

EXECUTION OF TRADEMARK AS COLLATERAL OBJECT OF CREDIT BANK

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Abstract- Trademarks, which is part of Intellectual Property Rights (IPR), are classified as intangible movable object. The trademark qualifies as something that can be used as bank credit collateral. The function of assurance is a means of protection for the bank security, namely certainty of debtors debt settlement. The proper assurance for trademark is a guarantee of fiduciary. Efforts made by the banks to minimize credit risk, by doing a thorough credit analysis using the principle of 5 C, which includes the analysis of character, capital, capacity, collateral and economic conditions. Trademarks as intangible objects in banking practice is very rare to use as credit collateral objects. This is because the assessment of the trademark as a guarantee requires specific skills in the assessment of IPR as collateral, unlike when the collateral object is land rights or motor vehicle which is relatively easier to assess. In addition to preventive measures undertaken by the bank, there are repressive efforts undertaken by the bank in case of failure of credit, especially for the execution of trademarks as repayment of bank loan.

Keywords: Execution, Collateral, Trademarks

I. INTRODUCTION

Of all banking activities, credit is the most dominating. This is reasonable, given of credit is the biggest source of revenue for banks, namely Credit interest. Nevertheless, the bank's business objectives for the benefit must be balanced with the security element. Given the provision of such credit has fairly high risk both for banks and for depositors. Sources of funds used by banks for loans instead of bank-owned fund itself but the public funds deposited in the bank. Thus, where the bank is dependent upon the level of public confidence in the banks. The higher the level of public confidence to the bank then the bank would grow.

Therefore, in the granting of credit risks inherent high enough then to do with the precautionary principle, namely through accurate analysis and in-depth, distribution right, good supervision and good monitoring, the credit agreement valid, binding strong assurance and documentation of credit complete. It is intended that all loans can be returned in a timely manner in accordance with the credit agreement.

15
The prudential principle defined in Article 2 of Law No. 7 of 1992 concerning Banking as amended by Act No. 10 of 1998 (the Banking Act) that Bank in conducting business based on economic democracy with the use of the

2
precautionary principle. The intent of the precautionary principle is that the bank is always healthy, always in a state of liquid, solvent and profitable. The enforcement of the prudential principle expected levels of public confidence in the banking always high so that people do not hesitate to save their money in banks.

One embodiment of the of the precautionary principle is stated in Article 8 of the Banking Act that provide credit or financing based on Sharia Principles, commercial banks are required to have confidence based on in-depth analysis on faith and the capabilities and capacities of the Customer Borrower to repay the debt or restore funding defined in accordance with the agreement. In his explanations mentioned that in order to obtain assurance on the ability and willingness of customers to settle their obligations in accordance with the agreement, the bank makes a careful assessment of five factors: character, capacity, capital, collateral and business prospects of the customers debtor, these five factors are often known with "the five's of credit".

The efforts of banks to minimize credit risk either by asking for collateral in the form of objects belonging to the debtor. The existence of a collateral is considered important in the field of credit though can not be said to be absolute. The mission of the Banking Act is in principle not always lending by banks should be accompanied by the requisite guarantees, because the guarantee was considered there with the opportunities and business prospects (prospective) debtor. However, when in lending without collateral means that banks are already taking the credit risk that must be faced by banks. Black 's Law Dictionary states the meaning of collateral (security):

The term is usually applied to an obligation, pledge, mortgage, deposit, lien, etc. Given by a debtor in order to make sure the payment or performance of his debt, by furnishing the creditor with a resource to be used in case of failure in the principal obligation. The name is also sometimes given to one who becomes surety or guarantor for another.

The existence of a Collateral preventive measures to secure the debt the debtor has been given by the bank by way of the debtor in order to ensure the wealth of the debtor to

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meet obligations to repay or with the ability of third parties to fulfill the debtor achievement.¹

In the banking practice in Indonesia there are some banks that received the trademark as a collateral, although the majority of banks in Indonesia is not willing to accept the trade mark as an object of credit guarantees, for various reasons. Some of the reasons given that IPR is a security object that requires special expertise in assessing the economics of IPR, while the availability of human resources with expertise in the field of assessors IPR is limited even absent in the bank, so the bank prefers commonly known collateral in the banking sector and the relative ease in assessment eg land rights, vehicle, engine production. Besides the reasons above is about how the execution of the trademark. Given the credit risks are unavoidable, namely the default of the debtor so requires banks to execute a security object. So based on the description of the issues studied is about execution trademarks as repayment of bank loans

