

RECONSTRUCTION OF LEGAL PROTECTION FOR COMMODITY FUTURES TRADING CUSTOMER BASED ON JUSTICE VALUE

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ABSTRACT

Approximately seven years after the Act No. 32 of 1997 on Commodity Futures Trading (*Perdagangan Berjangka Komoditi*) was amended by Law Number 10 Year 2011, the classic problem related to the legal protection of Commodity Futures Trading customers remains an actual problem that has no end up now. Some of the main issues, among others, ranging from customer complaints about their funds suddenly disappear in the hands of brokers, irrevocable funds, and unproven promises of brokers, to the settlement of civil disputes that are deemed to be less favorable to the interests of customers. The losses suffered by customers are not small, some reach Rp 34 billion in just 16 days, or more than Rp 2 billion per day. Departing from that fact, the dissertation titled "Reconstruction of Legal Protection for Commodity Futures Trading Customers" raised two main issues. Firstly, is it true that the legal protection of futures trading customers based on Law Number 10 Year 2011 on Amendment to Law no. 32 of 1997 concerning Commodity Futures Trading has not reflected the values of justice; Second, what is the ideal legal reconstruction of justice value commodity traders. By using the theoretical framework of justice as the grand theory, the theory of legal protection as the middle theory, and the theory of contract as applied theory, this dissertation used normative juridical research method with post positivism paradigm to answer the first problem formulation, and empirical juridical research method with the paradigm of critical theory to answer the result of this second problem. The result shows that the contractual relationship between future customers and future brokers already contains elements of injustice, even from the start of contract, contract implementation, to post-contract. Justice-based legal protection can create legal protection for customers by reconstructing several articles contained in the Commodity Futures Trading Law, such as Article 30A, Article 31, Article 49, Article 50, Article 61, and Article 66.

Keywords: reconstruction, customer's legal protection, futures trading, justice value

A. INTRODUCTION

The development of a business world tends to lead to speculative activities, it also requires legal¹ protection. Businesses seek to protect and secure themselves from possible risks through hedging². The hedging instruments of currency price fluctuations are, in some cases, available in the market in the form of forward³ and swap transactions⁴. Although still playing a secondary function (secondary rule) in economic activity, but it must be recognized that the development of derivative instruments increasingly enlarged.

The original derivative⁵ transaction to protect the parties from losses is now evolving into a business arena of great interest. Derivative transactions are also increasingly attracting the attention of many parties, because it is often considered gambling.

¹ Law is defined as the norm or rule that applies in society and becomes the reference of every person's behavior, and the rules or norms in positive law. Anis Mashdurohaturun Zaenal Arifin, and Gunarto, *The Inconsistency of Parate Execution Object Warranty of Rights in Banking Credit Agreement in Indonesia*, International Journal of Applied Business and Economic Research. Volume 15. Number. 20 .2017. page 268.

² Hedging is an act of protecting a company to avoid or mitigate the risk of loss on foreign currency as a result of a business transaction. Hedging is a mechanism implemented in the Futures Exchange by opening a buy or sell contract on a commodity similar to the commodity to be marketed in the physical market. See in Adrian Sutedi, *Produk-Produk Derivatif dan Aspek Hukumnya*, CV. Alvabeta, Bandung, 2012, p. 102.

³ Forward is a contract transaction between the buyer (taker) and the seller (writer) in the future where at maturity there will be the handover of a good with the amount and price agreed upon before. See in Adrian Sutedi. *Ibid*, p. 38.

⁴ Swap is one of the hedging techniques that can be used for hedging purposes and on other purposes can be used for trading purposes. See in Adrian Sutedi, *ibid*, p. 41.

⁵ Derivative transactions are transactions based on a contract or payment agreement whose value is derived from the value of the underlying instrument such as interest rate, exchange rate, commodity, equity and index, whether

Money that was originally only for transactions or waging, now it is used for speculative activities, although essentially the same: to store the purchasing power or wealth (store of value⁶). Foreign exchange transactions (forex) are highly liquid, because they last 24 hours a day, and 5 (five) days a week, non-stop. Therefore, forex transactions are in the form of futures trading increasingly in demand. This is different from stock trading transactions whose movement is limited by office hours.

Indonesia Futures Exchange is as one of the main components of Indonesia futures trading, although it already present since 17 years ago, but it not yet developed as expected. As one of the world's top five crude palm oil, rubber, coffee, cocoa, tin and coal, the top five commodities are importing countries. The price of Indonesian coffee, determined by the market in London⁷; cocoa and coal refer to US market prices; rubber depends on Singapore market price; and tin refers to Malaysian and London market prices, although the price-setting nations depend on Indonesia's supply.

