

**THE LEGAL PROTECTION TOWARDS INVESTORS FROM
INVESTMENT SCAM IN CASE OF PT GOLDEN TRADERS
INDONESIA SYARIAH**

A BACHELOR DEGREE THESIS



By:

SARAH LEA MAISYA HAMIDAH

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INTERNATIONAL PROGRAM

FACULTY OF LAW

UNIVERSITAS ISLAM INDONESIA

Yogyakarta

2018

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Submitted in Partial Fulfillment of Requirement to Obtain Bachelor's Degree
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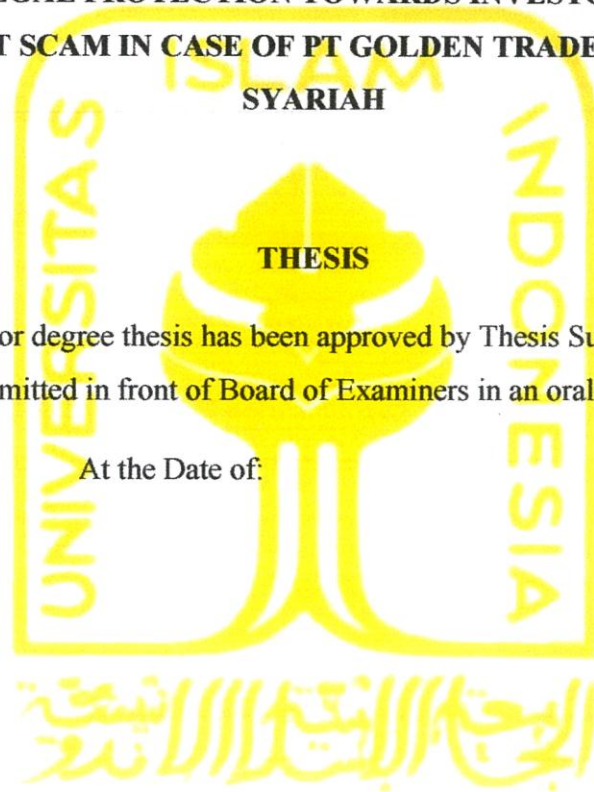
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**THE LEGAL PROTECTION TOWARDS INVESTOR FROM INVESTMENT SCAM IN
CASE OF PT GOLDEN TRADERS INDONESIA SYARIAH**

Karya ilmiah ini saya ajukan kepada Tim Penguji dalam Ujian Pendadaran yang diselenggarakan oleh Fakultas Hukum Universitas Islam Indonesia.

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MOTTO

“Indeed, with hardship comes ease. So when you have finished (your duties), then stand up (for worship)”

Q.S Al-Inshirah : 6-7

*With gratitude to Allah S.W.T.,
the author dedicates this thesis to:
Ayah, Mamah, Ami, Enin and all of my family
who always support me in every aspect of my life.*

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ABSTRACT

Investment scam in essence is a collection of funds from the public in the form of deposits but packed with investment. One of the modus used in investment scams is by using Ponzi schemes or pyramid schemes. In Indonesia there is a case of PT Golden Traders Indonesia Syariah (PT GTIS) which done investment scam with the sharia labelling. This thesis is based on normative research, therefore it will concept law as a norm consist of positive law. The result of this thesis is that PT GTIS conducts investment scam with Ponzi or multi-level marketing schemes. Legal protection that can be provided by the OJK can be in the form of preventive and repressive actions. Also the existing theory of responsibility can drag the MUI institution to take responsibility in the case of PT GTIS. All material losses from the case of PT GTIS is not the responsibility of the MUI institution but the personal responsibility of the board itself. The customer as a weak party must be more active in choosing financial investments, and The Indonesian Ulema Council (MUI) must be more involved in the occurrence of investment scams, because many sharia-labeled financial services companies carry out investment scams.

Keywords: Investment scam, Ponzi Scheme, Commodity Future Trading.

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CHAPTER I

INTRODUCTION

A. Context of Study

Investment is one form of practices that develops in business activities on financial services that promise high profits. The growing investment in society is basically an activity to raise funds from the community.¹ Although the basic principle of saving and investment are saving money somewhere, in saving the money saved can still be taken or used anytime. While investments have long-term goals, investors will only get the results of these investments for several years depend on the agreement made between investors and investment companies.

Investment is collecting some funds for the purpose of obtaining financial benefits. However, some people are not aware of the importance of investment and it not necessary to be done. Most of them prefer to have the money or have a deposit at the bank, because worry that the results of their investment do not in accordance with their desire. Then the people looking for a safe and secure.

According to Cambridge Dictionary, investment is put (money) into financial scheme, shares, property, or a commercial venture with the expectation

¹ *Kenali Perbedaan Menabung Dan Investasi yang Perlu Anda Ketahui*, <https://www.finansialku.com/kenali-perbedaan-menabung-dan-investasi-yang-perlu-anda-ketahui> accessed at 5 June 2018

of achieving a profit². While according to Indonesian Dictionary, investment is the investment of money or capital in a company or project for the purpose of obtaining profit.³ Based on the various understanding of the investment mentioned above, there is a similarity about the meaning of the investment which is the activities undertaken by a person or business entity by using capital to conduct a business in the hope of getting a profit in the future.

Gold is one kind of investment object. Gold as an asset plays a very important role in an investor's portfolio as it not only provides stability for returns but also gives an opportunity to maximize the wealth of the investor. Investors generally buy gold as a way of diversifying risk. Price of gold is determined by the market force of demand and supply. Central bank keeps some portions of their securities in the form of gold. Some studies pointed out that US central bank is the largest holder of gold they own 8133 tons of gold it represents 63.8% of American foreign reserves.⁴ Gold is a hedging tool against inflation.

Lately, there are a lot of companies or non-bank financial institutions that offer investment products to the public. This makes the upper middle class people start to participate in investment. However their participation is not accompanied by a good knowledge of investments that make the companies take advantage of the people's lack of understanding by offering fictitious investments. Therefore, the people as an investor will gain the losses.

² *Investment* <http://dictionary.cambridge.org/dictionary/english/investment>

³ *Investasi* <http://kbbi.web.id/investasi>

⁴ Aghila Sasidharan, "Gold as an Investment Option- A Study on Investment Pattern of Investors in Kerala" International Journal of Management and Commerce Innovation (2015) p681

Investment scam practices are still quite rife until 2018.⁵ Investment scam or also called bundle investment in essence is a collection of funds from the public in the form of deposits but packed with investment.⁶ Companies that indicate investment scam usually promise a high profit, even beyond the limit of reasonableness. In addition, investment products are offered with a pledge to be secured by certain instruments, such as gold, demand deposits, or guaranteed by government or other financial institution. Beside that the companies that make investment scams are using the names of large companies misleadingly to convince potential investors.

One of the modus used in investment scams is by using Ponzi schemes or pyramid schemes. In Ponzi scheme, the investor or the owner of the fund offers to place the funds with a promise for a much higher yield compared to other investment products. Profit sharing is generally fixed and there is no investment risk at all. How they put the money, sometimes not explained in detail. While, pyramid scheme is a fraud based on the recruitment of a number of investors where the initial promoters recruit other investors and later investors who are recruited will also bring many other investors.⁷

⁵ *Investasi Bodong Marak Perlu Pengawasan Lebih Ketat*
<https://investasi.kontan.co.id/news/investasi-bodong-marak-perlu-pengawasan-lebih-ketat>
accessed at 28 May 2018

⁶ P, Paripurna, “Kekosongan Hukum di Sektor Keuangan Dalam Penanganan Investasi Misleading.”
www.sikapuangmu.ojk.go.id: Edukasi Keuangan, 3-4 Agustus 2015, Surabaya: OJK, 2015
accessed at 28 May 2018

⁷ *Waspada Investasi Bodong*
https://jabar.kemenag.go.id/file/file/OJK/Waspada_Investasi_Bodong.pdf

In addition, to attract investors to participate, sometimes companies whose offer investment scam using religious elements in it. Such as the use of sharia label on investment products offered. It makes many investors, even non-Muslim investors, are participate because they feel secure with its sharia label.

In Indonesia there are many cases of investment scam under the guise of religion. One of the biggest cases is the gold investment case of PT Golden Traders Indonesia Syariah (PT GTIS). Before getting a sharia emblem, PT Golden Trader Indonesia (PT GTI) was originally only a company that sells and purchases gold bullion. Then in 2011, PT GTI proclaimed itself as an investment company labeled sharia to PT GTIS after obtaining halal certificate from Majelis Ulama Indonesia (MUI). The handover of the MUI certificate was given by KH Ma'ruf Amin as the chairman of MUI and witnessed by the chairman of the House of Representative Marzuki Alie.⁸

In 2013, many customers complained about PT GTIS committed fraud. The frauds modus is asking prospective customers to buy gold at a price of 20% -25% higher than the price of gold in PT Aneka Tambang, and each month the customer was promised a profit of 1.5% - 2.5% of the value of gold. The amount of customer funds affected by the fraud reached 10 trillion rupiah. Those funds were in the form of money and gold which was then taken away by the owner of PT GTIS, Ong Han Cun.⁹

⁸ 5 *Investasi Bodong Terbesar Di Indonesia Kenali Masing-Masing Modusnya*
<http://wow.tribunnews.com/2018/01/06/5-investasi-bodong-terbesar-di-indonesia-kenali-masing-masing-modusnya?page=all> accessed at 28 May 2018

⁹ ibid

In that case above, it become a concern whether legal institution body whose has authority to handle this case. Because, in the beginning of establishment the company, PT GTIS get the permission of sale and purchase activity, with the basic of commodity futures trading contract. In that permission, PT GTIS only get the lisenca to import and distribute the commodity, such as gold, diamond, and silver. In fact, suddenly this company doing business activity that contradict with the essence of sale and purchase. PT GTIS collected the money from the public by using Multi Level Marketing Scheme which is not in accordance with the essence of lisenca in the beginning. Therefore Bappepti assume has not authority to handling the case of PT GTIS, because the conduct of PT GTIS is not the authority of them.

Beside that not only the investment scam becomes a concern, but also the existence of sharia labeling on the investment product. Chairman of the MUI, Ma'ruf Amin denied allegations of involvement in the case of PT GTIS. MUI does not grant a business license, because MUI has no authority over the grant of such permit. MUI only states that PT GTIS operates in sharia.¹⁰

The existence of sharia label in PT GTIS, is making a lot of investors tempted to join on the investment. Investors feel safe to invest there because MUI has recognized the company is labeled sharia. In fact, the operational management of PT GTIS is not in accordance with sharia, MUI only labels the sharia because the object of investment is not contrary to Islamic Sharia. MUI does not grant a

¹⁰ *Dua Petinggi MUI Terseret Investasi Bodong GTIS* <http://nasional.kontan.co.id/news/dua-petinggi-mui-terseret-investasi-bodong-gtis> accessed at 8 June 2018

sharia business license to PT GTIS, because it is not the authority of MUI. This thing makes many PT GTIS investors suffer losses.

