

CREDIT AGREEMENT WITH FIDUCIARY COLLATERAL IN THE FORM OF A PATENT IN THE PERSPECTIVE OF INDONESIAN LAW

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Abstract

Purpose: Community needs for capital are obtained in various ways, one way is to make a debt agreement with financial institutions. This method is one way that is quite simple to obtain funds to support business activities. This debt agreement is usually carried out with a guarantee that the guarantee is a complement to provide assurance for financial institutions, in this case, the bank can obtain a loan refund in the event of an interpretation. One of the things that can be used as collateral is a patent. With the issuance of the latest law the patent is one way to obtain a loan from the bank.

Methodology: This research study gathered theoretical data about loan granting under fiduciary security of patent.

Main Findings: The development of the global community has caused development in security of loan application in banking internationally, one of them is security by using Patent. In Article 108 paragraph (1) of Patent Law, it is stated that right on Patent can be used as fiduciary security. The existing regulation indicates that the State supports economic development through granting of loan to Patent holders in order to develop their invention. A Patent Holder shall have an exclusive right to use the Intellectual Property Right by his/herself by using it as security.

Implications/Applications: The findings of this study are helpful for the individuals in understanding the aspect of patents and exclusive rights held by the owner in order to secure Intellectual Property.

Keywords: *Patents, accounts payable, collateral, loan, intellectual property, credit.*

INTRODUCTION

In granting the loan, a Bank shall pay attention to sound loan principles including risks to cope with for loan repayment. In order to obtain assurance prior to granting a loan, the Bank shall make a thorough assessment to character, capacity, capital, security and business prospect of the debtor. The security is one of elements of loan security in order to enable the Bank to obtain higher assurance on the Debtor's capacity to repay the debt ([Djuhaendah, 2011](#); [Kasmir, 2008](#); [Saidin, 2004](#); [Ambikai & Ishan, 2016](#); [Barkatullah, 2017](#)).

Security in a broader meaning means material or immaterial security. The material security is usually in the form of building, land, vehicle, jewelry or commercial paper. While immaterial security may be usually in the form of personal guarantee (borgtocht). Based on nature and form of asset, it can be distinguished into a movable asset (roerende goederen) and immovable asset (onroerende goederen). Another opinion categorizes movable asset into tangible and intangible asset. Tangible means nature thereof categorizes itself into a group of assets that can be moved from a place to another, e.g. office inventory, motor vehicle, etc. While Intangible assets are those categorized by the Law into the group such as cheque, draft, share obligation and bill ([Bahsan, 2007](#); [Subekti, 1997](#); [Sudikno, n.d.](#); [Venantia, 2008](#); [Boniface, 2016](#); [Chaiya, Janbanklong, & Kerpasit, 2016](#)).

In the law concerning security commitment, classification into movable and immovable assets has an important meaning. The existing difference in classification will also determine which type of pledgee/security commitment to which pledged asset is transferred in order to secure repayment thereof. The nature of security agreement is accessory, namely depending on its master agreement. Security transfer from the debtor to the creditor results in 2 (two) types of security interest commonly known as follows ([Bahsan, 2007](#)):

1. General security interest, namely security transferred by the debtor to the creditor, without granting concurrent right between one and another creditor.
2. Special security interest, namely security transferred by the debtor to the creditor, by granting concurrent right from another creditor, hence, the creditor is positioned as a preferential (preferred) creditor.

In developing Patent as a secured asset, the position thereof shall be valuable to be used as loan collateral. The patent has economic value because Patent constitutes material right, right on object sourced from brain work, logical work, under such assumption, Patent constitutes material right that can be used as loan collateral as material right in general. The status of Patent as material right that has economic value make it transferable as a secured object because Patent is a property.

Overview of Material Security

Security law is a rule or regulation of law regulating conditions of security from a debtor or third party for the certainty of debt repayment by the creditor or implementation of an achievement. In daily life we also often hear the term security. Security in daily language usually refers to a definition that means an existing object or asset used as a replacement or insurer for the loan granted to a person. Therefore, the definition of security in general is an object used as insurer for a

loan agreement between a creditor and a debtor ([Bahsan, 2007](#); [Damaryanti, Hendrik, & Annurdi, 2017](#); [Purba & Yenny, 2017](#); [Purwanto, & Purba, 2017](#)).