On the other hand, data from the Commodity Futures Trading Supervisory Agency (Bappebti) shows that in the third quarter (III/2017), the volume of futures trading transactions reached Rp 67.15 trillion, down 7.36 percent year on year (yoy) from Rp 72.49 trillion in the third quarter of 2016.⁸ The transaction value was derived from 5.06 million lots, with details of multilateral transactions contributing 928,593 lots (18.34 percent), and bilateral transactions reaching 4.13 million lots (81.66 percent). The declining growth in PBK performance during January-September 2017 was in line with the increasing volume of transactions occurring in the Exchange due to the increasingly widespread presence of illegal brokers operating.⁹ Bappebti as the sole oversight body of PBK (Commodity Futures Trading) in Indonesia has not managed to overcome the presence of illegal brokers, whereas the presence of brokers is crucial to the implementation of Commodity Futures Trading.¹⁰

Along with the growing and increasingly complex of PBK (Commodity Futures Trading) activities in Indonesia, the government passed Law Number 10 Year 2011 on Amendment to Law Number 32 Year 1997 regarding Commodity Futures Trading (UU PBK). The coverage of the subject of traded commodities is wider, including forex and index. The presence of Act on PBB to anticipate the progress of the trading system in the era of globalization; in which trade is no longer only done in the normal way, such as exports, imports, and domestic trade, but more broadly than that, the PBK through electronic systems (internet).

In principle there are two kinds of trade, physical trade and margin trading¹¹. The principle of physical trading is the trade in cash and carry or spot trading, ie traders exchange currency with commodities or currencies that act as money with currencies acting as goods. The principle of margin trading is the exchange of goods or currency trading with other currencies in a contract size with a guarantee of a transaction (necessary margin).

The following developments, in the derivative trade are known as terms of the multilateral trading system and the bilateral trade system referring to the Alternative Trading System (SPA). Both are arranged and organized by the Jakarta Futures Exchange (BBJ) and the Indonesia Derivative Commodity Exchange (BKDI), and supervised by Bappebti. The fundamental difference between the two systems is that in multilateral trading systems transactions are conducted on an exchange system, there are many buyers and sellers, similar to the Stock Exchanges. In bilateral trading systems transactions are conducted outside the exchange and customers are dealing with traders/dealers (fixed opponents).¹² The Alternative Trading System (SPA) is also known as the over the counter (OTC) market, but with some differences, the OTC has the potential to cause conflict (conflict of interest), because the customer transacts directly with the broker; while in the SPA potential conflict is more eliminated, because Brokers only distribute the mandate.

At the same time, customers' complaints of (Commodity Futures Trading) are also continuing to occur. It starts with the customer funds that suddenly disappear in the hands of brokers, funds that are difficult to withdraw, and brokers who cheat, until the broker pledge injury. The losses suffered by customers were unsparing, some reached Rp 34 billion in just 16 days, or more than Rp 2 billion each day.¹³

There are at least two major problems in this paper. First, is it true that the legal protection of commodity futures trading customers based on Law no. 10 Year 2011 on Amendment to Law no. 32 of 1997 does not reflect the values of justice? To answer this problem the authors used post positivism paradigm with normative juridical approach. Second, what is the ideal legal reconstruction of justice value commodity traders? To answer this second problem the author used the paradigm of critical theory

followed by movements or movements of funds or instruments, but excluding derivative transactions credit. See Article 1 Number (2) of Bank Indonesia Regulation Number 7/3/PBI/2005 about derivative transaction.

⁶Boediojo, *Teori Moneter*. BPFE Universitas Gadjah Mada, Yogyakarta, 1980, p. 3.

⁷Edy Burmansyah, *Ironi Komoditi Indonesia*, Harian IndoPROGRESS, 31 Juli 2017.

⁸Bisnis.com 23 Oktober 2017.

⁹*Ibid.*

¹⁰See UU PBK Pasal 1 Angka (17)

¹¹Margin is a sum of money or securities to be settled by a customer to a Futures Broker, Futures Broker at a Clearing Member, or a Clearing Member at a Clearinghouse Institution to ensure the conduct of Futures Contracts, Shariah derivative Contracts and / or other Derivative Contracts.

¹²www.panduantrading.com, *Kenali Sistem Perdagangan Alternatif Sebelum Memulai Trading*. Accessed at 30 January 2017, at 09.00

¹³Tribunnews.com 28 Agustus 2015

with the empirical juridical approach. The study was conducted analytically descriptively by revealing the factors that influence the sense of justice of the client of futures market. The location of study was in Banjarmasin, Semarang and several cities in Java. The theoretical framework in this research uses justice theory as grand theory, legal protection theory as middle theory, and contract theory as applied theory.

B. Results and Discussion

1. Theory of Justice (Grand Theory)

For the theory of justice, the author refers to several theories, Western, Islamic and Indonesian. The Western concept, among others, of Aristotle (384-322 BC) in the second chapter of his book, *EthikonNikomacheon*, was intrigued by the question of justice by observing how people gave different meanings to the idea, even in an age not yet familiar with the affairs such as copyright disputes or physician malpractice.¹⁴ Aristotle's principle, the fair is in the middle (Mesotes doctrine), because the situation is very just and very unfair is always extreme.¹⁵ John Rawls states that fairness does not merely mean justice.¹⁶

Different from Aristotle distinguishing the types of justice, DomitiusUlpianus proposes a formula of justice in the inter-subject relationship: "Justice is a steadfast and continuous will to give to anyone what is rightfully". The famous declaration of Ulpianus through its short formula: "*sumquiquetribuere*" is often regarded as the oldest formulation that is used as a reference to understand what justice is¹⁷. However, some critics criticizedUlpianus's justice formula. Hans Kelsen and Bernd Butthers, for example, claim, "to give to anyone what is entitled" is a vacuous formula precisely because it is never clear what the rights are and what they contain¹⁸. That's because each individual will formulate their rights according to their respective perceptions and interest.