From the basic background of the study, the author argues that the rights of customers or investors of the assets they keep. Thus, the legal protection of investors is required to prevent the occurrence of undesirable things, or to punish the perpetrators who misuse the investment. Also how is the sharia supervision that can be applied to handle such case above, so there is no misuse of sharia labeling anymore.

B. Problem Statement

1. Who has the authority to handle the case of PT Golden Traders Indonesia Syariah?
2. How is the legal protection be given to the investors from investment scam in case of PT Golden Traders Indonesia Syariah?

C. Research Objective

1. To identify who has the authority to handle case of PT Golden Traders Indonesia Syariah?
2. To discover the the legal protection be given to the investors from investment scam in case of PT Golden Traders Indonesia Syariah.

D. Theoretical Review

1. Basic Theory about Agreement and Breach of Contract

In principle, the contract consists of one or a set of promises made by the parties to the contract. The essence of the contract itself is agreement. On this

basis, Subekti defines the contract as an event in which a person promises to others where the two persons promise to do something.¹¹

There are elements that must be in the contract. From the meaning of contracts developed in Indonesia and the Netherlands can be deduced that there are some elements contained in the contract, namely¹²:

- a. There are parties;
- b. There is agreement that establishes the contract;
- c. The agreement is intended to give rise to legal consequences, and
- d. There is certain subject.

The contract law gives freedom to the contract subject to enter into contracts with certain restrictions. In connection with Article 1338 of the Criminal Code states:¹³

- a. All agreements are made legally valid as legislation to those who make it;
- b. The agreement shall not be withdrawn other than by mutual consent of the parties or by reason of the law which is sufficient for it; and
- c. The agreement shall be performed in good faith.

There is limitation to the principle of freedom of contract. Article 1320 of the Indonesian Civil Code restricts the principle of freedom of contract through

¹¹ Ridwan Khairandy, "*Hukum Kontrak di Indonesia dalam Perspektif Perbandingan*" (Yogyakarta: FH UII Press 2013) p 57

¹² Ibid p 66

¹³ Ibid p84

the arrangement of the requirements of the validity of contract which must follow to these conditions¹⁴:

- a. The existence of the agreement of the parties;
- b. The capacity of the parties to make the contract;
- c. The existence of a certain subject; and
- d. The existence of a clause that is not contrary to the law.

Breach of contract can be in the form of:¹⁵

- a. Not fulfilling performance at all;
- b. Fulfill performance but not as promised;
- c. Being late for performance;
- d. Perform an act which, according to the content of the agreement shall not be done.

Breach of contract can bring a detrimental effect to the debtor, which the debtor may be subject to several sanctions and penalties, including:¹⁶

- a. Compensation
- b. Cancellation of the agreement
- c. Transition of risk
- d. Pay a court fee when charged in court

¹⁴ Ibid p89

¹⁵ Ibid p280

¹⁶ Ibid p282

2. Basic Theory about Investment and Investment scam

The term investment comes from the Latin, that is *investire* (wear). Some experts have different views on the theoretical concepts of investment. Kamaruddin provides an understanding of investment in three senses, namely:¹⁷

- a. An act to purchase shares, bonds or other inclusion;
- b. An act of purchasing capital goods;
- c. Utilization of funds available for production with future incomes.

There are several types of investments, including:¹⁸

- a. Investment by assets is an investment classification of capital or wealth aspects.
- b. Investment based on its influence is an investment based on factors that influence or not affect the investment activity.
- c. Investment based on the source of its financing is an investment based on the origin of the investment it obtained.
- d. Investment by shape is an investment based on how the way to invest.

In investing there are definitely risks, here are some types of investment risks that may arise and need to be considered in making investment decisions:¹⁹

- a. Business risk
- b. Liquidity risk
- c. Interest rate risk

¹⁷ Sutrisno, Budi and Salim, "Hukum Investasi di Indonesia" (Jakarta: Rajawali Pers 2014) p 32

¹⁸ Ibid p37

¹⁹ Abdul Halim, *Analisis Investasi dan Aplikasinya* (Jakarta: PT Salemba Empat, 2015), p 39-40

- d. Market risk or Purchasing Power Risk
- e. Currency risk

Gold can be used as an object of investment. From an investment perspective, beside the static price increasing, gold is very different from stocks and bonds. Stocks and bonds may face default risks if the issuer cannot afford to pay, but gold has its inherent value. Gold investment has several advantages over the financial asset investment that has the same value between raw materials (intrinsic value) and the price (extrinsic value) of gold.

There are 3 types of gold investments, namely: ²⁰

- a. Gold Investment in physical form.
- b. Gold Investment in jewelry form.
- c. Gold Investment in the form of trading units.

The misused of investment can result investment scam. The Financial Services Authority in its article mentions the common form of suspected investment scam activity, including: ²¹

- a. Fixed income products, where this product offers a promised return fixed and will not be affected by the risk of price movements in the market;

²⁰ Esther Nababan, Valentin Panggabean, Faigiziduhu Bu'ulolo. *Analisis Fundamental dan Analisis Teknikal pada Investasi Trading Emas Online dengan Value at Risk*, Saintia Matematika Vol. 1, No. 4 (2013), pp. 369–382

²¹ P, Paripurna “*Kekosongan Hukum di Sektor Keuangan Dalam Penanganan Investasi Ilegal.*” www.sikapiuangmu.ojk.go.id: Edukasi keuangan 3-4 Agustus 2015 (Surabaya:OJK, 2015)

- b. Deposits that resemble banking products (savings or deposits), where in some cases in the form of a letter of Delivery Order or Securities issued by a company;
- c. Investment capital investment, where funds collected from the public are promised to be placed on more than one financial instrument or in the real sector;
- d. Online investment program via internet, which promise regular return of investment fund

Investment scams generally use the money game scheme or Ponzi scheme that plays public funds by paying bonuses to old customers with sources of funds coming from new customers. Ponzi schemes (pyramid schemes) are fraudulent investments where earlier investors' returns are paid from the contributions of later investor.²²

In most Ponzi cases, the returns are incredible and fantastic, and the profit received is also certain. Even the bigger funds invested are sometimes given a bigger return too, while the big profits will not last long.

E. Research Method

Type of Research

²² Hendrik Budi Untung, "*Hukum Investasi*" (Jakarta: Sinar Grafika 2010)

This thesis is based on normative research, therefore it will concept law as a norm consist of positive law, such as regulation and doctrine related with investment law, commodity future trading, contract law, and investment scam.

Research Object

The object of this research is to discover the legal consequence of investment scam in case of PT Golden Traders Indonesia Syariah, and also to know the legal protection that can be given to the investor from investment scam in case of PT Golden Traders Indonesia Syariah.

Data Sources

The data sources of this research was obtained from literatures. The first is primary legal sources, such as Investment Law, Commodity Future Trading Law, Civil Code, OJK Regulation, Fatwa of MUI, and Consumers Protection Law. Second is secondary legal sources, such as books, journal, news, and dictionary.

Data Collection

For data collecting in this research, the author is only using library research, finding the book and journal that related with the research, also find some statute concerned, which related to the Investment Law, Commodity Future Trading, Contract Law, and Investment scam. And also interviews some expert or institution related to Investment matters.

Research Approach

The approach method of this research is use juridical normative approach, which is use statute approach. It means that to understanding and to find some

problem in the investment scam with sharia label, based on the statute and such a current case happen today.

Data Analysis

This research is used qualitative method. It means that the data provided will be explained in the form of explanation, and it will determine based on the opinion or the testimony of expert, legal theories, and from authors argumentation.

F. The Outline of Thesis

This research will be complied systematically into 4 (four) chapters with following details:

Chapter I is Introduction which consist of these following parts: Background of Study, Problem Formulation, Research Objectives, Theoretical Review, Research Method and Outline of Thesis.

Chapter II is General overview on Contract Law, Investment Law, Commodity Future Trading, Investment scam, and Investment in Islamic perspective.

Chapter III is Findings. In this chapter contain on discussions and analyzes on the legal consequence of investment scam in case of PT Golden Traders Indonesia Syariah, and also to know the legal protection that can be given to the investor from investment scam in case of PT Golden Traders Indonesia Syariah.

Chapter IV is Closure which contains of the Conclusion and Recommendation which will be obtained by the previous analysis that has been done.

CHAPTER II

**GENERAL OVERVIEW ON CONTRACT, UNLAWFUL ACT,
INVESTMENT SCAM, COMMODITY FUTURE TRADING, AND
CONSUMERS PROTECTION**

A. Contract (Agreement)

1. Definition

In principle, the contract consists of one or a set of promises made by the parties of the contract. The essence of the contract itself is agreement. On this basis, Subekti defines the contract as an event in which a person promises to others where the two persons promise to do something.²³

Agreement requires the existence of offer and acceptance by the parties. The offer itself under Section 24 of the American Restatement Contract (second), is a manifestation of the will to enter into a transaction and to let others know that approval of the transaction is expected and it will close the transaction. The acceptance is a manifestation of the approval of the *offeree* (the person who offers) to the offer concerned. In short, offer and acceptance commensurate with the

²³ Ridwan Khairandy, “*Hukum Kontrak di Indonesia dalam Perspektif Perbandingan*” (Yogyakarta: FH UII Press 2013) p 57

terms *ijab* and *qabul*. This kind of principle in Indonesia is known as conformity of will.²⁴

There are elements that must be existed in the contract. According to the meaning of contracts developed in Indonesia and the Netherlands, it can be deduced that there are some elements contained in the contract, namely²⁵:

- a. There are parties
- b. There is agreement that established for the contract;
- c. The agreement is intended to raise a legal consequences, and
- d. There is certain subject.

According to the legal system of contract that applies in Indonesia, the elements of the agreement can be classified into three, namely elements of *essentialia*, elements of *naturalia*, and elements of *accidentalialia*. While J. Satrio defines that the elements of agreement only classified into two classifications, which are the element of *essentialia* and not *essentialia*.

The *essentialia* element is an important element in the agreement, which is a trait that must exist in the agreement. Without this element, there will be no agreement.

²⁴ Ibid p62

²⁵ Ibid p66

The element of *naturalia* is an element of contract which by law is regulated but can be ruled out by the parties. This section represents the nature of the contract that is secretly attached to the contract itself. While the element of *accidentalia* is an element which is the nature of the contract which clearly agreed by the parties.²⁶

Meanwhile, in Islamic law, the elements of the contract are called *arkan* or *rukun*. In Indonesia the term *arkan* or *rukun* is commonly called *rukun*. There are four of *Rukun* (elements of agreement or contract) according to the opinion of contemporary Islamic jurists, such as:²⁷

- a. The parties making the contract (*al-'aqidan*);
- b. Statement of will from the party (*shigatul-'aqd*);
- c. Object of akad (*mahalul-'aqd*); and
- d. The purpose of the contract (*maudhu al-'aqd*).

The first pillar (*rukun*) is the existence of the parties who make the contract. A contract is an agreement, which requires the existence of the parties to the transaction. These parties are the people who make agreements in which there are elements of *ijab* (offer) and *qabul* (acceptance).

