

## **Restructuring Failed Banks By Deposit Insurance Agency (Lsp) Acordanced Indonesian Banking Law**

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### **Abstract**

The failed banks are the banks that face financial problem, endanger the continuity of their business, and is declared no longer able to be healthy by Banking Supervisory Agency. During the economic crisis, the government reconstructs the national banking system which included recapitalization of the national banking system, a third-party fund guarantee program and settlement of liquidity assistance from Bank Indonesia. The National Bank Restructuring Agency is purposely founded to solve the banking crisis. The programs of restructuring banking that is implemented by the National Bank Restructuring Agency run slow because of legal process barriers and slow banking restructuring are measured by the rate at which asset values decline. The government issued Law Number 9 of 2016 concerning Prevention and Management of Financial System Crisis. The duties and responsibilities of the Deposit Insurance Agency are increasingly being expanded and strengthened, including their appointment as the organizer of the banking restructuring program. From the research results, the duties, and responsibilities of the LPS were further expanded and strengthened by the enactment of the PPKSK Law. LPS implements the resolution of failed systemic and non-systemic failed banks. For non-systemic failed banks that are not saved, the LPS recommends the OJK to revoke the bank's business license, makes payment of guarantee claims and carries out liquidation. On the other hand, if certain requirements are met, the LPS can make efforts to save a failed bank without a systemic impact. For banks failing to have a systemic impact, the problem is brought to the Financial System Stability Committee (KSSK). LPS can include the old shareholders or not. The LPS Law only provides options for failed bank resolution methods in the form of payment of deposit guarantor claims and bank liquidation (reimbursement), as well as the implementation of open bank assistance carried out with temporary equity participation. In the PPKSK Law, LPS gets an additional 2 (two) choices of failed bank resolution methods, namely transferring part or all the assets and / or liabilities (bridge bank). In the purchase and assumption option, a healthy bank takes over part or all the failed bank's assets and receives part or all the failed bank's liabilities. In the bridge bank option, a new bank was established to temporarily accommodate and manage part, or all the assets and liabilities transferred from the failed bank. Subsequently, the failed bank had its license revoked and liquidated. The

bank's bridge is temporarily managed until the bank can be sold to new investors. In one case bank failure, LPS can choose an option that is a combination or a combination of the existing bank resolution methods.

**Keyword :** failed banks, Deposit Insurance Agency (LSP), Restructuring,

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## Introduction

Indonesian banking runs business based on economic democracy and use precautionary principle. It means that the function and banking business are led to implement principles that are included in economic democracy based on Pancasila and Undang-Undang Dasar 1945.<sup>1</sup> Before 1977, national economic growth well, the rupiah exchange rate tends to be stable, foreign investment continues to increase, and the private sector is given the opportunity to borrow from foreign creditors. World economic problems began in July 1977 when the currencies of the number of Asian countries (South Korea, Thailand, and Malaysia)<sup>2</sup> plummeted, and their exchange rates against foreign currencies, especially the dollar, continue to deteriorate. These problems have an impact on the Indonesian economy.<sup>3</sup> On October 31, 1977, the letter of Intent (LOI) Indonesia – IMF was signed. The Letter of Intent contains several steps that the Indonesian government will take to nourish the economy. The October 1977 LOI includes:

- a. Comprehensive restructuring is the key to success.
- b. Insolvent banks that are unable to pay their obligations and cannot be saved are required to arrange and carry out their rehabilitation.
- c. The restructuring program consists of four parts. Its implementation is assisted by the IMF, World Bank and Asian Development Bank. Due diligence on the Bank is carried out to determine the degree of health. Healthy banks remain under Bank Indonesia, while unhealthy banks are cured by the Indonesian Bank Restructuring Agency.
- d. All cost related to bank closure and rehabilitation of state banks are borne by the government through the APBN. Issuing bonds that are guarantee by the government is the solution.<sup>4</sup>

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<sup>1</sup> Rachmadi Usman, (2001), *Aspek-Aspek Hukum Perbankan di Indonesia*, Gramedia Pustaka Utama, Jakarta,

<sup>2</sup> Alex Kurniawan, *Kajian Hukum Terhadap Penyelesaian Likuidasi Bank yang di cabut izin usahanya sebelum berlakunya Undang – Undang Nomor 24 tahun 2004 Tentang Lembaga Penjamin Simpanan*, Buletin Hukum Perbankan dan Kebanksentralan, Januari – April, 2013, p. 39.