The Law of Security that can be referred to the Indonesian Civil Codes explaining that based on the law, security is functioned to cover a debt, therefore the security shall be a means of protection for the Creditor, namely certainty of debt repayment of the Debtor or insurer of the Debtor. Material guarantee and personal guarantee arise out of an agreement aimed at securing legal certainty of the Creditor for debt repayment or implementation of achievement as promised by the Debtor or Third Party. The following are legal definitions of security from various experts ([Bahsan, 2007](#)):

Prof. Sri Soedewi Masjhoen Sofwan

The law of security is the law that regulates judicial construction that enables the granting of a loan facility by using items he/she purchases as security. The rule shall be reasonably satisfactory and give legal certainty for lending institutions, either domestic or abroad. The existing pledgee and such type of institution shall be supported the high amount of loan, long-term repayment period and relatively low rate. The explanation given by [Sofwan \(1987\)](#) is a judicial concept relating to drafting of laws and regulations regulating security to be applied in the future. While currently, laws and regulations relating to security have been made.

J. Satrio

The law of security constitutes laws and regulations that regulate security for the debt of creditor to debtor. The definition is focused only on arrangement of creditor rights but not considering debtor rights. On the contrary, the review subject of the law of security does not only relate to the creditor but it also strongly relates to the debtor ([Satrio, 2003](#)).

Salim H. S.

The law of security constitutes all legal rules regulating legal relation between pledgor and pledgee in relation to pledging in order to obtain a loan facility.

Prof. M. Ali Mansyur

The law of security constitutes law regulating legal relation between creditor and debtor in relation to pledging for granting of the loan. Based on the foregoing opinions, a conclusion can be made that the law of security constitutes laws and regulations regulating legal relation between pledgor and pledgee by pledging items as security.

Based on the foregoing definition, elements contained in the drafting of the law of security are:

1. A series of legal conditions, either sourced from implied or expressed legal conditions. Expressed conditions of the law of security constitute legal conditions sourced from laws and regulations, including jurisprudence, either in original form or derivative thereof. Implied conditions of the law of security constitute legal conditions arising out of and maintained in practice of loan encumbrance of security.
2. The conditions of the law of security regulate legal relation between pledgor (debtor) and pledgee (creditor). The pledgor is the party to whom the loan is granted under a certain loan relation, from whom a certain item as pledged object is given to the pledgee (creditor).
3. The existing security transferred by the debtor to the creditor.
4. The transfer of security made by the pledgor is meant as security (encumbrance) for debt repayment.

Article 2 of the Law Number 7 of 1992 as amended by the Law Number 10 of 1998 stipulates that Indonesian Banking shall, in doing its business, be based on economic democracy by using prudential principles. In banking law, the granting of security, there are several banking principles, namely the fiduciary relation principle, prudential principle, secrecy principle, and know your customer principle ([Hermansyah, 2005](#)).

Fiduciary Relation Principle

Fiduciary relation principle is a principle on which relationships between the bank and its customer is based. The bank shall, in collecting and managing public fund, be based on fiduciary relation principle. The customer entrusts his/her fund to be saved in the bank in the form of a portfolio and managed securely and honestly, which when it is withdrawn at any time, the bank can provide the same. Normatively, fiduciary relation is expressly mentioned in Article 29 and Article 8 paragraph (1) of the Law Number 7 of 1992 in conjunction with the Law Number 10 of 1998 hereinafter referred to as Banking Law. Banks shall perform business from public fund kept based on trust, hence, each bank shall maintain its soundness by keep maintaining and preserving public trust. The fiduciary relation principle is also regulated by Article 29 paragraph (4) of the Law Number 10 of 1998.

Prudential Principle

The prudential principle is a principle confirming that a bank shall, in doing its business in fund collection and especially in distribution thereof to public, be very cautious. The implementation of prudential principle is aimed at making the bank always in sound condition in running its business and fulfilling legal conditions and norms applicable in banking world. The prudential principle is contained in Article 2 and Article 29 paragraph (2) of the Law Number 10 of 1998.

