THE SHAREHOLDER SETTLEMENT PROGRAM
Taufik Mappaenre Maroef

The Shareholder Settlement Program:
A Pragmatic Resolution to Confront a Systemic Banking Crisis
in View of the Dysfunctional Legal System and Tradition
of the Republic of Indonesia.

1st edition.
include bibliographical references and index

dissertation copy
©2010 Taufik Mappaenre Maroef
all rights reserved
THE SHAREHOLDER SETTLEMENT PROGRAM:
A Pragmatic Resolution to confront a Systemic Banking Crises
in view of the Dysfunctional Legal System and Tradition
of the Republic of Indonesia

PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van de Rector Magnificus prof. mr. P. F. van der Heijden,
volgens besluit van het College voor Promoties
te verdedigen op donderdag 25 maart 2010
klokke 13.45 uur

door

Taufik Mappaenre Maroef
geboren te Makassar, Indonesia
in 1962
PROMOTIECOMMISSIE

Promotores:  Professor Dr. H. Franken  
Professor Dr. J. G. Kuijl  
Professor Dr. V. Timmerman (Erasmus University, Rotterdam)

Overige leden:  Professor Dr. B. Wessels  
Professor Dr. R. E. van Esch  
Professor Dr. J. M. Otto  
Professor E. Radjagukguk S.H., LL.M., Ph.D. (University of Indonesia, Indonesia)  
Professor Dr. B. Manan S.H., MCL. (University of Padjadjaran, Indonesia)
PREFACE

Bismillahir Rahmaanir Rahim,

I am grateful to be given the opportunity to take part in the unprecedented historical moment, during which the Indonesian Banking Restructuring Agency (“IBRA”) and the Shareholder Settlement Program were established and introduced to confront and overcome the systemic banking crisis and economic meltdown as occurred in Indonesia during 1997-2004. I am mostly delighted to be given the chance to share the priceless experience scientifically, and for that very reason I would like to express my highest appreciation to the wonderful people and institution at Leiden University, in particular the Faculty of Law, who have been very supportive and encouraging with my endeavoring to undertake the Ph.D research-study program. I am also grateful to be one of the contributing factors in the legal phenomenon as studied, and to avail the personal experience as recorded to become reference for future decision making, both in public and private sector. All in all, I am grateful for what I have become.

I would like to thank my family, in particular my wife and my mother, who have been the most important women in my entire life. To my two lovely daughters, whom I have been sharing my ups and downs in life for years: I appreciate your understanding and patience that has become the light of my life. I would like to dedicate this book to Professor H. Ahmad Maroef Md., my deceased father, who has been the main inspiration and commitment behind my undertaking of the Ph.D research-study program. I hope I could help preserve the scientific values as introduced and carried-out by him, and to ascertain that the benefit would be for the greater good.

Alhamdu lillahi Rabbi ‘aalamin, I would like to praise Allah, full of compassion, ever compassionate, for the opportunity, guidance and protection in my undertaking of the Ph.D research-study program, which for all of the eternity, superseding any physical reality. I would like to seek Allah’s bless upon the scholastic endeavor as undertaken, and I am grateful to acknowledge that this work may contribute positively as an important scholastic archive in the legal system and tradition in Indonesia.

Leiden, 2010
Taufik Mappaenre Maroef
“There are seven sins in the world: wealth without work, pleasure without conscience, knowledge without character, commerce without morality, science without humanity, worship without sacrifice and politics without principle”

Mahatma Gandhi (1869-1948)
TABLE OF CONTENTS

Preface v
Abbreviations and Accronyms xi

CHAPTER I : INTRODUCTION 1

A. Background 1
B. Statement of Problems 7
C. The Theoretical Framework 8
D. The Purpose of Research Study 10
E. The Research Methodology 11
F. Organization of Dissertation 12

CHAPTER II : THE FINANCIAL CATASTROPHE 17

A. The National Economy 18
   1. The Structural Imbalance: An Overview 18
   2. The Financial Sector 27
   3. What Could Go Wrong? 31
B. The Asian Financial Crisis 33
   1. The Contagion Effect 33
   2. The Case of Indonesia: Lost in Confidence 38
   4. Blessing in Disguise: The Expensive Lesson 44
C. The IMF Rescue Package 47
   1. In Search for A White Knight 47
   2. The Structural Adjustments Program 51
   3. Revitalization of the Banking System 56
D. The Indonesia Bank Restructuring Agency (“IBRA”) 61
   1. Regulatory and Operational Framework 61
   2. The Hospital for Troubled Banks 68
   3. The Government Guarantee Program 72
   4. Other Duties 75
   5. IBRA’s Overall Performance 76