II. DISCUSSION

1. Trademark As Object Collateral

Referring to the provisions of Article 499, the meaning of zaak or object in BW perspective is not only in the form of goods (goed), but also including the intangible sense that objects in the form of certain rights of a person. This means that the object of property could have ²³ property rights (ownership) or intellectual property rights as a translation of the Intellectual Property Right. World Intellectual Property Organization (WIPO) classifies each type of intellectual property rights into two major groups, namely:

- a. Copyright;
- b. Industrial property rights consisting of: (1) patent; (2) simple patent; (3) the design of industrial products; (4) trademark; (5) trading services; (6) trade name; (7) the origin of the sign; (8) the origin of designation; and (9) unfair competition.²

Intellectual Property Rights (IPR) has tremendous potential as an asset. The potential of IPR assets as financial resources are the subject of extensive discussion among investors, particularly if supported by innovative and appropriate methodologies. In some other countries, SME and Corporate IPR owners can use as evidence of IPR assets in the banking capital loans as long as IPR assets recognized intangible assets in the banking environment.³

According to Article 1 paragraph 1 of Law Number 15 Year 2001 regarding ¹³ trademark (Trademark Act), the meaning of trademark is a sign in the form of image, name,

¹ Djuhaendah Hasan, material Guarantee Institute For Land and Other Attached to the Land of the Conception of Application of Principle of Separation Horizontal, Citra Aditya Bakti, Jakarta, 1996, p.201

² Rachmadi Usman, *Material law*, Sinar Grafika, Jakarta, 2011, p.61

³ Wicipto Setiadi, speech the Head of the National Legal Development Agency, "Preparing Regulatory About IPR For Collateral Interest", Workshop About Setup Regulation of Intellectual Property Rights as a Tool Collateral In the National Legal System, Jakarta 26 s / d March 28, 2014.

19
word, letters, numbers, composition of colors, or a combination of those elements who have distinguishing features and use ¹¹ the trading of goods or services. While the definition of trademark is a brand that is used on goods traded by a person or community or a legal entity to differentiate with other similar items.

Brand as moving objects that are not tangible objects qualify as collateral because:⁴

1. It has economic value;
2. Can be transferred by a written agreement.

In addition to the above two conditions, the other requirements that must be met, namely

a. Brands can be used as a security object when these brands are trademarks registered in the General Register of Trademarks in DG IPR and evidenced the ²⁵ mark certificate, so the brand is protected by law for a period of 10 years from the filing date and the term of protection may be extended as provided by Article 28 Trademark Law. At the trademark certificate listed a few things, which includes:

- The name and address of the owner of the brand
 - The date of receipt and the registration number
 - The date of registration of the mark
- b. The financial statements of the company brand owners to know that the brand has value or not.
- c. The brand is a famous brand. Is meant by the famous brand brand brand that has been recognized by the public (consumers).

According to the Yunita Resmi Sari that the economic value of IPR can be calculated with the market approach, income approach and cost approach. To determine the value of the brand can be seen right from the company's financial statements trademark owners. In the financial statements, including the trademarks owned assets in the field, especially non-current assets, thus the right brand is an asset.⁵

Similarly, proposed by Cita Citrawinda Noerhadi that as the intangible and movable object IPR has the prospect to be used as loan collateral because:⁶

- IPR economic value can be calculated based on market prices;
- Can be sold;

⁴ Agung Sujatmiko dan Trisadini, *Op.cit*, h.34

⁵ Yunita Resmi Sari, Director of Development of SMEs BI, "Pushing Banking Making Assets IPR as a tool Collateral with due regard to the principle of prudence", Workshop About Setup Regulation of Intellectual Property Rights as a Tool Collateral In the System of National Law, Jakarta 26 s / d March 28, 2014

⁶ Cita Citrawinda Noerhadi, "Aspects of Legal Had a very signifikan correlation with the status of IPR as collateral for credit," Preparation Workshop On Regulation of Intellectual Property Rights as a Tool Collateral In the National Legal System, Jakarta 26 s / d March 28, 2014

- Can be licensed;
- Can be switched / transferred, either in whole or in part (inheritance, grant, will, written contract or other causes that justified by the legislation).