Despite Kelsen's criticism, Ulpianus was the first one to distinguish between public law and private law. In the text of Ulpian DigestaJustiniani 1.1.2 records his doctrine: "Public law is concerned with Roman statehood, while private law is concerned with the interests of individuals.¹⁹ The theory of interests as implied in the doctrine of Ulpianus has remained influential in the widespread practice of law. Includes a widespread interpretation of Indonesian legal practice which states that the entire Book III of the Civil Code can be ruled out if the parties to an engagement agree upon it so, using that Ulpianus doctrine, to the extent that it is not contrary to the doctrine of the *lex superior derogatlegiinferiori*, or insofar as the agreement of the parties is not contradictory with public law, where all parties must submit. This doctrine is embraced in Article 1320 of the Civil Code which subjects all treaties to the law.

Unlike Western thinkers, the concept of justice in Islam emphasizes the balance between individuals and society²⁰. Between individuals and society nothing is more predominant. Even according to Qadri²¹, the concept of justice in Islam has a deeper meaning than the concept of distributive justice and the finality of Aristotle; formal justice of Roman law as well as other human-made concepts of law. Justice penetrates the innermost heart of the human body, in the name of God, and becomes the mouth of all things, including motivation and action. Justice in Islam comes from the Qur'an and people.

According to Ahmad AzharBasyir, justice is putting things in the right place or putting things in the right proportions and giving someone something that is his right²². The basic principle of justice in Islam is explained by MadjidKhadduri²³ by grouping it into two categories, namely the substantive and procedural aspects which each cover a different aspect and justice. Substantive aspects of elements of justice in the substance of shari'a (substantive justice), and procedural aspects of elements of justice in procedural law is implemented (procedural justice).

Justice also will not be whole if not paid attention to its meaning as giving attention to personal rights and the right of rights to anyone who is entitled (*i'tha'ukullidzihhaqqinhaqqahu*). A very important meaning is the justice of God, both in the form of mercy and wrath that can all be returned to the man himself²⁴. Al-Syatibi divided into three levels: *dharuriyat*, *hajiyyat* and *tahsiniyat*.

¹⁴Budiono Kusumohamidjojo, *Teori Hukum Dilema antara Hukum dan Kekuasaan*, Yrama Widya, Bandung, 2016, p. 269.

¹⁵Aristoteles, *Ethika Nikomacheia*, edisi Jerman, Buku II, Stuttgart/Philip Reclam, 2013. Dalam Budiono Kusumohamidjojo, *Teori Hukum Dilema antara Hukum dan Kekuasaan*, Yrama Widya, Bandung, 2016, p. 270.

¹⁶John Rawls, *A theory of Justice*, Harvard University Press, Cambridge, 1971, p. 10-15.

¹⁷*Op.cit.*, p. 272.

¹⁸Kelsen dalam Budono Kusumohamidjojo, *Ibid.*

¹⁹*Ibid.*, p. 19.

²⁰Mahmutarom HR, *Rekonstruksi Konsep Keadilan Studi tentang Perlindungan Korban Tindak Pidana dalam Hukum Positif, Hukum Islam, Konstruksi Masyarakat dan Instrumen Internasional*, Badan Penerbit Universitas Diponegoro, Semarang, 2010, p. 48.

²¹AA. Qadri, *Sebuah Potret Teori dan Praktek Keadilan dalam Sejarah Pemerintahan Muslim*, PLP2M, Yogyakarta, 1987, p. 1.

²²Ahmad Azhar Basyir, *Negara dan Pemerintahan dalam Islam*, UII Pres, Yogyakarta, 2000, p. 30.

²³Madjid Khadduri, *Teologi Keadilan (Perspektif Islam)*, Risalah Gusti, Surabaya, 1999, p. 119-201.

²⁴*Ibid.*

Grouping is based on needs and priority scales. This sequence of hierarchical levels will be seen in importance and significance, as each level of each other contradicts each other. In this context the level of dharuriyyat is ranked first followed by hajiyyat and tahsiniyyat. Dharuriyyat level is to maintain the essential needs for human life. If this need is not met it will threaten the existence of the above five goals. While the level of hajiyyat is not threatening it only causes difficulties for humans. Further on tahsiniyyat level, is a need that supports the improvement of one's dignity in society and in the presence of Allah SWT.²⁵

Justice according to the concept of Indonesia is actually a relative concept²⁶, because justice is the result of interaction between expectations and reality. That is why in justice there must be a willingness to tolerate, not just think of self-interest and pleasure, willingness to sacrifice, and the realization that whatever is possessed is not absolutely possessed.²⁷

Mahmutarom²⁸, likens justice as a spirit capable of directing and giving life to the norms of written law, so that if justice is the spirit, then the written law is the human body. Without the soul, the body will die. Conversely, without the body of the spirit's life will not be implicated in reality. Ideally between the spirit and the body must be able to walk along, so that will create harmony in human life. In the event of a conflict of interest, not infrequently the body must be sacrificed. Likewise, in the event of a clash between justice and written law, justice is the spirit of a written law rule that must be maintained, and the actual rules of the law are merely instruments for the realization of justice being replaced or abandoned.²⁹

Then, what kind of justice applies to the Indonesian people?