Secrecy Principle

Bank secrecy principle regulated in Articles 40 to 47 A of the Law Number 10 of 1998. Pursuant to Article 40, banks shall keep customer and fund-related information confidential. However, the confidentiality obligation therein has exceptions. The confidentiality obligation shall not apply to matters relating to tax, debt settlement assigned by a bank to the State Agency for Receivables and Auctions / State Receivable Management Committee (UPLN / PUPN), for the interest of court of criminal case, in civil case between a bank and its customer, and for the purpose of exchange of information between banks.

Know Your Customer Principle

Know your customer principle is a principle applied by bank in order to identify and find out customer identity, monitor customer transaction activity, including report any suspicious transactions. The Know Your Customer Principle is regulated in the Regulation of Bank Indonesia Number 3/10/PBI/2001 concerning Application of Know Your Customer Principle. The purposes aimed to achieve in applying the know your customer principle is to improve the role of financial institution with various policies in supporting financial institution practice, avoiding various possibilities of financial institutions as target of crime and illegal activities committed by customer and protecting good name and reputation of financial institution.

The material guarantee is security in the form of absolute right on an object, having direct relation to a particular object of the debtor, it can be maintained from anyone, always attached to the object and transferable. Material guarantee according to its nature may be in the form of:

- a. Security in the form of Movable Asset. It is referred to the as movable asset because it is movable and transferrable or in the Law is referred to as movable asset such as right to movable asset commitment. Security in the form of movable asset is distinguished into tangible movable asset, which commitment is made by pawn, fiduciary, and intangible movable asset, which commitment is made by pawn, cessie, and account receivable.
- b. Security in the form of Immovable Asset is security that is immovable and non-transferrable in nature as regulated under the Indonesian Civil Codes. Commitment to the secured movable asset in the form of mortgage. The material guarantee is regulated under the Indonesian Civil Codes Book II and any other Laws in the form of:
 1. Pawn, regulated under the Indonesian Civil Codes Book II Chapter XX Articles 1150-1161, namely a right obtained by a creditor on a movable asset transferred by a debtor to take repayment and the asset by prioritizing the creditor from other creditors.
 2. Mortgage, regulated under the Law Number 4 of 1996, namely security encumbered by right on land, with or without other objects appurtenances thereon for certain debt repayment, granting position prioritized to other creditors.
 3. Fiduciary, under the Law Number 42 of 1999, namely security interest on movable asset either tangible or intangible and immovable asset especially building to which mortgage is not encumbered as collateral for a certain debt repayment giving the main position against other creditors.
 4. Naval Mortgage, regulated under Articles 1162 to 1232 of the Indonesian Civil Codes and the Law Number 17 of 2008 concerning Shipping ("Shipping Law"), and implementing regulations thereof;
 5. Warehouse Receipt, regulated under the Law Number 9 of 2006 concerning Warehouse Receipt System as amended by the Law Number 9 of 2011 ("Warehouse Receipt Law") and implementing regulations thereof.

The law of security is part of granting of the loan. Loan in Indonesia may be deemed as relation between a creditor (lender that is usually a Bank) and a debtor (customer, namely borrower). The relation highly relates to trust, that debtor within a period and under conditions that are mutually agreed can repay the loan concerned ([Rachmadi, 2003](#)).

Granting of Loan to the public is made through a loan agreement between the lender and the borrower, hence, there is a legal relationship between both of them. The common practice of the loan agreement is that it is prepared by the creditor or in this case the bank, while the debtor only reviews and understands the same properly. However, the loan agreement shall get special attention from both parties because the loan agreement has a very critical function in granting, management and implementation of the loan under the agreement entered into between the debtor and the creditor, if the debtor signs the loan agreement, it shall be deemed binding on both parties and effective as a law for both of them. The granting of loan is aimed at ([Rachmadi, 2003](#)):

1. Seeking for profit: namely aimed at obtaining the result of the granted loan. The result is mainly in the form of interest received by the bank as consideration for the service and loan administrative fee charged to the customer. The profit is important for the bank's life and if the bank is continuously suffering from loss, it is more likely that the bank will be liquidated (dissolved).
2. Assisting customer business: Another purpose is to assist the business of customers who need fund, either for investment or working capital. By using the fund, the debtor will be able to develop and expand his/her business.
3. Assisting the Government: The main purpose of a loan is not only to benefit the bank but also improve the economy of a Country.