The second pillar is a statement of will from the parties. The statement of will consists of the *ijab* and *qabul*. *Ijab* and *qabul* represent the licensing (offer or

²⁶ Ibid P67

²⁷ Ibid p69

approval). *Ijab* is an indication or expression of a desire to be bound to some obligations to the receiving party. While *qabul* is an act or action that approves a proposal submitted to the other party.

Therefore contract or agreement is a legal relationship between two parties to do something, which is the first party as the offer and the second party as the recipient. Then after the meeting of will between two parties, the contract will be established. In a contract there are several elements that must be fulfilled, some elements must really be in the contract, and the other some elements can only as a complement depends on the will of the parties.

2. Principle of Contract Law

The system of contract law arrangements contained in Book III Civil Code has a character or nature as a complementary law. Within such character, one may use or not to use the provisions contained in Book III. In the agreement, the parties may self-regulate which deviates from the provisions of Book III.²⁸

The contract law gives freedom to the contract subject to enter into contracts with certain restrictions. In connection with Article 1338 of the Criminal Code states:²⁹

- a. All agreements are made legally valid as legislation to those who make it;
- b. The Agreement shall not be withdrawn other than by mutual consent of the parties or by reason of the law which is sufficient for it; and

²⁸ Ibid p84

²⁹ Ibid

- c. The agreement shall be performed in good faith

Therefore the principles of the contracts contained in Article 1338 of the Criminal Code are as follows:³⁰

- a. The principle of consensus
- b. The principle of *pacta sunt servanda*;
- c. The principle of freedom of contract; and
- d. The principle of good faith.

The principle of consensus states that a contract or agreement must be based on a consensus or agreement of the parties who making the agreement.³¹ With the principle of consensus, the contract is said to have arisen if there is an agreement or willingness to agree between the parties who make the agreement. If there is no agreement, then there is no contract.

The principle of *pacta sunt servanda* states that each party must implement the agreement they make³². According to this principle, the parties' agreement is as legally binding as to the parties who make it. Therefore what the parties claim in a contract becomes law for them.

The principle of freedom of contract is a pillar of the civil law system. Especially law of engagement as set forth in Book III of the Civil Code. With the principle of freedom of contract, one can create a new type of contract that was

³⁰ Ibid

³¹ Ibid p90

³² Ibid p91

previously unknown in nominate contract and its contents deviate from a contract named as regulated by law. The contract is known as an innominate contract.³³

The principle of good faith in the contract is differentiated between pre-contractual good faith and good faith on contract performance. Pre-contractual good faith, is the must-have faith that the parties have to negotiate. The goodwill of the contract can be interpreted as honesty. This good faith is called good faith which is subjective, because it is based on the honesty of the negotiating parties. While good faith on contract performance referred to as good objective faith refers to the contents of the agreement. The contents of the agreement should be rational and appropriate.³⁴

The principles mentioned above are principles that arise as a result of the occurrence of an agreement. In a contract the principle indirectly must arise because the essence of a contract is the emergence of the rights and obligations of each party. Therefore, all of the above principles appear as a result of the occurrence of a contract or agreement.

The existence of a contract cannot be separated from the principles that bind it. The principles in the contract law must be fulfilled if the parties agree to commit themselves to do some legal actions.

³³ Ibid p86

³⁴ Ibid p91

3. Validity of Contract

There is limitation to the principle of freedom of contract. Article 1320 of the Indonesian Civil Code restricts the principle of freedom of contract through the arrangement of the requirements of contract's validity which must follow to these conditions³⁵:

- a. The existence of parties' agreement, the intent of the agreement is the occurrence of statement's conformity of will between one or more parties with the other.
- b. The capacity of the parties to make the contract, capacity here means the ability to perform a legal act which will have legal consequences. The person who will enter into an agreement is a qualified and competent person to perform a legal act as confirmed and determined in the Civil Code, there it is explained that a qualified person performing a legal act is an adult.
- c. The existence of a certain subject, in the execution of an agreement must be determined a clear object or problem that will be promised in the agreement later, the object or the problem is usually in the form of performance. Performances are what the debtor liabilities and what the creditor entitles to.
- d. The existence of a clause that is not contrary to the law.

³⁵ Ibid p89

Therefore the first-two conditions are called subjective requirements for the validity of contract, while latter two terms are called objective. For the validity of an agreement, the four conditions must be met. If any of the terms or conditions and even all conditions are not met, then the agreement is invalid. Thus, the terms of the validity of an agreement are applicable cumulatively.

An agreement which does not meet the subjective requirement is not automatically null and void, but it has no certainty as it is threatened by contract cancellation at any time and depends on the willingness of either party to comply (voidable). On the other hand, an agreement that does not meet the objective requirements of the terms of the contract, then the agreement is null and void, meaning that there is no agreement.³⁶

4. Breach of Contract (*Wanprestasi*)

An agreement has been made in accordance with the terms of the validity of the agreement as may be required by law, in practice sometimes experience things that are unexpected or experienced an event that is not desired by the parties. These things or events will result in the non-performance of an agreement, and may result in a loss to either party or both parties to enter into an agreement. One

³⁶ Subekti, "*Hukum Perjanjian*" (Jakarta: Intermasa, 2005) p20

of the obstacles in the implementation of the agreement is negligence or breach of contract (*wanprestasi*).³⁷

The negligence here is the negligence of the party that is obliged to fulfill the agreed performance, for not doing what has been agreed or he has committed an act which is not allowed in the contents of the agreement.

Breach of contract can be in the form of³⁸:

- a. Not fulfilling any performance at all;
- b. Fulfill performance but not as promised;
- c. Being late for doing the performance;
- d. Perform an act which, according to the contents of the agreement shall not be done.

Breach of contract can bring a detrimental effect to the debtor, which the debtor may be subject to several sanctions and penalties, including:³⁹

- a. Compensation;
- b. Cancellation of the agreement;
- c. Transition of risk;
- d. Pay a court fee when charged in court.

Indemnification or compensation in details includes costs, losses, and interest. Cost is any real expenditure or outcomes. The loss is the loss of creditor

³⁷ Ibid p21

³⁸ Ridwan Khairandy, "*Hukum Kontrak di Indonesia dalam Perspektif Perbandingan*" (Yogyakarta: FH UII Press 2013) p280

³⁹ Subekti, "*Hukum Perjanjian*" (Jakarta: Intermasa, 2005) p45

property as well as the debtor's negligence. And interest is the benefit that should be obtained by creditors if there is no default.

The cancellation of the agreement is provided in Article 1266 of the Indonesian Civil Code which states, "the void requirement shall always be included in reciprocal agreements, when either party fails to fulfill its obligations. In such case, the agreement is not null and void, but the cancellation shall be requested to the judge...". The judge's verdict is constitutive, actively canceling the agreement.⁴⁰

The risk transition is described in Article 1460 of the Criminal Code which determines that the sale of certain goods at risk is borne by the buyer.⁴¹ Although the goods have not been submitted by the seller to the buyer. However, if the seller delays at the agreed time, then the seller's negligence may be threatened by transferring the risk from the buyer to the seller.

The last sanction is to pay the cost of the case, if it is held before the judge. This provision is contained in a law of procedure namely article 181 paragraph (1) HIR.⁴²

Therefore, *Wanprestasi* can be interpreted as not implementing performances due to debtor's fault, either because of intentional or negligent. The fault will resulting the loss experienced by the creditor, which is the responsibility of the debtor. There are also sanctions against debtors who conduct *wanprestasi*.

⁴⁰ Ibid45

⁴¹ Ibid p48

⁴² Ibid p50

B. Unlawful Act (*Onrechtmatige Daad*)

1. Definition

According to article 1365 of the Civil Code, unlawful acts are unlawful acts committed by a person who because of his wrong has caused the loss of others. Therefore, the elements of unlawful acts are as follows:⁴³

a. The existence of an act

An act against the law begins with an act of the perpetrator. The act here means either doing something or not doing anything.

b. The act is against the law

The actions committed must be against the law. Unlawful elements may be acts that violate applicable laws, acts that violate the rights of others guaranteed by law, acts contrary to the legal obligations of the perpetrator, acts contrary to decency, or acts contrary to the good attitude in the community to pay attention for the interests of others.

c. The existence of errors from the perpetrator

Laws and jurisprudence require that perpetrators must contain an element of error in carrying out such actions. Therefore, strict liability does not include responsibility under article 1365 of the Civil Code.

⁴³ Munir Fuady, "Perbuatan Melawan Hukum". (Jakarta; Citra Aditya Bakti, 2002) p26

Article 1365 of the Civil Code requires the existence of an element of "error" (*schuld*) in an act against the law. An action is deemed by law to contain an element of error so its legal responsibility can be sought if it meets the following elements, which are element of deliberate, elements of negligence, and no justification or excuses.

d. There is a loss to the victim

The existence of *schade* for the victim is also a requirement that the lawsuit under Article 1365 of the Civil Code can be used.⁴⁴ In contrast to losses due to *wanprestasi* which only recognize material losses. Then losses due to unlawful acts in addition to material losses, jurisprudence is also familiar with the concept of immaterial loss, which will also be assessed with money.

e. The existence of a causal relationship between deeds and losses

The casual relationship of an act committed with a loss that occurs is also a condition of an act against the law. There are two kinds of theories in causal relationships, namely factual relation theory and theoretical causal theory. Factual relations (causation in fact) are merely a matter of fact or what is factually occurring. Any cause that result loss can be a factual cause, provided the loss will never exist without cause.

⁴⁴ Ibid p30

Therefore an act can be said as unlawful if the act violates the rights and obligations arising from a legal act, causing harm to another party. It means that an unlawful act is any act that violates the law, which brings loss to another party, obliges parties who because of their mistakes to cause such losses, then he must give compensation to the injured party.

2. Elements of Error in Unlawful Actions

There are three elements of wrongdoing in the act against the law, namely:⁴⁵

a. Unlawful acts with intentional elements

In unlawful acts, the element of deliberate newness is assumed to exist when the deliberate act has resulted in the physical consequences of the physical and / or mental or property of the victim, even though it has not been a deliberate injury (physical or mental) of the victim.

The element of intent must meet the following elements:⁴⁶

- 1) There is a state of mind to do
- 2) There is a consequence of the act
- 3) Consciousness to do, not only to cause consequences, but also the belief that with such actions can certainly lead to these consequences.

b. Unlawful acts with an element of negligence

⁴⁵ Ibid p52

⁴⁶ Ibid p45

Unlawful acts with an element of negligence are different from those against the law by the element of intent. In deliberation there is intention in the heart of the offender to cause a certain loss for the victim. However, there is no intention in the heart of the perpetrator to cause harm. In fact there may be a desire to prevent the occurrence of such losses.

In the legal science, in order for an act to be regarded as negligence, it must meet the following basic elements:⁴⁷

- 1) The existence of an act or ignore something that should be done
- 2) The existence of a duty of care (duty of care)
- 3) Not run the obligation of prudence
- 4) The loss to others
- 5) The existence of a causal relationship between the act or not doing the deed with the losses that arise.
- 6) There is no justification and excuses

Therefore, based on the description above, it can be understood that in general the elements of unlawful action can be divided into four elements, the first element is the existence of misleading actions, the second is the element of error, the third is the element of causality, and the fourth is the element of loss.