Justice in positive law must necessarily be sourced on the basis of the state. Pancasila as the basic state or state philosophy (*fiilosofischegrondslag*) until now maintains and it is very important for the state of Indonesia. Axiologically, the Indonesian nation is a supporter of the Pancasila (subscriber of values Pancasila) values: the divine, humanitarian, united, communal, and the social justice.

Thus it can be said that justice according to the conception of the Indonesian nation is social justice³⁰. According to Notohamidjojo³¹, social justice demands that people live properly in society. Each should be given an opportunity according to *menseljkewardigheid* (humanitarian appropriateness). Bung Hatta (quoted by DjokoWidagdo, et al³²) in his description of the precepts of "Social Justice³³ for all Indonesians" writes, "Social justice is the decisive step to implementing a just and prosperous Indonesia". Hatta also stated that the ideal of social justice in the economic field is to achieve equitable prosperity.

In the perspective of positive law, justice is the recognition and equal treatment between rights and obligations. Equitable recognition and treatment of rights and obligations means that if there is recognition of life, it must defend the right to life with great effort, without causing harm to others, because the other person also has the same right to life.³⁴ Acknowledging the life rights of others, it must also give others the opportunity to defend their right to life.

1.2. Theory of Legal Protection (Middle Theory)

In this dissertation research, the writer used the legal protection theory of Roscoe Pound as the middle theory. Basically the theory of legal protection is a theory related to the provision of services to the public. According to Roscoe Pound, law is a social engineering tool (law as tool of social engineering). And human interest is a demand that must be protected and filled human in the field of law³⁵. There are two interests that are avoided: the public interest and the social interest. Common interests include:

²⁵Mahmutarom HR, *Rekonstruksi Konsep Keadilan Studi tentang Perlindungan Korban Tindak Pidana dalam Hukum Positif, Hukum Islam, Konstruksi Masyarakat dan Instrumen Internasional*, Badan Penerbit Universitas Diponegoro, Semarang, 2010, p. 61.

²⁶Majjid Khadduri, *The Islamic Conception of Justice*, The Johns Hopkins University Press, Baltimore and London, 1984, p. 1.

²⁷Mahmutarom HR, *Op. Cit.*, p. 33.

²⁸*Loc. Cit.*

²⁹*Ibid.*

³⁰Darji Darmodiharjo & Shidarta, *Pokok-Pokok Filsafat Hukum: Apa dan Bagaimana Filsafat Hukum Indonesia*, PT. Gramedia Pustaka Utama, Jakarta, 1995, p. 166.

³¹O. Notohamidjojo, "*Kata Pengantar*", dalam W.F de Graay Fortman, *Rahasia Hukum* (terjemahan hukum O. Notohamidjojo), BPK Gunung Mulia, Jakarta, 1973, p. 13.

³²Djoko Widagdo, dkk, *Ilmu Budaya Dasar*, cetakan kedua belas, Jakarta: PT. Bumi Aksara, Jakarta, 2012, p. 104.

³³Social justice is aimed at realizing or creating social welfare for all Indonesian people. "Social justice in the Pancasila legal state has the meaning that the distribution of resources is intended to create social welfare, especially for the lowest community or socio-economic weak society. Anis Mashdurohatun Dan M. Ali Mansyur, *Model Fair Use/Fair Dealing Hak Cipta Atas Buku Dalam Pengembangan IPTEK Pada Pendidikan Tinggi*, Jurnal Hukum Ius Quia Iustum NO. 1 VOL. 24 Januari 2017. page 37.

³⁴Suhrawardi K. Lunis, *Etika Profesi Hukum*, Cetakan keenam, Sinar Grafika, Jakarta. 2012, p. 50.

³⁵Lili Rasyidi, *Filsafat Hukum*, Remadja Karya, Bandung, 1988, p. 228-231.

1) the interests of the state as a legal entity in maintaining its personality and substance; and 2) the interest of the state as a waiver of the public interest.

Community interests protected by law are: 1) public interest for public safety, such as security, health, welfare and security for transactions and income; 2) the interests of social institutions, which include protection in marriage, politics (such as free speech), or economics.

From the above explanation it appears that the law as protection of human interest is different from other norms. This is because the law contains the command and/or prohibition, and divides the rights and obligations.

1.3. Theory of Contract Law (Applied Theory)

The writer used the subjective-objective contract theory developed in the 19th century in the French legal system as applied theory. This theory at the micro level will be applied in the preparation of new theories or new concepts.