CHAPTER III : THE SHAREHOLDER SETTLEMENT PROGRAM 83

A. The Troubled Banking Sector 83
   1. Flaws of the Banking System 83
   2. Bank Indonesia Liquidity Support 95
3. Factual Condition of IBRA Banks 105
4. In Quest of Fairness 108

B. Institutional Impediments 113
1. The Banking Law: Limit on IBRA’s Powers 114
2. The Company Law: Shareholder’s Limited Liability 117
3. Other Available Venues 120
4. The Judicial System: An Impossible Venue? 123
5. The Need for Pragmatic Resolution 127

C. Alternative Approach: Out-of-Court Settlement 130
1. The Initial Design 130
2. Government’s Task Force: The Chronology 134
3. The Commercial Aspect 136
4. Flaws of the Initial Design 138

D. The Dark Episode 140
1. The Political Twist: Leadership in Peril 140
2. New Administration Means New Style 148
3. Unwitting Collateral Damages 155

E. The Point of No Return: Lesson Learnt 156
1. The Supreme Guidelines 158
2. The Parliament Standpoint 160
3. The Megawati’s Resolution 161
4. The Implementing Framework 164

CHAPTER IV : The Shareholder Settlement Agreement: 173
Contract as Promise

A. The Contracts 173
1. The Entry Parameter 173
2. The Basic Profiles 177
3. The Forgotten Ones: More Settlement Contracts 183
4. The Non-Cooperative Obligors 186

B. Contract Validity and Enforceability 189
1. Principles and Rules 189
2. Validity of the Settlement Agreements 197
3. Additional Notes on the Settlement Agreements 202
4. Conclusion on Validity and Enforceability 208

C. The Release and Discharge Clause 209
1. Relevant Connotation 209
2. Conflicting School of Thoughts 214
3. The Presidential Instruction No. 8 of 2002 218
   (“INPRES No. 8”) 218
4. Implementation Strategy 223
5. Promising Signal of Contractual Compliance 226
Table Of Content

D. The Completion of The Program 228
   1. The Closure of IBRA 228
   2. The Closing Agreement 230
   3. Publicly Sanctioned Release & Discharge 232
   4. New Paradigm in Law Enforcement Undertaking 237

E. Interim Closing Remarks 239
   1. The Final Result 239
   2. Certain Unfinished Homework 245

CHAPTER V : The Verge of Judiciary 249

A. The Judicial System 250
   1. In Quest of Judicial Independence 250
   2. The Judicial Personnel 252
   3. The Court Management 255
   4. The Judicial Reform: An On-going Discourse 256

B. The Constructive Signal 262
   5. Legitimacy of A Policy Decision 262
   6. The Validity of “PP - 17 “ 263
   7. The Validity of “INPRES No. 8” 264
   8. In Summary 266

C. The Empirical Imprecision 267
   9. The Out-of-Court Anomaly 267
   10. The Collateral Damages 270
   11. The Unwitting Legal Actions 274
   12. Eyes Without A Face 278

CHAPTER VI : Conclusion 283

APPENDIX : Additional Notes on IBRA-related Legal Cases 295
ANNEXES : 307

Annex I : Unofficial translation of Presidential Instruction No. 8 Year 2002 concerning The Warranty of Legal Certainty for Debtor Who Has Fulfilled the Obligations or Legal Action Against Debtor Who Fails to Fulfill the Obligations as Stipulated in the Shareholder Settlement Agreements (“INPRES No. 8”).

Annex II : Unofficial translation of Decision of Supreme Court No. 03/HUM/2003, May 3, 2008, concerning Legal Claim to undertake Judicial Review against Presidential Instruction No. 8 Year 2002 (a.k.a. ”INPRES No. 8”).

Annex III : Unofficial translation of Decision of Cabinet Meeting concerning the Settlement of Bank Shareholders’ Obligations (PKPS) as carried-out under the Auspices of Indonesian Banking Restructuring Agency (IBRA), dated March 7, 2002.

