agreements are not included as a result of the existence of legal research methods using sources of legislation and conceptual. Other than that with unclear mechanisms or legal rules that can assist customers in supervising the management of the trust property. Suggestion that can be given in this research are: (a) The parties understand this trust agreement carefully, especially regarding the possibility of management failures and operational failures made with the bank. (b) Banks and customers can request assistance from independent third parties as supervisors and reporters to customers regarding the bank's performance in managing the assets.

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