1.3.1. Subjective Contract

Regarding the subjective contract theory, Wayne Barnes points out:

"The subjective theory, which is said to be represented by French Legal System is concerned with the actual meeting of the minds or literal intentions of the parties. Both partially had to contract and external manifestations of assent are really merely as evidence of the actual intent of the contracting parties. Proponents of this theory may wish to be bound and accordingly promote the freedom of contract above all other principles. They repose on the contention that individuals need to be compelled to perform their obligations to which they have not given their consent".³⁶

The focus of subjective theory of contract is the meeting of the will or desire of the parties. The parties shall strictly agree on the agreement made between the two. This contract theory only binds people who have been clearly defined and subject to bind themselves with others. Thus the freedom of the parties is above everything.³⁷

1.3.2. Objective Contract

On the understanding and focus of objective contract theory, Wayne Barnes points out:

"The central premise to the objective theory of contract is that it is approved by external evidence, and evidence of subjective, internal intention is therefore unimportant. That is, contract formation is concerned with communication, not cognition. Thus modern objective theory provides that objective manifestations of intent of a reasonable person in the position of the party of the principle of fairness and protection of reliance, freedom of contract, and personal autonomy".³⁸

Judging from its construction, the main premise of the theory of objective contracts, namely the binding of contracts is determined by analyzing and reviewing from external evidence or evidence and subjective evidence. The parties' intentions are not important. This means that contract formation is determined by communication, not cognition. In the theory of modern objective contracts, the intent of the parties must be determined from a reasonable point of view in the other's position.

2. Values of Justice in the PBK (Commodity Futures Trading) Contract

The results show that the contractual relationship of commodity futures trading between broker futures and customers does not reflect the values of justice in contract, either at the time of pre-contract, contract implementation stage, or post-contract implementation.

Implementation Values of Justice in Pre-contract Phase

Contractual relations in the pre-contract stage can be seen, among others, from some rules governing the rights and obligations of futures brokers, in their contractual relationships with customers. The contractual relationship between the broker and the PBK customer is indicated by the agreement, in which one party agrees to deposit funds or margin in order to make transactions, and the other party manages the PBK as per the first party.

³⁶Huusein Ahmed Tura, "Interpretation of Contract Under Ethiopian Civil Code: Subjective or Objective Method", AAU Student Law Review Vol 2 No 1 July 2011, p. 74-75.

³⁷H. Salim HS & Erlies Septiana Nurbani, *Penerapan Teori Hukum Pada penelitian Disertasi dan Tesis (Buku Kedua)*, PT. RajaGrafindo Persada, Jakarta, 2014, p. 245.

³⁸Wayne Barnes, "The French Subjective Theory of Contract: Separating Rhetoric From Reality", *Majalah French Subjective Theory of Contract*, Vol 1, 2008, p. 1.

The mandate agreement is an agreement made between the customer and the broker's representative of the futures broker. The agreement herein is a written agreement, namely the agreement of provision of a mandate as stipulated in Article 50 Paragraph (2) of Law Number 10 Year 2011 concerning PBK which states "The Futures Broker shall submit the Company Information Document and Document Notification of Risk and establish an agreement with the Customer before the relevant Futures Broker may receive Customer's funds for Futures Trading, Sharia Derivative Contracts and / or other Derivative Contracts".

In the trust agreement, the customer authorizes the broker's representative to execute and implement the PBK transaction. The grant of power is provided for in Article 1792 BW of which the contents "The Authorizer is a covenant with which the person gives power to another who receives it, in whose name carries out an affair"³⁹

The authorized party in the exercise of power must be in accordance with the content of the power, with the consequence of being a dependent of the proxy if it deviates from the content of the power. It is in harmony with Article 1797 BW stipulating that "The power is not allowed to do anything that exceeds its power, the powers granted to settle an affair by the way of peace, in no way have the power to submit his case to the decision of the referee".⁴⁰ Although the provisions of Article 1797 BW do not mention the legal consequences if the assignee exercises power or affairs that deviate from the content of the power, but by notifying the assignee to perform the duties or affairs pursuant to the content of the power, be borne by the proxy.

In the provision of a mandate, the sale and purchase is the type of legal relationship established, while the order is the method of purchase or sale. Although the "trust contract" method can be done, in the sense that the broker assures "certain profit", it is a method that is vulnerable to deviations from the principles of PBK. One of the commonly used deviation modes is to promise the maximum profit if entrusting the funds completely to the broker, when it is appropriate to buy or sell.

The Regulation of the Head of the Commodity Futures Trading Supervisory Agency No. 101/BAPPEBTI/PER/01/2013 on Brokers' License Agreements governs the PBB mechanism shall be subject to a set of predetermined rules, but none of the rules explicitly specify that the broker shall also bear the losses if customers suffer losses. Herein lays one of the weakness factors of PBK. Fairness is not used as a principle in calculating loss, and the loss must be fully borne by the customer. Thus, although the regulation stipulates that the principles of PBK are open and not confidential, the transparency principle of buying or selling PBK products is not beneficial to protect the interests of the customers if not accompanied by the principle of fairness in determining a buying or selling position. Both of these principles should therefore be applied together because they are complementary.