<sup>3</sup> Dhian Indah Astuti, Tundjung Herning Sitabuana, Dian Septiandani, (Januari 2012), *Peran Lembaga Penjamin Simpanan Dalam Memberikan Perlindungan Hukum Terhadap Nasabah*, Jurnal, Humani Vol.5, No.1 p. 73

<sup>4</sup> Adrian Sutedi, (2016), *Hukum Perbankan, Suatu Tinjauan Pencucian Uang Merger, Likuidasi dan Kepailitan*, Sinar Grafika, Jakarta, p. 85.

To overcome the crisis, the government issued several policies that are providing guarantees for all bank payment obligations and public deposits (blanket guarantee). The existence of a blanket guarantee program does not encourage the creation of market discipline, so the following effort is to replace the guarantee program based on the provisions contained in article 378 paragraph (2) of Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning banking.<sup>5</sup> The contents of the article include that each bank is obliged to guarantee public funds deposited in the bank concerned and public savings at the bank, a public savings institution is established. On 22 September 2004, the government enacted Law Number 24 concerning the Deposit Insurance Agency (LPS). As a legal entity, LPS was formed as an independent, transparent, and accountable institution in carrying out its duties and providing accountability to the President. A bank is said to have a problem or experience failure when it is no longer able to fulfill the obligations of depositors and creditors. This default is due to bank liquidity problems. A troubled bank is categorized as a bank under intensive supervision if the problematic bank experiences an increase in bad credit (NPL / Non-Performing Loan).<sup>6</sup> A troubled bank that is unable to maintain the soundness of the bank is known as a failed bank. According to Article 1 number 7 of the LPS Law, a failing bank is a bank that is experiencing financial difficulties and endangers its business continuity and is declared no longer able to be healthy by the Banking Supervisory Agency (LPP) in accordance with its authority. Article 21 of the LPS Law states that:

1. The LPS receives notification from the LPP regarding a troubled bank that is under restructuring as referred to in the legislation in the banking sector.
2. The LPS resolves the failed Bank which does not have a systemic impact after the Coordination Committee submits the settlement to the LPS.
3. The LPS handles failed Banks that do not have a systematic impact after the Coordination Committee hands over the handling to the LPS.

In the United States, bank failures are managed by the Federal Deposit Insurance Corporation (FDIC). Bank failure in the United States is required to be different from other types of bankruptcy. When a bank fails, it can have a devastating impact not only on the bank's customers but on other related parties as well. Failure of any bank (especially large banks) can damage the economy and reduce public confidence more acutely than failures at other private companies. In various countries there is

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<sup>5</sup> Zuriyanti. Oktober (2005). Perlindungan hukum terhadap nasabah penyimpan dana pada bank yang di likuidasi menurut undang – undang nomor 24 tahun 2004 tentang lembaga penjamin simpanan, Jurnal, JOM Falkultas hukum Vol. 2. No. 2

<sup>6</sup> Buletin Bank Indonesia. (2010). Krisis global dan penyelamatan sistem perbaikan Indonesia, Jakarta.

a common thread in facing the financial crisis, namely the emergence of encouragement to form formal schemes for protecting depositors that guarantees institutions that can fulfill bank obligations to all stakeholders if the bank is liquidated to maintain public trust.<sup>7</sup>

The duties and responsibilities of the LPS in the banking and financial system in Indonesia were further expanded and strengthened by the enactment of Law Number 9 of 2016 concerning Financial System Crisis Prevention and Management (PPKSK Law), on April 15. Among the important points in the PPKSK Law are the granting of authority to the President to determine the crisis conditions suggested by the KSSK (Financial System Stability Committee) and the establishment of a bank restructuring body.<sup>8</sup> (Prasetya, 2016).