⁴⁷ Ibid

C. Investment scam

1. Definition of Investment

The term investment comes from the Latin, *investire* (wear). Some experts have different views on the theoretical concepts of investment. Fitzgerald defines investment as: "activities related to the effort of drawing the resources used to hold the capital goods at the present time, and with the capital goods will be produced new products in the future."⁴⁸

Another definition of investment is proposed Kamaruddin Ahmad. He defines investment as: "placing money or funds in the hope of obtaining additional or specific gains on the money or funds"⁴⁹In this definition, investment is focused on the placement of money or funds aimed at earning a profit in the future.

Kamaruddin provides an understanding of investment in three senses, namely:

- a. An act to purchase shares, bonds or other inclusion;
- b. An act of purchasing capital goods;
- c. Utilization of funds available for production with future incomes.

⁴⁸ Salim and Budi Sutrisno "*Hukum Investasi di Indonesia*" (Jakarta: Rajawali Pers 2014) p35

⁴⁹ Ibid p32

In the Dictionary of Financial and Investment Terms, the term investment is defined as an investor putting money in a means or pointing to an investment of a business when someone wants to reap the benefits of the success of his business.⁵⁰

Based on the various understanding of the investment mentioned above, there is a similarity that the meaning of the investment is the activities undertaken by a person or business entity by using capital to conduct a business in the hope of getting a profit in the future.

There are several types of investments, including:⁵¹

a. Investment by assets

Investment by assets is an investment classification of capital or wealth aspects. This investment is divided into two types, namely real assets and financial assets. Real assets are tangible investments, such as buildings, vehicles and so on. The financial assets are documents (letters) claims by the holder to the real activities of the issuer of the securities.

b. Investment based on its influence

This investment is an investment based on factors that influence or not affect the investment activity. This type of investment is divided into two types, namely autonomous investment and investment induced. An autonomous investment is an investment that is not influenced by income levels and is speculative, for example,

⁵⁰ John Downes and Jordan Elliot Goodman. *Dictionary of Finance and Investment Terms* (Unites States of America: Barron's. 2003) p300

⁵¹ Salim and Budi Sutrisno "*Hukum Investasi di Indonesia*" (Jakarta: Rajawali Pers 2014) p36

purchase of securities. While induced investment is an investment that is influenced by the increase of demand for goods and services and income level, for example, transitory income, means income earned apart from work, such as interest.

- c. Investment based on the source of its financing (Law Number 1 Year 1967 concerning Foreign Investment, Law Number 11 Year 1968 concerning Domestic Investment)

This investment is an investment based on the origin of the investment it obtained. This investment is divided into two types, namely investment sourced from foreign capital and investment sourced from domestic capital.

- d. Investment by shape

This investment is an investment based on how the way to invest. This investment is divided into two types, namely portfolio investment and direct investment. Portfolio investment is conducted through the capital market with securities instruments, such as stocks and bonds. While direct investment is a form of investment by way of building, buying a total, or acquiring a company.

In investing there are definitely risks, here are some types of investment risks that may arise and need to be considered in making investment decisions:⁵²

- a. Business risk (business risk), is a risk arising from the decline in the profitability of issuers. Listed companies are companies that conduct public offering (primary market) either by issuing bonds or shares.
- b. Liquidity risk (liquidity risk), this risk relates to the ability of the relevant stock to be traded immediately without suffering significant losses.
- c. Interest rate risk is the risk arising from changes in the prevailing interest rate in the market. Usually this risk goes against the prices of capital market instruments.
- d. Market risk is a risk arising from the changing state of the economy affected by the recession and other economic conditions.
- e. Purchasing power risk is a risk arising from the effect of changes in the rate of inflation, where this change will lead to reduced purchasing power of invested money or interest earned from investment.
- f. Currency risk (currency risk), is a risk arising from the influence of changes in the exchange rate of domestic currency such as rupiah) with other currencies.

⁵² Abdul Halim, *Analisis Investasi dan Aplikasinya* (Jakarta: PT Salemba Empat, 2015), p 39-40

Based on the description above it can be concluded that risk is a possibility where investors do not get a return in accordance with expectations. With these investment risks, investors are required to be careful and conduct careful analysis before starting the investment.

2. Gold Investment

Gold is one of the natural wealth that can not be renewed. The volume of gold in the world is limited and result in gold prices tend to be stable and tend to increase from year to year. In addition gold is not too influenced by the political or security development of a country.

Gold can be used for long-term investment vehicles because it has a price that tends to rise from year to year. There are times when it goes down, stagnant, but in the long run it can be said to always go up. Increase was higher than the inflation rate. By having gold, we can say that we have tried to maintain wealth or to maintain our purchasing power.

In the investment world, gold is a solution for beginners who want to start investing. Gold is available from the weight of one gram to one kilogram, making it perfect for beginners who want to invest in gold little by little. As a tools of someone to change the habit from saving into investment.

There are 3 types of gold investments, namely: ⁵³

- a. Gold Investment in physical form is investment of gold in physical form of gold or in the form of gold bullion, which can be obtained at Antam (various mines) Units or pieces of gold bars usually start from 25gr, 50gr, 100gr, and 1000g.
- b. Gold Investment in jewelry form. Gold investment in the form of jewelry in the form of: rings, necklaces, earrings, and various other accessories made of gold.
- c. Gold Investment in the form of trading units. Online gold trading is the purchase of online gold contracts through brokers whose physical gold is stored at the Bullion Association London, and the price follows the New York Mercantile Exchange (America's largest commodity market).

Gold as an asset plays a very important role in an investor's portfolio as it not only provides stability for returns but also gives an opportunity to maximize the wealth of the investor. Investors generally buy gold as a way of diversifying risk. Price of gold is determined by the market force of demand and supply. Central bank keeps some portions of their securities in the form of gold. Some studies pointed out that US central bank is the largest holder of gold they own

⁵³Valentin Panggabean, Esther Nababan, Faigiziduhu Bu'ulolo. *Analisis Fundamental dan Analisis Teknikal pada Investasi Trading Emas Online dengan Value at Risk*, Saintia Matematika Vol. 1, No. 4 (2013), pp. 369–382

8133 tons of gold it represents 638% of American foreign reserves Gold is a hedging tool against inflation.⁵⁴

In the economy world, historically, gold was being used as a currency. It always plays an important role in the world's major currency systems. Gold first became the single metallic standard for US dollar in 1900, and being the back for US dollar until 1973. After 1973, both gold and US dollar are floating on the market. Even though gold is no longer a monetary standard, governments and central banks are still holding gold as a portfolio in their reserves to back the paper currencies.⁵⁵

From an investment perspective, beside the static price increasing, gold is very different from stocks and bonds. Stocks and bonds may face default risks if the issuer cannot afford to pay, but gold has its inherent value. To some extent the inherent value insures investor's wealth comparing to other assets. In addition, gold also has a more stable price trend in the long term Figure 7-2 shows that in last 20 years gold had less volatility than stock, which indicates a lower market risk. Therefore gold is one of the fundamental assets within any long term investment portfolio to keep the value and lower the risk on the market.⁵⁶

Gold investment has several advantages over the financial asset investment that has the same value between raw materials (intrinsic value) and the price

⁵⁴Aghila Sasidharan. A Study on Investment Pattern of Investors in Kerala. International Journal of Management and Commerce Innovations ISSN 2348-7585 (Online) Vol 3, Issue 1, pp: (681-684), Month: April 2015 - September 2015

⁵⁵Lujia Wang. *Investment in Gold An Empirical Study of the Gold Return from 90s to 21st* p23

⁵⁶ Ibid p24

(extrinsic value) of gold. ⁵⁷Gold will still be worth the gold itself even if it is melted and formed with any model different from money which if the intrinsic melt will not be equal to its extrinsic value. The second advantage of gold is immune to inflation. When compared to the rate of inflation, the rise in gold prices always exceeds inflation. Third, long-term investment products are generally not easy or quickly sold but gold can be easily traded in the desired unit (liquid). Fourth, the value of gold continues to appreciate (strengthening) against the US dollar so that the possibility of a small loss.

Of all the precious metals, gold is the most popular as an investment. Investors generally purchase the gold as a hedge or safe haven against any economic, political, social or currency-based crises. These crises include investment market declines, currency failure, inflation, war, and social unrest. Investors also buy during times of a bull market in attempt to gain financially.

3. Investment scam

Investment scam in essence is the collection of funds from the public in the form of savings but packaged with investment. The Financial Services Authority in its article mentions the common form of suspected investment scam activity, including: ⁵⁸

⁵⁷ VK Bhalla, *Investment Management* (New Delhi: S Chand and Company LTD, 2000), p 496

⁵⁸ Otoritas Jasa Keuangan, “*Bentuk Umum Produk Diduga Misleading Yang Ditawarkan*” from <http://sikapiuangmu.ojk.go.id/id/article/129/bentuk-umum-produk-diduga-ilegal-yang-ditawarkan>. Accessed at 28 April 2018

- a. Fixed income products, where this product offers a promised return fixed and will not be affected by the risk of price movements in the market;
- b. Deposits that resemble banking products (savings or deposits), where in some cases in the form of a letter of Delivery Order or Securities issued by a company;
- c. Investment capital investment, where funds collected from the public are promised to be placed on more than one financial instrument or in the real sector;
- d. Online investment program via internet, which promise regular return of investment fund

Companies or parties offering investment scams are mostly not from the Financial Services Institution (OJK) so that the company is not listed on the OJK. The facts prove a lot of people get stuck wanting to get rich quick without hard work. This opportunity is used by irresponsible parties to commit fraud under the guise of investment. Investment scam companies realize the character of investors if the initial investors get the return as promised, they tend to reinvest from the money.

This form of investment scam activity has characteristics in the products offered, including: ⁵⁹

- a. Returns or profits offered are very high (even often unreasonable) and / or in any amount ascertained;
- b. Investment products are offered with a pledge to be secured by certain instruments, such as gold, demand deposits, or guaranteed by certain parties such as government, Bank, and others;
- c. Use the names of large companies unlawfully to convince potential investors;
- d. Community funds are not recorded in segregated accounts (separate accounts) for easy use irresponsibly.

Investment scams generally use the money game scheme or Ponzi scheme that plays public funds by paying bonuses to old customers with sources of funds coming from new customers. There is no real business activity to sustain the profit payments to society, as a result it can be expected, will lose money in a short time because the money has been handed over to others who have come first. Moreover, investment scam activities use public facilities to facilitate people to follow the practice. Collection of funds from the community wish gets profits or interest beyond the limit of reasonableness.