Implementation of Justice Values in the Implementation Stage of the Commodity Future Trading Contract

In the implementation of commodity futures contracts (PBK) there is some collaborations between several parties involved in it. In addition to the Supervisory Agency, Futures Brokers, Futures Exchange, and others, including of course the Client's Client. But the contractual relationships of brokers and clients of PBK depend on the quality and honesty of brokers. This is because without brokers, customers cannot move in the PBK. In terms of contractual relationships between brokers and customers, the "fate" of customers of PBK is determined more by the legal protection provided by the Commodity Futures Trading Supervisory Agency (Bappebti). Implementation of the *privity* principle makes it difficult for customers to defend their rights because the existing rules do not entitle the customer to directly sue the futures broker to court. The legal protection provided is in the form of a legal complaint to Bappebti, and the Bappebti will decide which route the customer can take advantage of⁴¹. While the real loss of the customer is the funds that must first be deposited to the futures broker, before the customer can provide a trust or conduct transactions.

Transparency is a very important principle in the PBK contract. The area of application begins at an early stage of the whole process of the PBK, ie starting from the selection of brokers, contractual relationships, depositing margins and so on. In the implementation phase of PBK, transparency function is also important because achieving accountability will only materialize if this principle is consistently applied.

In the perspective of the PBK Contract Law, the confidentiality clause is a type of accomplishment not doing anything. The essence of this clause is the prohibition to do something. Liability is born if this prohibition is violated. In BW Indonesia, there are no special rules related to this clause, unless the type of achievement does not do anything as regulated in Article 1234 BW. In the context of PBK implementation, brokers are not allowed to use customer funds, without any orders or mandate from customers. In practice, this provision is often violated by some brokers. As a result many customers are harmed.

As a form of protection for customers of non-beneficial CSBs due to a breach of this duty of confidentiality, in general the basis of which can be used is a claim on the basis of violation of good faith and fair dealing.

Implementation of Post-Contract Values Justice

³⁹SubektidanTijjtrosudibjo, *terjemahanBurgerlijkWetboek (BW), cetakanketigapuluhtiga*, PranadnyaParamitha, Jakarta, 2003, p. 457.

⁴⁰*Ibid.*

⁴¹See Act PBK Number 32 Year 1997 Article 61 letter (a) and (b).

It relates to the liability between the broker's representative to the futures broker with the customer, as long as the broker's mandate does not deviate from the content authorized by the customer, then all events in the execution of such duties become the responsibility of the customer. But if the broker's representative in performing the mandate duties deviates from the content of the power, then all forms of loss arising be the personal responsibility of the broker's representative concerned. Broker Representative shall be liable to the customer for any loss suffered as a result of negligence, negligence or actions caused by any conflict of interest in connection with the duties of the Broker Representative, as stipulated in the Decree of the Commodity Futures Trading Supervisory Agency no. 64/BAPPEBTI/Per/I/2009.

Whereas Article 1367 Paragraph (1) of the BW stipulates that "a person shall not only be liable for damages caused by his own actions, but also for damages caused by the actions of the persons who become his dependents or due to the goods under his control.

Responsibility as referred to in Article 1367 Paragraph (1) of the BW does not specify its own liability, but the liability for other persons under its control and for the items under its control in the event of a mistake. Thus, if the person who is supposed to be responsible for the person in charge or the goods under his control, due to his negligence has resulted in another person suffering a loss, the person responsible for providing the supervision that includes the goods under his control due to his negligence, shall be liable for arising damages.

The number of clauses in the agreement that unilaterally made by the futures broker, and not explained in detail to the customer, became one of the causes of customers experiencing many losses. Moreover, customers' knowledge of PBK in general is still minimal, and almost certainly will not be able to predict what will happen with their funds/money. This is where clients should get legal protection from actions that will harm. Legal protection here is not protection, by replacing or paying damages, but a legal protection that will guarantee the fulfillment of the rights and obligations of the customer. For example, the inequalities of the judges' perspective in handling PBK cases, for example, make customers feel much unprotected. There is a panel of judges who are willing to deal with the lawsuit of cases of PBK, some refuse and suggest directly taken to the Commodity Futures Trading Arbitration Board (BAKTI); although the recommendations of the Futures Exchange have granted the parties the freedom to choose the settlement: through the court or through the arbitration body.

In the PBK, relationships between parties are included in civil ties. If a dispute arises from a contract (breach of contract), it will be resolved in a civil manner. The settlement of this case must be preceded by a lawsuit to the court in the jurisdiction of the defendant.⁴² In the mandate agreement, the customer authorizes the broker's representative to execute and implement the PBK. The grant of power is provided for in Article 1792 BW whose contents "The Authorizer is a covenant with which the person gives power to another who accepts it, in behalf of holding an affair".⁴³

Characteristic of the trusting agreement is actually an authorized attorney that may be made in a special or public manner in accordance with Article 1795 BW, which stipulates that "The power of attorney may be made specifically, that is, only one particular or over, or in whole, principal"⁴⁴. However, it does not mean that the choice of settlement option from those who feel aggrieved is always restricted, especially after the authority of the PBB has the initial authority to resolve the dispute has given freedom to choose.