## METHOD

The research method applied is in the form of a normative approach. Another name for normative legal research is doctrinal legal research, also referred to as library research or document studies.<sup>9</sup> The research specification used is descriptive analyst, which describes the state of the object under study and a number of factors that influence it. The data obtained were collected, compiled, explained, then analyzed.<sup>10</sup>

The approaches used in this research are the constitutional approach, historical approach, and conceptual approach. The statutory approach is used to review all laws and regulations related to the restructuring of the Failing Bank by the IDIC. The historical approach is used in connection with the restructuring that has been carried out in the banking sector when the monetary crisis occurred in the late 1990s. The conceptual approach departs from the views and doctrines that are developed in the science of law. By studying the views and doctrines in legal science, researchers will find ideas that define legal notions, concepts and legal principles that are relevant to the issues.<sup>11</sup>

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<sup>7</sup> Adrian Sutedi, (2012). Aspek hukum Lembaga Penjamin Simpanan ( LPS ) , Sinar Grafika, Jakarta, p. 32.

<sup>8</sup> Hari Prasetya. (2016). Mengupas Peran (Penting) LPS Dalam sistem perbankan, Indie Publishing, Depok, Jawa Barat p. 9.

<sup>9</sup> Suratman, H. Philip Dillah, (2012), *Metode Penelitian Hukum*, Alfabeta, Bandung, p. 51.

<sup>10</sup> Soerjono Soekanto, Sri Mamudji, (2011), *Penelitian Hukum Normatif, Suatu Tinjauan Singkat*, Raja Grafindo Persada, Jakarta, p. 24.

<sup>11</sup> Peter Mahmud Marzuki, (2010), *Penelitian Hukum*, Kencana, Jakarta, p. 93.

The method of data analysis used is a qualitative approach that produces descriptive analysis data, namely what is stated by the research objectives concerned in writing or orally and real behavior. For normative legal research, analysis of legal materials is carried out.<sup>12</sup>

## DISCUSSION

Banking institutions have a major role in implementing economic policies and are one of the most important components of the national economy in maintaining stability, progress, and national economic unity.<sup>13</sup> (Hasibuan, 2002).

In 1997, Indonesian experienced an economic crisis. The root causes of the crisis in Indonesia consist of various factors, including:

1. The rapid economic growth before the crisis was driven more by investment growth and not by efficiency and innovation.
2. The company's financial structure is inherently unhealthy. A number of large companies excluding banking, rely on loans more than 100% when compared to equity.
3. In the process of lending, a mark-up practice occurs so it only destroys the capital structure itself.
4. The collapse of the Indonesian economy was caused by the absence of good governance in the company.<sup>14</sup> (Sutedi, 2006).

The development of the Indonesian banking system has evolved into five stages of rehabilitation and improvement from the high inflation of 1967-1973, the enactment stage of the net assets ceiling in 1974-1983, the growth and regulation stage of 1983-1988, the acceleration stage of 1988-1991, and the consolidation stage 1991-1997, namely the principle of prudence that is being introduced, including capital adequacy and bank ratings. However, the crisis had already spread during the consolidation stage, while the fundamentals of the banks were still weak, including capital adequacy that had not been resolved.

Article 34 of the Bank Indonesia Act states that the task of supervising banks will be carried out by an independent financial sector supervisory institution and established by law. To carry out this mandate, Law No.21 of 2011 concerning the Financial Services Authority (OJK) was issued, which is abbreviated as the OJK Law. OJK carries out the task of regulating and supervising financial service

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<sup>12</sup> Ibid.,

<sup>13</sup> Malayu S.P Hasibuan, (2002), *Dasar-Dasar Perbankan*, Bumi Aksara, Jakarta, p. 2.

<sup>14</sup> Adrian Sutedi, *Op. Cit.*, p. 2

activities in the banking sector, capital market, pension fund insurance sector, financing institutions and other financial institutions.