Institution guarantee the trademark as a security object is a fiduciary as regulated by Law No. 42 of 1999 on Fiduciary (UUJF). According to Article 1 paragraph 2 UJF, is a fiduciary is security rights over movable goods both tangible and intangible and immovable particular building can not be encumbered with security rights as stipulated in Law No. 4 of 1996 on Mortgage which remains in the possession of the Giver Fiduciary, as collateral for the repayment of certain debt, which gives priority to the Beneficiary position Fiduciary against other creditors. The elements contained in the fiduciary is:

- rights guarantees
- moving objects
- Immovable particular building can not be encumbered encumbrance
- For debt repayment
- creditor Preferren

Objects are burdened with fiduciary must be registered to the fiduciary registration office, namely the Office of the Ministry of Justice and Human Rights electronically (Online System). Applications for registration of fiduciary fiduciary done by receiver, power or his representative. In this case the notary who got the username and password to register fiduciary to the fiduciary registration office.

Fiduciary registration office then issued a certificate of fiduciary on the same date as the date of filing the application for registration. Fiduciary guarantee born on the same date the date of fiduciary guarantee on record in the Register of Fiduciary. In Article 4 of Government Regulation No. 21 Year 2015 regarding Registration Procedures and Fees Preparation of Deed of Fiduciary noted that the application for registration of fiduciary referred to in Article 3 submitted within a period of 30 (thirty) days from the date of manufacture deed of fiduciary.

Registration stage is a manifestation of the principle of publicity and as a marker of the birth of fiduciary, fiduciary so that if the recipient does not register then never born fiduciary then the creditor (fiduciary receiver) only plays as concurrent creditors. In addition, the principle of publicity as well as a form of legal protection for creditors (receiver fiduciary) and also ensuring legal certainty to the parties concerned, both the giver fiduciary, fiduciary receivers, as well as to third parties.

In addition, according to Wicipto Setiadi, Head of the National Law Development Agency needs to prepare regulations that encourage the birth of regulations that it is asserted that IPR brand certificate, design, patent or copyright can be used as collateral to the Bank or Financial Institution. Regulation is important so banks in Indonesia may also play a role in encouraging creativity in the field of IPR, as well as increasing opportunities for the creative industries to develop their business. Beside the support from banking industry, the

Ministry of Finance should also be encouraged to issue regulations that strengthen IPR certificates as part of commercial paper that has full economic value so the juridical foundation becomes strong.⁷

As we know that In Article 43 of Bank Indonesia Regulation Number 14/15 / PBI / 2012 concerning Asset Quality Rating for Commercial Banks, stipulated that the collateral may be taken into account as a deduction in the calculation of Allowance Aset (PPA) is set as follows:

- Securities and shares are actively traded on the stock exchanges in Indonesia or rated investment grade and bound under pledge;
- land, buildings, and homes are bound with mortgage;
- machine which is installed on land bound with mortgage;
- aircraft or ships with dimensions over 20 (twenty) cubic meters, bound with mortgage;
- motor vehicles and inventory bound under fiduciary; and / or
- warehouse receipt bound with guarantee right on the warehouse receipt.

Based on Bank Indonesia Regulation Number 14/15 / PBI / 2012 concerning Asset Quality Rating for Commercial Banks above shows that IPRs have not been entered as collateral accounted for as a deduction in the PPA.

In some countries, namely Bangladesh, India, Cambodia, Canada, China, Kenya, Malaysia, the US (Texas) IPR is already recognized as collateral, as an example:⁸

- India: LT Foods, using the trademark 'Daawat' (rice packaging) as collateral in a loan of £ 50 million to acquire a competitor company based in the USA.
- USA: In 2006, Ford Motor Company offers its intellectual property, including trademarks Ford and the entire domestic tangible assets to obtain loans amounting to US \$ 23 billion.
- China: In 2008, the Chinese government started a pilot project of use of IPR (Patent) as collateral loans are backed by insurance. Until 2013, the pilot project has covered 29 regions with a total value of outstanding loans amounted to CNY25.4 billion.
- Malaysia: In 2013, the Malaysian government allocated a budget of RM 200 million for the Malaysian Debt Ventures Bhd (MDV) to develop Financing Guarantee scheme IPR. The financing scheme is for SMEs engaged in the field of biotechnology innovation, green technology, and ICT (information, communication and technology). With this scheme, the government through the Credit Guarantee Corporation Malaysia provide interest subsidy of 2% and a guarantee of 50%.