Reconstruction of the ideal legal protection for the consumers based on justice is as follows:

1. In Article 30A Paragraph (2) of the Alternative Trading System which previously reads:

"The electronic trading system used in the Alternative Trading System shall meet the requirements set forth by the Regulation of the Head of Bappebti."

Reconstructed to:

"The electronic trading system used in the Alternative Trading System shall comply with the provisions stipulated in the Information and Electronic Transactions Act further stipulated by the Regulation of the Head of Bappebti as long as it is not contrary to the applicable Law."

2. Article 31 Paragraph (1) which previously reads:

"Business activities as a Futures Broker may only be executed by a Stock Member in the form of a limited liability company which has obtained a business license from Bappebti"

Reconstructed to:

⁴²Ricahrad BurtonSimatupang, *Aspek Hukum Dalam Bisnis*, PT RinekaCipta, Jakarta, 2007, p. 41-42.

⁴³Subekti, R dan R. Tijrosudibjo, *Op.Cit*, p. 457.

⁴⁴*Ibid*, p. 458.

"Business activities as a Futures Broker may only be made by a Stock Member in the form of a limited liability company which has obtained a business license from Bappebti. The futures broker is responsible for the actions of the broker representative who is his responsibility.

3. Article 49 Paragraph (1a) which previously reads:

"Each party is prohibited from bidding on a shariah contract, a shariah derivative contract and/or other derivative contract, with or without promotional activities, recruitment, training, seminars and/or raising Margin funds, guarantee funds, and/or equivalent to it purpose of transactions relating to Futures Trading, except to have permission from Bappebti "

Reconstructed to:

"Each party is prohibited from bidding on a shariah contract, a shariah derivative contract and/or other derivative contract, with or without promotional activities, recruitment, training, seminars and/or raising Margin funds, guarantee funds, and/or equivalent to it purpose of transactions relating to Futures Trading, except having permission from Bappebti. Promotional activities, customer recruitment and supply of futures contracts, shariah derivative contracts and/or other derivative contracts must be performed on the basis of true, honesty, and good faith promotional ethics. "

4. Article 50 Paragraph (2) previously reads:

"The futures broker shall submit the Company Information Document and Document Notification of Risk and make the Customer agreement before the relevant Broker can receive the funds of the Customer concerned"

Reconstructed to:

"The futures broker shall submit the Company's Document of Information and Document of Notification of Risk which must be made by using certain standard operating procedures (SOP) performed in chronological manner prior to the relevant Brokerage Company may receive funds belonging to the Customer in question"

5. Article 61 which previously reads:

"Without prejudice to the right of the Parties to settle civil disputes relating to the Trading in the Court or through arbitration, any dispute shall first seek its settlement by:

- a. the deliberate to reach consensus among the disputing parties; or
- b. utilization of the facilities provided by Bappebti and/or Bernagka Exchange, if the consensus for consensus, as referred to in letter a is not reached.

Reconstructed to:

"Without prejudice to the right of the Parties to settle civil disputes relating to the Futures Trading in court or through arbitration, any dispute shall first attempt to resolve through:

- a. the deliberate to reach consensus among the disputing parties; or
 - b. utilization of the facilities provided by Bappebti and/or Futures Exchange, if the consensus for consensus, as referred to in letter a is not reached.
 - c. in the case of deliberations for consensus is not reached, the customer is given the priority of choosing the means of settlement that is considered the best and profitable.
6. Article 66 Paragraph (2) letter b number 5 which previously reads:

"Conduct a search of a company suspected of having committed a criminal offense in the field of Futures Trading"

Reconstructed to:

"Conduct a search of a company suspected of committing a criminal act in the field of Future Trade and perform a proactive software checks used by futures brokers to avoid any fraudulent or other harmful actions to the detriment of the customer".

Based on the description, it can be seen that there are some differences between the futures trading rules (PBK) before being constructed with after construction. Some of the differences that are meant between the two are as follows:

**Table of Contents of the Futures Trading Law
Prior to After Reconstruction**

| Before Reconstruction | Weaknesses | After Reconstruction |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Article 30A Paragraph (2):</p> <p>"The electronic trading system used in the Alternative Trading System shall meet the requirements further stipulated by the Regulation of the Head of Bappebti"</p> | <p>Not yet explicitly regulates the linkage of Electronic Trading System with the ITE Law</p> | <p>Article 30A Paragraph (2):</p> <p>"The electronic trading system used in the Alternative Trading System shall comply with the provisions stipulated in the Information and Electronic Transactions Act further stipulated by the Regulation of the Head of Bappebti as long as it is not contrary to the applicable Law"</p> |
| <p>Article 31 Paragraph (1):</p> <p>"The business activities as a Futures Broker may only be made by an Exchange Member in the form of a limited liability company which has obtained a business license from Bappebti."</p> | <p>Have not set the responsibility for the broker's representative who is the responsibility of the broker.</p> | <p>Article 31</p> <p>Paragraph (1):</p> <p>"Business activities as a Futures Broker may only be made by a Stock Member in the form of a limited liability company which has obtained a business license from Bappebti. The futures broker is responsible for the actions of the broker representative who is his responsibility "</p> <p>Paragraph (2).</p> <p>"The futures broker is responsible for the actions of the broker representative who is his / her responsibility as long as it is done outside the provisions outlined by the board of directors, but if it is in line with the policy line, then the provision of power shall apply. "</p> |
| <p>Article 49 Paragraph (1a):</p> <p>"Each party is prohibited from bidding on a sharia contract, a shariah derivative contract and/or other derivative contract, with or without promotional activities, recruitment, training, seminars and/or raising Margin funds, guarantee funds, and/or equivalent purpose of transactions relating to Futures Trading, except to have permission from Bappebti "</p> | <p>Not yet explicitly linked the necessity of futures brokers to conduct promotional activities true and honest.</p> | <p>Article 49 Paragraph (1a):</p> <p>"Each party is prohibited from bidding on a sharia contract, a shariah derivative contract and/or other derivative contract, with or without promotional activities, recruitment, training, seminars and/or raising Margin funds, guarantee funds, and/or equivalent purpose of transactions relating to Futures Trading, except having permission from Bappebti. Promotional activities, customer recruitment and supply of futures contracts, shariah derivative contracts and / or other derivative contracts must be performed on the basis of true, honesty, and good faith promotional ethics. "</p> |
| <p>Article 50 Paragraph (2)</p> | <p>So far this obligation has been done only for formalities.</p> | <p>Article 50 Paragraph (2):</p> |

| | | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>"The futures broker shall submit the Company Information Document and Document Notification of Risiko and make the Customer agreement before the relevant Broker can receive the funds of the Customer concerned"</p> | | <p>"Brokerage jngka obligate to submit Document Company Description and Document Notification of Risiko that must be done by using certain standard operating procedure (SOP) which done chronologically before the relevant Brokerage can receive fund owned by Customer which is"</p> |
| <p>Article 61: "Without prejudice to the right of the Parties to settle civil disputes relating to the Trading in the Court or through arbitration, any dispute shall first seek its settlement by: a. deliberation to reach consensus among disputants; or b. utilization of the facilities provided by Bappebti and / or Bernagka Stock Exchange, if the consensus for consensus, as referred to in letter a is not achieved ".</p> | <p>Rules like this are very detrimental to customers, because the fact that loses customer funds, not futures brokers.</p> | <p>Article 61: "Without prejudice to the right of the Parties to settle civil disputes relating to the Trading in the Court or through arbitration, any dispute shall first seek its settlement by: a. deliberation to reach consensus among disputants; or b. utilization of the facilities provided by Bappebti and/or Future Exchange, if the consensus for consensus, as referred to in letter a is not reached. c. in the case of deliberations for consensus is not reached, the customer is given the priority of choosing the means of settlement which is considered the best and favorable ".</p> |
| <p>Article 66 Paragraph (2) letter b (5): "Conduct a search of a company suspected of having committed a criminal offense in the field of Futures Trading"</p> | <p>Do not consider proactive inspection of software used by brokers</p> | <p>Article 66 Paragraph (2) letter b (5): "Conduct a search of a company suspected of committing a criminal offense in the field of future Trade and perform a proactive software inspection used by futures brokers to avoid any fraudulent or other actions that harm customers".</p> |

Source: Processed from Primary Data (2017)

The description clearly shows there are some important differences between the Commodity Futures Trading Act (UU PBK) before and after the reconstruction. Differences are expected to provide a fairer perceived protection for futures trading customers. This is because reconstruction is done since the concept, implementation, settlement of civil disputes, until the criminal investigation process. On the other hand, it must be admitted that the reconstructed PBK Law still contains some deficiencies regarding the application of the value of justice in contractual relationships in it.

The weaknesses is primarily concerned with a conflict of interest between the practice of the parties involved in the conduct of futures trading operations, between the large gains that may be obtained with the high risk to be faced. Moreover, the rapid development of network technology or information technology is also not easy to follow. As a result, the rule of law is supposed to protect the parties, it is considered as an obstacle for the other parties.

4. CONCLUSION

1. Legal protection of customers of PBK as regulated in Law No. 10 Year 2011 on Amendment to Commodity Futures Trading Law (UU PBK) does not reflect the values of justice, either in the implementation of Justice Values at Pre-contract stage, at the implementation stage until post-contract stage.
2. The reconstruction of legal protection to create an ideal legal protection for fair value commodity futures trading customers is to reconstruct Article 30A Paragraph (2) on Alternative Trading System; Article 31 Paragraph (1) concerning obligations of MF A trader; Article 49 paragraph (1a) on promotional ethics; Article 50 Paragraph (2) concerning the use of standard operating procedure (SOP); Article 61 on the Settlement of Civil Disputes; and Article 66 Paragraph (2) letter b (5) on supervision and examination.

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