The authority related to regulation and supervision of bank institutions and health includes licensing, business activities, liquidity, profitability, solvency, asset quality, minimum capital adequacy ratio, maximum lending limit, loan to savings ratio, bank planning, and others that have shifted to the OJK. This is as a reference in determining the implementation of failed bank settlement due to, among others, marked by a decrease in capital, asset quality, liquidity, and profitability as well as bank management which is not implemented based on prudential principles in sound banking principles.<sup>15</sup>

In running the business, the bank collects public funds in the form of savings, time deposits and current accounts, which are generally short term (less than a year). The funds collected will be used by the bank to finance corporate loans or placements in other investment instruments which generally have a maturity of more than a year. This is where banks naturally face what is called a maturity gap in their financial structure, which means that between paying customer fund obligations and the maturity of the placement results are not the same. Once a bank fails to fulfill its obligations to depositors, the bank's reputation is at stake, it is not impossible to experience a rush by customers. If it is like this, any large and healthy bank will collapse.<sup>16</sup> According to article 1 point 7 of the LPS Law, a failing bank is a bank that is experiencing financial difficulties and endangers its business continuity and is declared no longer able to be healthy by the banking supervisory institution (LPP) in accordance with its authority.

The functions of LPS are:

1. Formulate and determine policies to actively participate in maintaining the stability of the banking system.
2. Formulate and implement policies for the settlement of failed banks (bank resolutions) that do not have a systematic impact.
3. Carry out the handling of failed banks that have a systematic impact.

Deposit insurance was first made in the United States as a response to the Great Depression, currently referring to the International Association of Deposit Insurers (IADI). There are 95 countries that apply deposit insurance both explicitly and implicitly. This amount is more than 60%

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<sup>15</sup> Zulfi Diane Zaini, (2012), *Independensi Bank Indonesia dan Penyelesaian Bank Bermasalah*, Keni Media, Bandung, p. 194.

<sup>16</sup> Bulletin Bank Indonesia, *Op. Cit.*, p. 31

of the total existing countries. There are various types of deposit insurance based on coverage, characteristics of risk premiums, co-insurance and funding.<sup>17</sup> Several other countries implementing the guarantee program policy include China, India, Hong Kong, South Korea, Thailand, Argentina, Brazil, Chile, Mexico, Russia, the European Union, Japan, and others.

Thailand implemented a guarantee program through the Financial Institutions Development Fund (FIDF) in 1985 with no limit on the amount of the guarantee. It should be noted that what stands out from the main problem of banking is the high non-performing loan. Reaching 50% of total credit, it is not surprising that a budget of 43 billion US dollars (equivalent to 32% of GDP) was prepared by the Thailand government to restructure 20 problem banks, to accelerate restructuring in the form The Financial Restructuring Advisory Committee (FRAC) in October 1997. At the same time, to restructure non-performing loans and bad debt, the Asset Management Corporation (AMC) was formed. Meanwhile, to strengthen bank capital, the Thai government established the FIDF which functions to help overcome bank capital and liquidity. Government ownership of recapitalized banks must gradually be reduced to strengthen the structure of state revenues through a gradual divestment program.

In the United States, bank failures are managed by the Federal Deposit Insurance Corporation (FDIC). Bank failure in the United States required different types of bankruptcy because of the importance of banks in the effective economy. When a bank fails, it can have a devastating impact not only on the bank's customers but also on other stakeholders as well. Bank failure (especially large banks) can damage the economy and decrease with failure in other companies.<sup>18</sup>

In the Bank for International Settlement (BIS) paper entitled Bank Restructuring In Practice (1999), it is said that for banking restructuring, there are a number of methods applied in a number of countries, namely Government Capital Injection, Asset Management Corporation (AMC), domestic bank mergers, and foreign bank takeovers.<sup>19</sup>

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<sup>17</sup> Moch. Doddy Ariefianto, Soenartomo, (Januari 2013), *Risk Taking Behaviour of Indonesian Banks : Analysis on the Impact of Deposit Insurance Corporation Establishment*, Jurnal, Buletin Ekonomi Moneter dan Perbankan, p. 6.