Ponzi schemes (pyramid schemes) are fraudulent investments where earlier investors' returns are paid from the contributions of later investor. People can be

⁵⁹ Otoritas Jasa Keuangan, "*Karakteristik Umum Produk Diduga Ilegal*" diakses pada dari <http://sikapiuangmu.ojk.go.id/id/article/130/karakteristik-umum-produk-diduga-ilegal>

drawn into Ponzi schemes without a “hard sell,” as long as the perpetrator can create the impression of credibility, often through personality and charisma.⁶⁰

Charles K Ponzi was the one who pioneered the Ponzi scheme and Money Game. The Ponzi (Pyramid) and Money Game schemes are two schemes that are often used in investment scams. Using term Money Game because in these investment activities there is no business activities undertaken, just do the rotation and the game member money.⁶¹

Money Game is basically a collection of money by the organizers. The money collected may have been invested in various types of investments. However, usually the investment is only a mere mask because the results given to investors actually investors' money as well. The provision of reward money is done by “digging the hole closing holes”. Participants who invested money early in the activity often still had time to enjoy the benefits. However, the benefits enjoyed do not come from investments, but from the "contributions" of participants who come in later. ⁶² Both Ponzi and Money Game are networked, attracting members as much as possible and rotating the members' funds by paying bonuses to old members of new member funds.

In the elucidation of Article 9 of Law Number 7 Year 2014 on Trade in the meaning of "pyramid scheme" is the name or activity of business which is not

⁶⁰ Anne M. Wilkins William W. Acuff Dana R. Hermanson “*Understanding a Ponzi Scheme: Victims’ Perspectives*” Journal of Forensic & Investigative Accounting Vol. 4, Issue 1, 2012

⁶¹ Hendrik Budi Untung. 2010. *Hukum Investasi* (Jakarta: Sinar Grafika) p.

⁶² Elvyn G. Masasasya. 2012. *90 Rahasia Investasi Pribadi* (Jakarta: Elex Media Komputindo) p. 111.

from the proceeds of sale of goods.⁶³ The business activities take advantage of the opportunity of the participation of business partners to obtain benefits or income primarily from the participation costs of others who join later or after the merger of such business partners. The investment scam company promises huge profits, but in fact the profits are paid with incoming funds from new members. The promised advantage is a patchwork result. There is no real investment in the Ponzi scheme, so it can be understood that sooner or later the funds will be exhausted.

Elements of a Ponzi scheme include; (1) investor deposits, (2) little or no legitimate business operations, (3) little or no business profits or earnings, and (4) the source of returns to investors is from cash received from new investors. Investors in a Ponzi scheme not only lose principal invested when the scheme is discovered, but they may have to repay amounts received from the investment (ie, claw backs) before discovery that the investment was a fraud. In addition, if the investor wants to recover any funds lost, a formal public claim of loss is required to be filed with the bankruptcy court exposing the investor to numerous legal notices, lawyer solicitations, and public identification.

Neither the company nor the irresponsible parties in the Ponzi scheme are using promises that seem very promising, giving sweet promises with a reasonable explanation because the manager is said to have certain access to an investment instrument. The existence of a correlation that is convincing and involving famous people and even religious leaders, even though these people do not know themselves involved. Provision of testimonials and success info of

⁶³ Wiku suryomukti. 2011. *Super Cerdas Investasi Syariah* (Jakarta: QultumMedia), p. 42.

previous investors; and a definite and fantastic return, in most Ponzi cases, the returns are incredible and fantastic, and the profit received is also certain. Even the bigger funds invested are sometimes given a bigger return too. Then the big profits will not last long.

D. Commodity Future Trading

1. Definition

Commodity markets are markets where raw or primary products are exchanged. These raw commodities are traded on regulated commodities exchanges, in which they are bought and sold in standardized contracts. The commodities market consists of the trading of forward contracts or future contracts. Forward contracts are contractual agreements to buy/sell any commodity bet there in two entities while futures contracts are market agreements to buy/sell very specific commodities bet there in two entities over a recognized commodities exchange. It is a physical virtual market place for buying and selling of raw or primary products. For investors' purposes there are currently about 50 major commodity markets worldwide that facilitate investment trade in nearly 100 primary commodities. Commodities are split into two types: hard and soft commodities. Hard commodities are typically natural resistless that must be mined or extracted (gold, rubber, oil, etc.), whereas soft commodities are agricultural products or livestock (corn, wheat, coffee, sugar, soybeans, etc)

According to Law No 32 of 1997 concerning commodity futures trading as the legal basis for the implementation of futures trading in Indonesia, a future

trading is anything related to the sale of commodities that the delivery is done in the future based on futures contracts or options on futures contracts. Futures Contracts are standardized contracts with predetermined amount, quality, type, place, and delivery time. Because of its standard form, only the price is negotiated on the futures exchange. Futures trading only takes place in organized markets (organized market) or known as the Futures Exchange. The Futures Exchange trades futures contracts for various commodities (agriculture, plantation, mining, or financial products, such as currency, even indexes such as stock indices).

Futures exchange is a place of futures trading transactions. In this stock is traded a variety of futures products. These futures products can be divided into 3 types of products: ⁶⁴

a. Stock index

Stock index is the combined value of the movement of some leading shares in a stock exchange For example: Hangseng 33. This index is the value of the movement of 33 stocks in the stock Hongkong. The common stock indexes traded in Indonesia are: Hangseng33 (Hongkong) Stock Index, Kosp200 (Korea), Nikkei225 (Japan)

b. Commodity

⁶⁴ Pantas Lamban Batu, “Perdagangan Berjangka: Futures Trading”, (Jakarta: PT. Elex Media Komputindo, 2010), 38.

Commodity is one of the futures products whose trade amount is quite big. This is mainly due to the type and quantity of commodity products traded on a very large futures exchange. Commodity products can generally be divided into 2 types: - Hard commodities (durable commodities) such as: Gold, Rubber, Oil - Soft commodities (non-durable commodities) such as: Coffee, corn, Red beans, Soybeans.

c. Foreign Exchange

Foreign exchange (Forex) trading conducted in the currency market. Forex trading is a futures product whose volume and transaction value is the greatest among other products of futures.

2. Institution related to Commodity Future Trading

There are institutions in futures trading, such as: ⁶⁵

a. Elements of Supervision

In this case the Commodity Futures Trading Supervisory Agency (bappebti). UU No. 32 of 1997 concerning futures trading mandates the establishment of bappebti as a government institution that conducts the development, regulation and supervision of daily trading activities in Indonesia.

⁶⁵ Trainer & Complain Devision PT. First State Futures Surabaya, *Pengenalan Perdagangan Berjangka*, (Surabaya: PT. First State Futures, 2013), 5-6.

b. Organizational Elements, namely the Futures Exchange and the Clearing House.

Futures Exchange, hereinafter referred to as the stock exchange, is an organization based on membership and serves to provide facilities for the implementation and monitoring of futures contract transaction activities in accordance with applicable laws and regulations. This Exchange is located in Jakarta, commonly called the Jakarta Futures Exchange (BBJ).

The Clearing House is a supplementary body of a futures exchange that serves to complete and guarantee the performance of all transactions conducted on the exchange and has been registered with it. The Clearing House acts as a seller against holders of open positions and as buyers of holders of open positions.

Therefore in futures trading buyers and sellers do not need to meet each other or know each other because in their transactions are represented by the Clearing House. The Clearing House in Indonesia is called the Indonesian Derivatives Clearing House (LKBI) located in Jakarta.

c. Principals and Supporting Elements

The principal element is a futures brokerage, that is, the only professionals who can receive a mandate (order) from the customer and forward it to be traded on the exchange. The customer's dealings in relation to the stock exchange and the clearing house will be represented by the futures broker.

The supporting element is a futures adviser and manager of futures and banking centers and experts in accounting, law, warehousing, and quality testing institutions.

d. User Elements

It means business world and the general public is divided into two groups, namely the hedger group and the investor or speculator group.

E. Consumers Protection

1. Definition

Based on Law No. 8 of 1999 on Consumer Protection in article 1 point 1, consumer protection is any effort that ensures the legal certainty to provide protection to consumers. Philipus M. Hadjon states that in the consumer protection there are two theories of legal protection, namely the protection of repressive law and preventive law protection. Repressive legal protection is a legal protection that is done by applying sanctions to the perpetrators in order to restore the law to its true state. While the protection of preventive law is legal protection aimed at preventing the occurrence of a dispute.⁶⁶

Thus from the above exposure, it can be concluded that with the existence of consumer protection law, it is expected that the consumer can increase awareness, ability and independence to be able to protect himself from various problems of loss caused by the producers or entrepreneurs who are still rife.

⁶⁶ Eli Wuria, "*Hukum Perlindungan Konsumen*" (Yogyakarta: Graha Ilmu, 2015) p6

In consumer protection law, the aspect of the agreement is a very important factor, although not an absolute factor that must exist. The existence of legal relationship in the form of agreement will strengthen the consumer's position in dealing with the adverse party of consumer's rights. The legal consequence of a contract is basically the existence of a legal relationship of an engagement, namely in the form of rights and obligations. That is, the engagement is associated with certain rights that have economic value. If the right is not met, then there will be juridical consequences to replace it with a certain amount of money.⁶⁷

Legal protection for consumers can be done by business actors by providing or creating consumer protection system that contains access to information, improve the quality of the goods and / or services in production, and the maximum service to consumers, so that consumers will get legal certainty. The guarantee of legal certainty in order to provide protection to the consumer, among others, is by increasing the dignity of consumers, and open access to information related to goods or services.

Legal protection for consumers is one of the things that have many benefits for all components of society from all circles, it is because with the guarantee of legal certainty through a legal protection provided by applicable legislation, the rights and interests of consumers have clearly protected by law. Therefore it will be achieved a just and prosperous society life, and regardless of all possible problems of consumers and business actors are still common.

⁶⁷ Abdul Halim "*Framework Sistem Perlindungan Hukum Bagi Konsumen di Indonesia*" (Bandung: Nusa Media, 2016) p21

2. Principles of Consumer Protection Law

The principles of legal protection for consumers as stated in Article 2 of Law Number 8 Year 1999 regarding Consumer Protection are as follows: ⁶⁸

a. The principle of benefit

The principle of benefit is intended to mandate that all efforts undertaken in the implementation of the settlement of consumer protection issues should provide the greatest benefit to the interests of consumers and entrepreneurs as a whole.

b. The principle of fairness

The principle of fairness in the protection of consumer law is intended for the participation of all people can be realized maximally and provides opportunities to consumers and producers to obtain their respective rights. This principle of justice requires that in the regulation and enforcement of consumer protection laws, between consumers and producers can be fair through the acquisition of rights and the implementation of its obligations are carried out in a balanced manner.

c. The principle of equality

The principle of equality states that to provide a balance between the interests of consumers, producers (entrepreneurs) and governments. This principle of balance requires that consumers, producers, and governments can derive balanced benefits from regulating and enforcing laws on consumer protection.

⁶⁸ Eli Wuria, "*Hukum Perlindungan Konsumen*" (Yogyakarta: Graha Ilmu 2015) p10

d. The principle of consumer safety and security

The principle of consumer safety and security is intended to provide security for the consumer safety, comfort and safety in the use, use, utilization and consumption of goods and / or services consumed. Both of these principles require that with such legal guarantees, the consumer will benefit from the products used, so that the products of goods and / or services used will not threaten the security and safety of consumers and their property.

e. The principle of legal certainty

The principle of legal certainty is intended so that both producers and consumer can obey the law and obtain justice in the implementation of consumer protection, and the state that provides legal certainty. Thus, it can be interpreted that the Consumer Protection Act hopes that the rules on the rights and obligations contained in this law can be realized in the social life of society and daily life.