2. Execution of a trademark as an object of fiduciary

The provisions on the execution of the object of fiduciary guarantee provided by Article 15 and Article 29

⁷ Wicipto Setiadi, *Loc.cit*

⁸ Yunita Resmi Sari, *Loc.cit*

UUJF, that banks in completing the credit does not have to file a lawsuit to the court, but the creditor can execute three (3) ways, namely through parate execution: execution with executorial title : execution with sales under the hand made under the agreement Giver and Receiver Fiduciary if in this way can be obtained the highest price that benefits the parties.

Of the three ways mentioned above, the method of execution that is more effective for trademarks is execute the sale under the hand. However, the sales under the hands do if they meet the requirements, namely:

- a. There is an agreement between the giver and the recipient fiduciary, meaning in this case there is the good faith of the giver fiduciary, ie the owner of trademark rights.
- b. Implementation of sales are made after the expiration of one (1) month since notified in writing by the Giver and Receiver fiduciary or to the parties concerned.
- c. And be announced in at least two (2) newspapers circulating in the area concerned.

If there is a buyer the right to the trademarks, the steps as a protection efforts for the bank and the buyer the right to the trademark, the agreement between the owner of the trademarks with the buyer in an authentic agreement which was witnessed by the bank to ensure happening purchase agreement. The money from the sale by the owner of trademark rights used as loan repayment. When there is excess the excess is the right of the owner of the trademark rights.

After the repayment of bank loans, then the next step is to request the transfer of the right at director General IPR and submit the Application for transfer of rights Brands typed in two (2) copies to the applicant or authorization shall be registered IPRs in the Directorate General of the Indonesian addressed to the Director of Brand Directorate General of Intellectual Property rights, Ministry of Law and human rights, to contain namely:

- a. Name Brand and Trademark registration number petitioned the transfer rights;
- b. The name and full address of the owner of a registered trademark in the name of the old
- c. The name and address of the new owner.

By attaching:

- Copy of the identity of both parties;
- Copy of the deed of the company and amendments;
- Proof of transfer of rights, could form letter purchase agreement, the grant letter, letter of determination of heirs, wills, original or copy of which has been legalized by the competent authority;
- A letter of use of the mark by the assignee and stamped;
- Special Power of Attorney if the request for the transfer of trademark rights posed by the power shall be registered in the Directorate General of Intellectual Property Rights by stating the brand and the number to be diverted over sufficient duty;

- Proof of payment of the application fee for transfer of rights in accordance with applicable government regulations;
- Copy of certificate of the brand;
- The transfer of documents in foreign languages must be translated in advance in Indonesian.

Besides Request transfer of trademark rights also filing elimination of Fiduciary of the list of collateral Fiduciary done by receiver fiduciary, power or his representative, in this case carried out by a notary online, and then will be issued a certificate stating that the certificate of fiduciary guarantee is no longer valid.

Where the debtor at the same fiduciary giver is not good faith, execution can be carried out by the bank using parate execution or with executorial title, the Fiduciary Certificates that include the words "BASED ON THE JUSTICE BY ONE ALMIGHTY GOD". Fiduciary Certificates have executorial power equal to a court decision which has obtained permanent legal force. This execution less effective way for banks because it is done through auction sales, while the object of the auction for a brand based on previous research has not been done.⁹

III. CONCLUSION

Trademark as intangible movable goods which qualify as objects of credit guarantees, which have economic value and are transferable. However, not many banks that accept objects trademarks as collateral for various reasons. Whereas in some countries, a trademark considered to be accepted as an object of bank credit guarantees. Therefore, the need for banks to take into consideration IPR as a security object by placing as an additional guarantee in advance and the necessary regulation in the form of regulations issued by the Financial Services Authority which it is asserted that a certificate of IPR both brands, designs, patents or copyrights may be used as collateral to a bank or financial institution and is supported by the Ministry of Finance also issued regulations that strengthen IPR certificate as part of the securities in the full economic value so that the juridical foundation to become stronger.

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