Bibliography 333
Executive Summary/Samenvetting 345
Curriculum Vitae 357
Index 359
# ABBREVIATIONS and ACCRONYMS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>APU</td>
<td><em>Akta Pengakuan Utang</em>, or the Acknowledgement of Indebtedness, which was basically a cash shareholder settlement agreement as signed by IBRA and IBRA banks’ shareholders.</td>
</tr>
<tr>
<td>Bank Indonesia</td>
<td>The Central Bank of the Republic of Indonesia (a.k.a. “BI”), which possesses the power both as the comptroller of the national monetary system and the banking supervisory agency.</td>
</tr>
<tr>
<td>BLBI</td>
<td><em>Bantuan Likuiditas Bank Indonesia</em>, or the Bank Indonesia’s Liquidity Support, which was the liquidity funds of the central bank in its’ capacity as the lender of last resort.</td>
</tr>
<tr>
<td>DPR</td>
<td><em>Dewan Perwakilan Rakyat</em>, or the Parliament, or the Legislature.</td>
</tr>
<tr>
<td>FSPC</td>
<td>The Financial Sector Policy Committee, or <em>Komite Kebijakan Sektor Keuangan</em>, or KKS.</td>
</tr>
<tr>
<td>IBRA</td>
<td>The Indonesian Bank Restructuring Agency, or <em>Badan Penyehatan Perbankan Nasional</em>, or BPPN.</td>
</tr>
<tr>
<td>IBRA Banks</td>
<td>The commercial banks that were handed over by Bank Indonesia to IBRA, under the auspices of 1998 Banking Law and PP-17, which consisted of nursed banks and frozen banks.</td>
</tr>
<tr>
<td>INPRES No. 8</td>
<td><em>Intruksi Presiden No. 8 Tahun 2002</em>, or the President Instruction No. 8 of 2002, concerning the Warranty of Legal Certainty for Debito Who Has Fulfilled the Obligations or Legal Action against Debito Who Fails to Perform the Obligation as Stipulated in the Shareholder Settlement Agreements.</td>
</tr>
<tr>
<td>MEFP</td>
<td>Memorandum of Economic and Financial Policies, a.k.a “Letter of Intent”, which were series of commitments of the Government of Indonesia to undertake certain economic and financial system structural adjustment measures under the IMF framework of supervision and financial supports.</td>
</tr>
<tr>
<td>MPR</td>
<td><em>Majelis Permusyawaratan Rakyat</em>, or the People’s Consultative Assembly, which consisted of elected members of the Parliament and the Regional Representative Council (DPD).</td>
</tr>
<tr>
<td>MRNIA</td>
<td>The Master Refinancing and Notes Issuance Agreement, which was basically a refinancing shareholder settlement agreement as signed by IBRA and certain IBRA banks’ shareholders.</td>
</tr>
<tr>
<td>MSAA</td>
<td>The Master Settlement and Acquisition Agreement, which was basically an asset shareholder settlement agreement as signed by IBRA and certain IBRA banks’ shareholders.</td>
</tr>
<tr>
<td>OC-IBRA</td>
<td>Oversight Committee of IBRA.</td>
</tr>
<tr>
<td>PP-17</td>
<td><em>Peraturan Pemerintah No. 17 Tahun 1999</em>, or the Government Regulation No. 17 of 1999, concerning the Indonesian Bank Restructuring Agency/IBRA, which had been amended several times and was the ultimate operational legal ground to undertake IBRA’s tasks and functions.</td>
</tr>
<tr>
<td>Term</td>
<td>Description</td>
</tr>
<tr>
<td>-------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Release and Discharge</strong></td>
<td>The sovereign warranty of legal certainty and policy consistency in relation to the out-of-court method and mechanism of “the Program”.</td>
</tr>
<tr>
<td><strong>The IMF</strong></td>
<td>The International Monetary Fund.</td>
</tr>
<tr>
<td><strong>The Program</strong></td>
<td>The Shareholder Settlement Program, as carried out by IBRA, in which IBRA banks’ shareholders and the Government of Indonesia agreed to settle their differences by means of out-of-court method and mechanism, by signing, executing and completing shareholder settlement agreements.</td>
</tr>
<tr>
<td><strong>The Supreme Court</strong></td>
<td>The Supreme Court of Justice of the Republic of Indonesia, or <em>Mahkamah Agung Republik Indonesia</em>, which is the constitutional body in charge of the judiciary and judicial power.</td>
</tr>
<tr>
<td><strong>The World Bank</strong></td>
<td>The International Bank for Reconstruction and Development.</td>
</tr>
</tbody>
</table>