3. The Right and Obligation of Business Actor

Business actor is any individual or business entity, whether in the form of a legal entity or non-legal entity established and domiciled or conducting activities within the jurisdiction of the Republic of Indonesia, either alone together through an agreement to organize a business activity in various economic fields.⁶⁹

There are rights and obligations for business actors mandated by Consumers Protection Law, it is intended that in carrying out its business activities, the

⁶⁹ Article 1 Number 3 Law Number 8 Year 1999

business actor must always remember the responsibilities imposed on him for all products produced, circulated, and traded. The Protection Law gives rights and obligations to business actors in running their business is not without reason, but it is intended to create a healthy relationship between business actors and consumers, so that there will be no one party who feel harmed because of the negligence of the perpetrator business.

The rights imposed by Law Number 8 of 1999 concerning Consumer Protection to business actors, as stated in Article 6 are as follows:⁷⁰

- a. The right to receive payments in accordance with the agreement on the condition and exchange rate of goods and / or services traded
- b. The right to obtain legal protection from miscellaneous consumer actions
- c. The right to defend one-self in the settlement of the law on consumer disputes
- d. Right to rehabilitation of good name if legally proven that consumer loss is not caused by traded goods and / or services
- e. The rights set forth in the provisions of other laws and regulations.

⁷⁰ Eli Wuria “*Hukum Perlindungan Konsumen*” (Yogyakarta: Graha Ilmu 2015) p60

The business actor also has several obligations to be implemented. The obligations of business actor as contained in Article 7 of Law Number 8 Year 1999 concerning consumer protection are:⁷¹

- a. Good faith in doing business activities
- b. Provide true, clear, and honest information about the conditions and warranties of goods and / or services and provide explanations of use, repair and maintenance
- c. Treat or serve consumers correctly and honestly and not discriminatory
- d. Ensure the quality of goods and / or services produced and / or traded under the provisions of the applicable quality standards of goods and / or services
- e. Provide an opportunity for consumers to test, and / or try certain goods and / or services and provide a guarantee on goods that are discarded or traded.
- f. Provide compensation, compensation and / or compensation for losses due to use, use and use of goods and / or services traded
- g. Provide compensation, indemnification and / or reimbursement if the goods and / or services received are not in accordance with the agreement.

The existence of regulation and legislation which explicitly regulates the rights and obligations owned by business actors in carrying out their business, it is expected that business actors can understand and run their business in accordance with existing provisions in applicable law.

⁷¹ Ibid p61

4. The Responsibility of Business Actor

Responsibility is an awareness that is owned by humans individually due to intentional or unintentional deeds. Furthermore, in relation to the responsibility of the business actor in running his business, the business actor must bear the risk of everything that is his responsibility because of the actions taken, causing harm to the consumer.

Responsibility of business actors that must be fulfilled is regulated in Law Number 8 Year 1999 is as follows:⁷²

- a. Business actors are responsible for providing compensation for damage, pollution, and or loss of consumers due to consuming goods and / or services produced or traded.
- b. The compensation referred to above can be in the form of a refund or replacement of goods and / or services of the same type or equivalent, or health care accordance with the provisions of the prevailing laws and regulations.
- c. The indemnification shall be held within a period of seven days after the date of the transaction.
- d. The provision of compensation above does not eliminate the possibility of criminal charges based on further

Therefore, business actors have an obligation to provide true, clear and honest information to their customers, because lack of adequate information is one

⁷² Ibid p67

of the product defects that will harm consumers. Thus a business actor in carrying out his business activities must always prioritize honesty and openness. Then all possible risks that occur can be minimized.

F. Islamic Perspective of Investment and Commodity Future Trading

1. Investment according to Islamic Perspective

According to the Islamic perspective, investment is a highly recommended activity because it can encourage economic growth that is characterized by increased transactions, savings and loans, leases, lien and other economic activities.

In the economic perspective of Islam, investment is not about the material gains that can be obtained through the investment. As a result of the implementation of the zakat mechanism, the productive assets owned by a certain number of people will always be imposed with zakat, which will encourage the owner to manage it through investment. Thus through such an investment the owner of the asset has the potential to retain the amount and value of its assets, even profit.⁷³

Islam forbids money hoarding because hoarding money mean preventing it from achieving its tended objectives and negates its function as a viable tool for development. Hoarding money is also prohibited on the ground that it obstructs the Muslim from realizing socio-economic justice among members. The logical

⁷³ Indah Yuliana, *Investasi Produk Keuangan Syariah* (Malang: UIN Malika Press, 2010), p 14-15.

alternative to hoarding is investing and investment could be realized through a choice of opportunities.⁷⁴

There are a number of principles governing Islamic investment, such as:⁷⁵

- a. The Islamic investment should conform to the Sharia principles, which are based on three sources: the Qur'an, the *Sunnah* and the consensus of the Islamic scholars.
- b. The invested business must participate in halal venture. Therefore, investment involving elements like *riba'*, gambling, *gharar* and manufacturing and/or selling of haram products like liquor and pork are prohibited in Islam.
- c. The investment should be transparent and certain so as to provide investors with full knowledge about the nature and specifications of the investment.
- d. The investment should involve a tangible commodity. Hence, commodities, which are not tangible or not backed by assets, cannot be invested in.
- e. Finally, there is clear ownership of the investment on the part of the investor, regardless of whether or not the investor has fulfilled his/her debt obligation, obtained for the purpose of investment.

A person who will invest should pay attention to the prohibited and permissible conditions of investing so that it is beneficial to him for the world and the hereafter, as contained in the Qur'an, hadith, *ijmak* and *qiyas*. According to

⁷⁴ Rasem N. Kayed dan M. Kabir Hassan, *Islamic Entrepreneurship* (London: Zed Books, 2002), p. 83.

⁷⁵ Mohd. Ma'Sum Billah, "Investment Policies Under Shari'ah Principles", *Journal of Islamic Banking and Finance*, (2016): p. 15.

Metwally investments in Islamic economic countries, is influenced by three factors:

- a. There are sanctions against the holder of less or unproductive assets (hoarding idle assets)
- b. It is prohibited to perform various forms of speculation and all kinds of gambling, and
- c. The interest rate for various loans is zero.⁷⁶

Thus, a Muslim may choose three alternatives to his funds, namely:

- a. Someone is allowed to hold his wealth in the form of cash (idle cash)
- b. A person is allowed to hold his savings in the form of an asset without production, such as deposits, real estate, jewelry (gems) and so on, or
- c. Investing in savings is like having projects that add to the inventory of national capital⁷⁷

From the description above can be understood that Islam strongly advocates investment but not all areas of business are allowed in investing. The above rules set permissible or halal limits and are forbidden or unlawful. The aim is to control people from activities that endanger society. Therefore all investment activities should refer to the applicable sharia law.

⁷⁶ Mardiyah. *Investasi Menurut Perspektif Ekonomi Islam*. Jurnal Ekonomi Bisnis Islam Vol 1 No 1 Tahun 2016 p73

⁷⁷ Ibid 74

The investment capital circulation should not be channeled to the types of industries that engage in prohibited (*haram*) activities such as the purchase of liquor factory stocks, restaurants that serve forbidden food and all things that are forbidden by sharia should be abandoned. All transactions that occur in the stock exchange for example should be on the basis of likes like, there is no element of coercion, no party is harmed, no element of usury, and there is no element of sphere or gambling (*maysir*). All transactions must be transparent, unlawful if there is an insider trading element. Here are a few that investors need to adhere to in order for the treasures invested to be a blessing from God, beneficial to the people so as to reach the *falah* (inner-born peace) in the world also in the hereafter.

In the matters of gold investment, can fall into different rules (Hukm) namely:⁷⁸

- a. Haram and Void: If the gold is not yet owned by the bank and will only be bought from a third party in another separate transaction. This kind of investment has become haram and void, because the bank has sold something which is not in its rightful possession. Since there is no element of Tawabud fil Majlis, for example offer and acceptance during the same event, any such delay would bring to Riba an-Nasiah. As well as seller owned the gold, but did not deliver the gold or what represent the gold at spot.

⁷⁸ Syed Ehsanullah Agha , Abdul Rahman Saafi & Obaidullah Abdul Qayoom. “*Gold Investment from Islamic Perspective: The Case of Malaysia*” International Journal of Economics and Finance; Vol. 7, No. 5; 2015 p179

- b. Haram and Void: If the gold is not delivered, upon request to the customer immediately at opening of the gold investment account. For example, the customer pays a certain amount of money to buy gold and got investment license, but seller did not issue anything to prove that the sale has been concluded. In this condition, the seller has not given a written proof to signify that the customer is *tasarruf* (the rights to the sell gold, which has been purchased, at any point of time)
- c. Halal and valid: When both the bank or the seller rightfully owns the gold at the point of sale and the bank or the seller issues a proof of purchase, in the form of physical gold or certificate, to the customer and immediately gives the customer his right of *tasarruf*.

Here are some Quran verses about the appeal to invest:

- 1) Q.S Al-Hasyr:18

يٰۤاَيُّهَا الَّذِيْنَ ءَامَنُوْا اتَّقُوا اللّٰهَ وَلْتَنْظُرْ نَفْسٌ مَّا قَدَّمَتْ لِغَدٍ
وَآتَّقُوا اللّٰهَ ۚ اِنَّ اللّٰهَ خَبِيْرٌۢ بِمَا تَعْمَلُوْنَ ﴿١٨﴾

“O you who have believed, fear Allah. And let every soul look to what it has put forth for tomorrow - and fear Allah. Indeed, Allah is acquainted with what you do.”

From the verse it can be understood that the verse contains moral advice to invest as stock of life in the world and in the hereafter because in Islam all kinds

of activities if the intention as worship will be worth the hereafter also like this investment activity.

2) Q.S *Luqman*: 34

إِنَّ اللَّهَ عِنْدَهُ عِلْمُ السَّاعَةِ وَيُنزِلُ الْغَيْثَ وَيَعْلَمُ مَا فِي الْأَرْحَامِ
وَمَا تَدْرِي نَفْسٌ مَّاذَا تَكْسِبُ غَدًا وَمَا تَدْرِي نَفْسٌ بِأَيِّ أَرْضٍ
تَمُوتُ إِنَّ اللَّهَ عَلِيمٌ خَبِيرٌ

“Surely Allah alone has the knowledge of the Hour. It is He Who sends down the rain and knows what is in the wombs, although no person knows what he will earn tomorrow, nor does he know in which land he will die. Indeed, Allah is All-Knowing, All-Aware.”

The above verse, Allah explicitly declares that no one in this world can know what to do or cultivate and what events will happen tomorrow. Because of the ignorance of the human being ordered to try, one of them by investing as a provision for tomorrow's uncertain day, the result is God's prerogative rights but the important follow the standard of religion in any activity including investment.