<sup>18</sup> Stanley V Regalevsky and Sarah J Ricardi (2019), *Anatomy, of A Bank Failure*, The Banking Law Journal, p. 869.

<sup>19</sup> Zhuang Cai, Peter Wheale, (April 2009), *Managing Efficient Capital Allocation With Emphasis On The Chinese Experience*, Journal of Ethics, p. 120.

In Indonesia, the government and Bank Indonesia conducted a banking restructuring program in 1999, a banking restructuring program covering national banking recapitalization, a third-party fund guarantee program and settlement of Bank Indonesia liquidity assistance (BLBI).<sup>20</sup>

In 1997-1998, when the economic crisis occurred, Bank Indonesia as the central bank carried out its function as Lender of Last Resort, which was the provision of liquidation by the central bank to financial institutions or to the market due to sudden shocks which resulted in an increase in demand for liquidity normally which could not fill with other sources. Bank Indonesia provides Bank Indonesia Liquidity Assistance (BLBI) for banks experiencing liquidity difficulties. Later, the problem that arose was the misuse of funds that were originally intended to be paid to customers, switching to the use of these funds for the benefit of owners of BLBI recipient banks. Based on Presidential Instruction No. 8 of 2002 concerning the provision of guarantees to provide legal certainty which is a legal attempt by the government by applying the non-litigation BLBI settlement pattern, namely opening up the possibility of receiving BLBI in good faith by signing a "Shareholder Liability Settlement Agreement" which contains settlement of his debt obligations to the state, then the person concerned is given a contra-achievement in the form of providing a guarantee of legal certainty from the state with a Release and discharge clause which is a form of eliminating the prosecution of the criminal aspect, the juridical consequence of this choice is to make the fulfillment of civil obligations as agreed. as the basis for the elimination of criminal prosecution against the controlling shareholder.<sup>21</sup>

In the banking and financial system in Indonesia, the duties, and responsibilities of the LPS are further expanded and strengthened by the enactment of law number 9 of 2016. Based on the LPS Law, the LPS is an institution that has the authority to implement failed bank resolutions, in other words LPS is the resolution authority in Indonesia. It is obvious that in carrying out these tasks, LPS needs to coordinate with other authorities, especially banking supervisors that is the OJK. The OJK has made efforts to restore the condition of a troubled bank to a healthy state (recovery). If the restructuring effort is unsuccessful, the bank is referred to as an unsustainable bank or a failed bank. The subsequent treatment for the failed bank is referred to as a resolution, which is implemented by the LPS. In articles 21 and 22 of the LPS Law, the implementation of non-systemic failures of bank resolutions is referred to as settlement. LPS has the option to save or not the unsystematic failed banks. If the LPS does not carry out a rescue, the LPS recommends the OJK to revoke the bank's

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<sup>20</sup> Aulia Pohan, (2008), Potret Kebijakan Moneter Indonesia, *Seberapa Jauh Kebijakan Moneter Mewarnai Perekonomian Indonesia*, RajaGrafindo Persada, Jakarta, p. 192.

<sup>21</sup> Zulfi Diane Zaini, (2012), *Independensi Bank Indonesia Dan Penyelesaian Bank Bermasalah*, Keni Media, Bandung, hlm 209.



business license, and then the LPS will pay the guarantee claim and carry out liquidation. Otherwise, if certain requirements are met, the LPS can make efforts to save the failed bank without having a systematic impact.<sup>22</sup>

For failed banks that are handled with systemic impacts, the problem is brought to the committee which is authorized to set policies related to banks with systemic impacts. In the LPS Law, this committee is called the Coordinating Committee, in the OJK Law it is called the Financial System Stability Coordination Forum (FKSSK), while in the PPKSK Law it is called the Financial System Stability Committee (KSSK). If the bank is declared as failed systematic bank, the LPs will take cover of the bank. In the effort to handle this, the LPS can include the old shareholders or not.