The following are benefits for the Government that can be obtained by extending the granting of the loan ([Rachmadi, 2003](#)):

1. Tax revenue from benefit obtained from customers and banks;
2. Providing work opportunity, in this case for the loan to new business or business expansion that requires new workers, hence, it can receive more workers that are unemployed.
3. The increasing number of goods and services, which is clear that majority of loans provided will increase the number of goods and services publicly distributed.
4. Saving State foreign exchange reserves, especially from products previously imported and if they can be produced domestically using existing loan facilities will clearly save the State's foreign currency reserves;
5. Increasing the State's foreign currency reserves, if the products funded by the loan are exported products.

The following are elements of credit itself in the foregoing credit definition ([Rachmadi, 2003](#)):

1. Time, namely the interval between loan approval and repayment thereof. Each loan granted shall have a certain period, the period includes loan the repayment term agreed in advance. The period may be in the form of a short or long term.
2. Trust, namely the creditor's belief that the loan granted (in the form of money, goods or items) will be actually received back within a certain term in the future. The one used as the basis of the granting of loan by a creditor / Bank to a debtor is that the loan will be repaid within a certain term as agreed by both parties. The trust is given by the bank, whereas previous examination is made to the customer both internally and externally. The examination and investigation are made in the past and current condition of the customer.
3. Transfer or object, whereas the creditor transfers the economic value or object in the form of money or bill to the debtor that shall be returned upon due.
4. Risk, the repayment term will result in the risk of bad debt that may arise during the loan term. The longer the term, the higher the risk will be and vice versa. The risk is at the bank's liability, both risks arising out intentionally resulted by a negligent customer and non-intentional risk e.g., natural disaster or bankruptcy of the customer's business without other intentional elements.
5. Creditor and Debtor, there is a loan agreement between a creditor and a debtor proven by a deed of agreement and each of the parties shall exercise their rights and perform their obligations respectively.
6. Consideration, it is the profit of the loan or service thereof known as interest. Consideration in the form of interest and loan administrative fee is the bank's profit. While consideration for banks adopting Islamic principles is determined on a profit-sharing basis.

In addition to the foregoing elements, a loan may also involve several other parties, such as Notary, Appraisal, Insurance Company, Land Deed Official (PPAT), Fiduciary Body / Department of Law and Human Rights, Office of National Land Agency (BPN), etc.

Based on Article 1 point 1 of the Law Number 13 of 2016 concerning Patent (hereinafter referred to as Patent Law), Paten means an exclusive right granted by a State to an investor for his/her invention in technology, who for a certain period performs the invention by his/herself or gives approval to another party to perform the same.

The patent is an intellectual property right granted by a state to an investor for his/her invention in technology that has a strategic role in supporting the nation's development and improving public welfare. Based on the foregoing, the intellectual work is contained into a specific problem-solving activity in the field of technology, which may be in the form of process or product or improvement and development of product and process ([Muchtart, 2016](#)).

The patent is a protected Intellectual Property Right (IPR) for technological intellectual work, or also known as invention, and containing a technical solution of a problem on an already existing technology. For example, a small nail invented by Levi Strauss to be mounted on the edges of blue jeans pockets, e.g. subsequently granted by Patent in the United States in 1873, it brings a technical solution for a problem of easy-to-lose sewing on pocket of denim material pant at that time, given outdoor application with a quite high intensity. The patent invention may be in the form of product or process ([Akhmad & Joni, 2011](#)).

The Patent owner shall have an exclusive right to use the Intellectual Property Right by his/herself or by cooperating with other parties in the form of licensing agreement or loan agreement. Patent of investment in creative industry is currently divided into 16 (sixteen) sub-sectors, namely game application and development, architecture and interior design, visual communication design, product design, fashion, film, video animation, photography, handicraft, culinary, music, publishing, advertising, performing art, art, television and radio.

CONCLUSION

The development of the global community has caused development in security of loan application in banking internationally, one of them is security by using Patent. In Article 108 paragraph (1) of Patent Law, it is stated that right on Patent can be used as fiduciary security. The existing regulation indicates that the State supports economic development through granting of loan to Patent holders in order to develop their invention. A Patent Holder shall have an exclusive right to use the Intellectual Property Right by his/herself by using it as security.

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