3) Commodity Future Trading according to Islamic Perspective

The *Salam* contract is an Islamic contract that is most similar to a conventional futures contract, because the buyer pays money to the seller and is promised to be sent a number of agreed commodities at a certain time to come. As with any conventional futures contract, the actual *Salam* price is the cash price of

today. However, unlike conventional futures contracts that does not occur money exchange until the contract expires, the buyer 's *Salam* capital is immediately paid in full, which poses a risk to the buyer if the seller will not deliver the goods at the specified time.

From a seller's point of view, the *Salam* contract is a transaction to obtain the purchasing capital from the buyer with a promise of delivery in the future. The seller in "greetings" can use this loan to produce commodity or other things. The seller bases his decision on two things, namely the owner's information about the expected price changes of the commodity, and his views on future commodity price fluctuations.

Other Islamic contracts similar to futures contracts are *Istisna* contracts, which are modified for installment payments according to the development of production. To make *istisna* a fair contact in a conventional sense, the post-initial payment of the contract must be zero for both parties, also taking into account the structure of today's yield curve.

Contract sellers at *istisna* in the Islamic system usually cannot do anything about installment payments according to the development of production except using them to produce goods. It cannot use it to prevent risks or other market goals, such as investing in other goods. Moreover, since the goods are made on order, the seller automatically cannot prevent the risk by following other contracts.

CHAPTER III

ANALYSIS OF THE LEGAL PROTECTION TOWARDS INVESTORS FROM INVESTMENT SCAM IN CASE OF PT GOLDEN TRADERS INDONESIA SYARIAH

Case Position

PT Golden Traders Indonesia Syariah (PT GTIS) is one of the companies that run gold business. Addressed at MGK Mega Kemayoran, Office Tower A 9th Floor, Jalan Angkasa, Kemayoran, Central Jakarta. The founder of PT GTIS is a Malaysian citizen, Michael H. C. Ong in cooperation with Mr. Edward C.H.Ho.⁷⁹

PT GTIS, which was previously an ordinary company under the name of PT GTI which has been granted permission through investment approval letter (BKPM) with no. 951/1/PMA/2009 dated 7 August 2009 was amended by letter No.BKPM. 2980/A.8/2011 dated November 25, 2011, as well as business license No. 262/1/IU/I/PMA/PERDAGANGAN/2012 dated April 16, 2012. With the approval to conduct business activities in the field of large trading, by conducting import activities and major distributors of merchandise in the form of gold, diamonds and silver located in Jakarta.

⁷⁹ *"Kerugian Akibat Penggelapan Dana Nasabah GTIS Capai Triliunan"* from <https://news.detik.com/berita/2763389/kerugian-akibat-penggelapan-dana-nasabah-gtis-capai-triliunan> accessed at 18 June 2018

PT GTIS then market its investment products through various media, especially through referral system, in which every customer will be asked to look for more customer which more or less resembles system of Multi-level marketing (MLM). In a short time of two years, the company is growing very rapidly and successfully established 13 offices spread across several major cities in Indonesia.⁸⁰

PT GTIS offers investment products in the form of physical and certified gold purchases and also offers a profit of 2-4.5% per month paid in cash. For example someone invested Rp 50 million then each month will receive interest of Rp 1-2.5 million. Whereas based on the facts that exist, when making a presentation in MUI, Ong only explained if the investment in PT GTIS products only in the form of physical investment of gold.⁸¹

This investment product is secured by a buy-back guarantee agreement, whereby GTIS will buy back the gold held by the customer at a price equal to the purchase price and without risk. In PT GTIS investment, customers must buy gold sold by PT GTIS at a price higher than the market price of gold, with a price difference of about 20-30%. Therefore customers do not get a profit at the beginning of the purchase of gold.

⁸⁰ Fitria Ramadhani, Paraita Prananingtyas, and Siti Mahmudah “*Perlindungan Hukum terhadap Investor oleh Otoritas Jasa Keuangan dalam hal Terjadinya Investasi Ilegal*” *Dipenogoro Law Review* Vol 5 No 2 Tahun 2016 p 7

⁸¹ *Ibid* p 2

PT GTIS promises bonuses or interest to customers, but there is no information from where PT GTIS obtained funds to pay interest to its customers. Based on information PT GTIS claimed to buy gold with cheap price from *UBS (Untung Bersama Sejahtera)* and sell it in Singapore with high price. The advantage of the price difference is then used to pay interest to the customer, but no further information about who it is UBS and in Singapore where the sale of gold is done.⁸²

On the other hand, PT GTIS customers can only purchase products through agents, agents here are GTIS customers, and will earn commissions for each customer brought. Therefore if you join to become a customer, will also be an agent, and can gain additional benefits in the form of commissions.

Based on the above, the business of PT GTIS is similar to the Ponzi Scheme, which is a false investment system where the investment company pays the profit to the investor from the investor's own money, or from the investor's next money. In general, these investments offer tremendous profits in a short period of time with very low risk, or even risk. Investors still receive regular interest payments for some time, so investors generally feel no problem at all and will increase their investment. However after customer depositing additional funds with a large nominal, they began to realize that there was a problem when there was a loss of interest payments, until the capital turned out to be irrevocable.

⁸² Ibid p8

The case started in 2013, when Michael Ong served as director of PT GTIS escaped with the money and gold of customers. As a result of his actions, the customer suffered losses of Rp 600 billion. Finally, the company went bankrupt.⁸³

A. The Legal Authority of Investment scam in Case of PT Golden Traders Indonesia Syariah

Investment companies in the case of investment scams usually only have licenses as ordinary trading companies. However in practice the company operates as an investment company by collecting funds from the public. For example, the above case offers an investment in the form of buying and selling gold.

The difference is in the sale and purchase of ordinary gold, a person who bought the gold will have and fully master the gold. Nevertheless if the customer is asked to invest in gold, and some or all of the gold is managed by the company, then the customer is promised with fixed remuneration every period, including investment and allow for investment scam.

The comparison to differentiate between direct selling and money games is, if direct selling is true, profits are derived from product sales. Therefore, for direct selling participants, it is required to sell a product at a reasonable price so that they can get benefit from the sale. As for money games, the product is not a core. Not even rarely encountered, in practice did not use the sale of products. The

⁸³ Erlangga Djumena. “*Manatan Bos GTIS Bawa Kabur Rp 1 Triliun Uang Nasabah*” from <https://tekno.kompas.com/read/2013/04/05/09294686/mantan.bos.gtis.bawa.kabur.rp.1.triliun.uang.nasabah> accessed at 18 June 2018

main source of money game income comes from the deposit of new members. To note, in this scheme, the new member's deposit is not a profit of the company but a liability made by the company to any new member wishing to join.

Investment scam activity resembles a banking instrument, with the main characteristic of fraud under the guise of investment which is the lack of legal licensing documents from regulators such as the Financial Services Authority (OJK), Bank Indonesia, Bappebti - Ministry of Trade, Ministry of Cooperatives and Small and Medium Enterprises; others. Business activities to raise funds from the public can only be done by banks

In the case mentioned above there is ambiguity whether the case includes civil or criminal matters. There are a number of legislation that can be used to catch investment scam actors, such as the Criminal Code (KUHP), Law Number 20 Year 2001 regarding the Amendment of Law Number 31 Year 1999 concerning the Eradication of Corruption Act, Law no. 8 Year 2010 on Prevention and Eradication of Money Laundering or Banking Law.

However, according to the authors, cases of investment scam can enter the civil realm, it could be because the Act Against Law/unlawful act. Default occurs when in the investment scam there is a binding agreement between the two parties. Whereas a person is said to have committed an unlawful act if his conduct

is contrary to the rights of others, or against his or her own legal obligations, or against the decency.⁸⁴

Unlawful act can be claimed for compensation. Therefore, civil lawsuit is one effort that can be done by customers who become victims in the case of investment scam in order to be asked for compensation. The Financial Services Authority (OJK) is urged to sue the perpetrator of a civil investment activity to the court. The lawsuit against the law (PMH) was taken to request compensation from the perpetrator. Then the compensation is given to the victims of investment scam activities.

Based on Article 4 of Law no. 21 Year 2011 on the Financial Services Authority that one of the objectives from the establishment of OJK is to protect the interests of consumers and society, thus providing protection to consumers is one of the duties and authority of OJK.

The provisions contained in the OJK Law and the POJK that regulate consumer protection are in line with Law no. 8 of 1999 on Consumer Protection. Through this Act, it changes the concept of the relationship between business actors and consumers. Previously, it stated that business actors and consumers are two balanced parties, so it does not require protection. It means that consumers should be careful of any products or services that have been chosen.

⁸⁴ “*Perbuatan Melawan Hukum dan Wanprestasi sebagai Dasar Gugatan*” from <http://www.hukumonline.com/berita/baca/hol3616/perbuatan-melawan-hukum-dan-wanprestasi-sebagai-dasar-gugatan> accessed at 19 June 20108

All forms of protection that can be done by OJK to consumers and the public is a regulation issued by OJK to financial service business actors under the supervision of OJK namely banking, capital market, and non-bank financial industry. The regulation consists of regulation in slowing down of business, arrangement in marketing product to consumer and society until arrangement related to sanction which will be imposed if financial service business actors violate regulation which has been determined by OJK.

There are several preventive and repressive actions performed by OJK, including:⁸⁵

- a. Establishment of Task Force (*Satgas*) Alert Investment by conducting investment awareness and Focus group discussion about the handling of suspected cases of investment allegedly misleading.
- b. The establishment of Investor Protection Fund (IPF) or Investor Protection Fund which is an investor protection institution in the capital market
- c. Issuing POJK No, 1 / POJK.07 / 2013 on consumer protection of the financial services sector.
- d. Settlement of disputes in the financial services sectors listed in article 29 (c) OJK Law. The settlement of the dispute can be made to a court or alternative dispute settlement institution.

⁸⁵ Sufmi Dasco Ahmad “*Peranan Otoritas Jasa Keuangan Dalam Penanggulangan Investasi Ilegal di Indonesia*”. Journal Prival Law Vol 6 No 1 2018 p 8

Education and Consumer Protection is a specialized field established by OJK that has authority to undertake loss prevention measures and protect consumers and society that includes: education, consumer complaint services, and legal defense. This is in accordance with Article 28 of the OJK Law.

The field of EPK has two functions, namely preventive and repressive. Preventive function is carried out by several prevention efforts to minimize the occurrence of consumer losses / complaints, including literacy and education as well as financial inclusion, customer service, and market conduct monitoring. As for repressive efforts for the settlement of complaints, act of cessation is other action and alternative dispute resolution or defense law. Another OJK step is to formulate the Indonesian National Literacy Finance Strategy (SNLKI) as a manifestation of the role of OJK in improving the knowledge, understanding and use of financial products and services by the people of Indonesia. The SNLKI is comprehensive and is used as a guide for all financial service institutions and stakeholders in order to optimize the role for the improvement of people's welfare.

One of the results of SNLKI is *Literasi Keuangan*. Through financial literacy, the society expected that they can gain an understanding of financial services institutions and products on financial services. Furthermore, the community is expected to be able to encourage the improvement of the utilization of financial products and services in accordance with their needs.