There are at least two main principles in selecting resolution options, namely the Least Cost Resolution Principle or Lower Cost Resolution Principle. The principle requires that the resolution authority selects the resolution option that has the lowest cost of all available options. Whereas in the second principle, the choice of resolution option which has lower costs compared to the payment option for guarantor claims and bank liquidity, does not have to be the option that has the lowest cost. Several criteria that need to be considered or become the basis for determining the resolution method or option, such as minimizing costs, minimizing the risk of reasoning (contagion), ensuring small customers are guaranteed, there is no saving for shareholders, in this case the bank's losses must first be borne by shareholders and financial assistance or additional capital in the bank may not give the slightest benefit to shareholders. Other criteria are adequate transparency, timely response, and availability of adequate resources.

The LPS Law only provides options for failed bank resolution methods in the form of payment of deposit guarantor claims and bank liquidation (reimbursement), as well as the implementation of open bank assistance which is carried out with temporary equity participation. In the reimbursement option, the business license of the failed bank fails must be revoked, then the bank's assets are liquidated and used to pay liabilities according to the priority order of the creditors. If there is a deposit guarantor, the deposit guarantor will pay the guaranteed customer deposit in advance, so the customer can immediately have access to his savings. Furthermore, the deposit guarantor replaces the position of the customer whose guarantee is paid for the distribution of the proceeds from the bank liquidation. Open Bank Assistance is a resolution option whereby a troubled bank or failed bank to receive assistance from the resolution authority including increasing capital and providing loans. Regarding the increase in capital and the provision of such loans, the resolution

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<sup>22</sup> Hari Prasetya, (2016), *Mengupas Peran Penting LPS Dalam Sistem Perbankan*, Indie Publishing, Depok, p. 162.

authority can place a management team to manage the bank concerned. Open Bank Assistance is often called a bail-out.

In the PPKSK Law, LPS gets an additional 2 choices of failed bank resolution methods, such as: transferring part or all the assets and / or liabilities to other banks (Purchase and Assumption) or transferring part or all the assets and or liabilities to the bank (Bridge Bank).

Transferring part or all the assets and / or liabilities of the systemic bank to the receiving bank (Purchase and Assumption), which means that a healthy bank takes over part or all the failed bank's assets and receives part or all the failed bank's liability. To support the implementation (Purchase and Assumption), the resolution authority can provide incentives to healthy banks that take over the assets and liabilities of the failed bank, the failed bank whose part or all its assets and liabilities have been transferred are subsequently revoked and liquidated.

Multiplying part or all the assets and / or liabilities of the systemic bank to the intermediary bank (Bridge Bank), it means that in this resolution option a new bank is established to temporarily accommodate and manage part, or all the assets and liabilities transferred from the failed bank, then the failed bank is revoked and liquidated. The bank bridge option is basically a variation of the purchase and assumption option. The bank's bridge is temporarily managed until the bank can be sold to new investors. This resolution option is selected when the Purchase and Agreement transaction cannot be completed within the specified time, while the failed bank has a certain value that must be maintained.

In one case of bank failure, the resolution authority may select an option which is a combination or combination of the various existing bank resolution methods.

## **Conclusion**

The LPS were further expanded and strengthened by the enactment of the PPKSK Law. LPS implements the resolution of failed systemic and non-systemic failed banks. For non-systemic failed banks that are not saved, the LPS recommends the OJK to revoke the bank's business license, makes payment of guarantee claims and carries out liquidation. On the other hand, if certain requirements are met, the LPS can make efforts to save a failed bank without a systemic impact. For banks failing to have a systemic impact, the problem is brought to the Financial System Stability Committee (KSSK). LPS can include the old shareholders or not. The LPS Law only provides options for failed bank resolution methods in the form of payment of deposit guarantor claims and bank liquidation (reimbursement), as well as the implementation of open bank assistance carried out with temporary equity participation. In the PPKSK Law, LPS gets an additional 2 (two) choices of failed bank

resolution methods, namely transferring part or all the assets and / or liabilities (bridge bank). In the purchase and assumption option, a healthy bank takes over part or all the failed bank's assets and receives part or all the failed bank's liabilities. LPS can choose an option that is a combination or a combination of the existing bank resolution methods.

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