B. The Legal Protection towards Investor from Investment scam in Case of PT Golden Traders Indonesia Syariah

One of the preventive measures of OJK in Investment scam is Task Force Investment (*Satuan Tugas Waspada Investasi*) established under a Decision of the Chairman of Bapepam-LK Number: Kep-208 / BL / 2007 stipulated on June 20, 2007, the last being extended by Decree of Chairman of Bapepam-LK Number : Kep-124 / BL / 2012 stipulated on March 19, 2012. Besides further renewed by Decree of the Board of Commissioners of the Financial Services Authority Number: 01 / Kdk.01 / 2015 on the Establishment of Task Force on the Suspect of Legal Action in the Field of Society Funds and Investment Management.⁸⁶

Task Force Investments is actually not the realization of OJK duties in handling investment scam cases because PT Golden Traders Indonesia Syariah itself is not within the authority of OJK. The task force is a coordinating body for task force members to optimize the prevention and handling of alleged unlawful actions or *wanprestasi* in the field of fund raising and investment management.

PT Golden Traders Indonesia Syariah only gets a business license issued by the Investment Coordinating Board (BKPM) related to gold and diamond trading. On the other hand in reality PT GTIS raises funds from the public through gold investment products. Therefore the handling of this case leaves the gray area

⁸⁶ Fitria Rahmadani, Paramita Prananingtyas, and Siti Mahmudah “Perlindungan Hukum Terhadap Investor oleh Otoritas Jasa Keuangan dalam hal Terjadinya Investasi Ilegal” *Dipenogoro Law Review* Vol 5 No 2 Tahun 2016 p8

because none of the supervisory agencies either OJK or Bappebti are authorized to handle the case. OJK and Bappebti both did not give permission to PT GTIS to run a gold investment business.

Law Number 21 of 2011 on Article 6 describes the scope of duties and authority of the Financial Services Authority in performing regulatory and supervisory tasks on financial services activities in the Banking sector, financial services activities in the Capital market sector, and financial services activities of the Non-Bank Financial Industry (IKNB) such as the insurance sector, pension funds, financing institutions, and other Financial Services Institutions.

There is a limit for OJK in carrying out its duties and authorities relating to the supervision and regulation on the financial services sector listed in article 8 of the OJK Law. This resulted in not all financial services are the authority of OJK, only banking financial services, capital markets and non-bank financial industry that became the duty and authority of OJK. Thus, OJK does not have the authority to supervise other financial services such as cooperatives or futures commodities.

PT GTIS is a company engaged in gold investment, where gold investment can be categorized as commodity futures trading. This makes PT GTIS not the domain of OJK authority in conducting supervisory and regulatory duties.

Futures' trading is the authority of the Commodity Futures Trading Supervisory Agency (Bappebti) established under Act Number 32 of 1997

concerning Commodity Futures Trading. Bappebti has the duty to conduct guidance, regulation, and supervision of futures trading activities in accordance with the policy set by the Minister and the applicable laws and regulators commodity exchanges.

PT GTIS as one of the companies that conduct gold investment business can be categorized as merchandise futures. Thus in this case the permission to run business activities must be given by the authorized authority, namely Bappebti. However, PT GTIS's trade scheme uses a Ponzi scheme that is inconsistent with Law no. 10 Year 2011. On this basis Bappebti rate has no authority over the case of investment scam conducted by PT GTIS.

The investment case of PT GTIS is further handled by Task Force Investments. This task force will analyze cases of allegations of unlawful acts in the field of fund raising and investment management in accordance with the duties and authorities of the task force. After the analysis, the task force will coordinate the handling of alleged unlawful actions in each field of fund raising or investment. Then the task force will delegate the case to members of the task force who have the authority to conduct legal process. In the case of PT GTIS, Task Force Investments has permitted the settlement of the legal process because the investment scam by PT GTIS belonged to the category of fraud.

According to the author, in this case there is the involvement of the Indonesian Ulema Council, and the halal label listed in the company name. Therefore, in addition to granting authority to the Task Force as a step established OJK, National Sharia Council also has a crucial role to anticipate the occurrence of investment scam with the use of religious elements in it, especially Islam.

The National Sharia Council as one of the institutions of the Indonesian Ulema Council already has the Sharia Supervisory Board. It would be better if the task of the Sharia Supervisory Board was added to oversee the occurrence of investment fraud using elements of Islamic religion. Some of DPS's duties and responsibilities are as follow:⁸⁷

- a. Provide advice to the Board of Directors as well as oversee the activities of the company to comply with the Sharia Principles.
- b. Assess and ensure compliance with Sharia Principles on operational guidelines and products issued by the company.
- c. Supervise the company's new product development process.
- d. Requesting a fatwa on the National Sharia Council for new products of companies that have no fatwa.
- e. Perform periodic review of Sharia principles fulfillment of company business mechanism.

⁸⁷ Peraturan Bank Indonesia Nomor 6 Tahun 2004 pasal 27

- f. Requests data and information related to sharia aspects of the company's work units in the framework of execution of its duties.

Therefore, it is preferable between OJK and Sharia Supervisory Board to cooperate and to form a new step to oversee sharia-based investment activities. In order to avoid abuse of religious elements contained in a company name, like PT GTIS.

MUI is an institution or community organization that accommodates the Islamic scholars in Indonesia to guide and nurture the Muslims throughout Indonesia. MUI establishes everything based on the Fatwa, a term of opinion or interpretation on a matter relating to Islamic law. MUI oversees the DSN-MUI institution that serves to issue Syariah certification for various business fields such as the granting of sharia certificate PT GTIS which affects the growing investor interest to join PT GTIS investment.

The existence of a fraud case by PT GTIS which already has sharia certification in running its business makes the community become a customer of PT GTIS requested that MUI also take responsibility in this case, because it is sharia certificate that make the customer interested to invest their funds.

Judging from the theories of responsibility, responsibility is born because of unlawful acts committed by a person resulting in harm to others, known by responsibility based on the element of error. Errors in the law are divided into two types: Responsibility due to unlawful acts committed deliberately in the sense that the perpetrator knows that the act is prohibited because it harms others but still

want the consequences of the act and the responsibility due to the act of violating the law because of negligence (negligence tort liability).

Therefore, MUI cannot be held legally liable because the loss suffered by PT GTIS customers is not caused by MUI action, but individual or personal actions of PT GTIS management. In this case the DSN-MUI only establishes a business activity based on sharia principles or Islamic legal principles governed by the MUI fatwa such as the principles of justice and balance (*'adlwatawazun*), benefit (*maslahah*), universalism (*alamyah*), and contains no *gharar*, *maysir*, *riba*, *zalim* and objects that are haram.

MUI can only be held legally accountable if it is related to its authority to provide sharia certification, for example PT GTIS apply the usury system on its business that is not in accordance with Islamic principles in trading and resulted in customers feel aggrieved by the application of the interest system then the customer can conduct a lawsuit against the law to the MUI.

For comparison of analogy, Banking Act is explicitly stipulated that OJK is an institution acting as supervisor in the banking field. In the event of fraud committed by a bank to its customers, OJK as supervisor cannot be held legally accountable, but it is the responsibility of the individual board or bank. It is also applicable to the DSN-MUI as the supervisor of the syariah business cannot be held accountable if there is a management of the sharia business that performs unlawful acts, but is the personal responsibility of the party who commits the act against the law.

In this case the legal remedy done by the customer is to file a lawsuit to the district court for the acts of embezzlement committed by Michael Ong as the board of PT GTIS.

CHAPTER IV

CONCLUSION AND RECOMMENDATION

A. Conclusion

The case of PT Golden Traders Indonesia Syariah (PT GTIS) is a case of gold investment that was abused by its owner. The investment transaction system in the PT GTIS case is similar to the commodity futures trading system. However they are on behalf of themselves investment companies.

PT GTIS conducts investment scam with Ponzi or multi-level marketing schemes, where every new customer in the investment business must find a new customer who will become a consumer and become part of the company. In the Ponzi scheme, members give high bonuses and are enticed to multiply profits for new customers. Then when the company must give the bonus to the customer, they cannot do it. Even the owner of PT GTIS committed fraud and ran away with money and customers.

The main task of OJK is to organize a system of regulation and supervision of all financial services activities. The form of legal protection that can be given is to ask the financial services company to stop its business activities if it is potentially detrimental to the community.

Legal protection that can be provided by the OJK can be in the form of preventive and repressive actions. Among them is the establishment of a task

force, the establishment of Investor Protection Fund, issuing OJK regulations on consumer protection in the financial sector, and settlement of disputes, either through courts or alternative dispute settlement. In addition, the OJK also developed a National Financial Literacy Strategy (SNLKI) to improve understanding and use of financial services products by the public.

Despite that, the existing theory of responsibility cannot drag the MUI institution to take responsibility in the case of PT GTIS. DSN-MUI as an institution under support of MUI has been proven to properly provide sharia certification to PTGTIS in accordance with existing procedures. PT GTIS who has received sharia certification from DSN-MUI has been proven to run its business system in accordance with Islamic principles in trading.

All forms of MUI management are not the responsibility of the MUI institution but the personal responsibility of the board itself. This is in accordance with Law No. 40 of 2007 on Limited Liability Company in article 97 paragraphs 2 which explains that the directors are fully responsible for the loss of the company if the person is guilty or negligent in performing their duties. Thus MUI is not the subject of the emergence of the gold law of PT GTIS gold investment fraud, and is not obliged to be responsible for providing compensation and compensation to the injured party.

B. Recommendation

The Financial Services Authority (OJK) as the authorized institution in handling customer fund collection in the form of investment scams, should take

precautionary measures against investment scams early. One method is to educate the public by creating a knowledge program on financial services that has the potential to become investment scams and the knowledge of OJK customer complaints mechanisms to the public in every region in Indonesia. The program was created by OJK by making rules regarding long-term socialization in the form of public discussion, cooperation with local governments for the implementation of the program. In addition, OJK can also conduct training on financial services to the public to better understand financial service products on a regular basis so that people understand what forms of financial services can lead to the category of investment scam and know the mechanism of customer complaints so that legal protection can be prescribed.

The customer as a weak party must be more active in choosing financial investments so as not to get caught up in investment scams so that they do not suffer losses. In addition, the customer must know what steps can be taken if they become victims of investment scam, so that when they experience a loss the customer can immediately ask for accountability to the investment scam actor, either in the form of civil actions, namely asking for compensation for losses suffered, or in the form of actions criminal scope, which is to make a claim in court so that misleading investors are prosecuted.

The Indonesian Ulema Council (MUI) must be more involved in the occurrence of investment scams, because many sharia-labeled financial services companies carry out investment scams. Sharia labeling to a company is carried out by the MUI, therefore in this case the MUI has a role even though it does not

directly participate in investment scam activities. The MUI has a Sharia Supervisory Board (DPS), one of which is to oversee the activities of Islamic banking. The author suggests that investment activities that use sharia labels will also be the supervision of DPS, so that the Islamic investment companies will not fall into investment scam activities.

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