Risk Mitigations of Trademark Rights Law as Credit Bank Guarantee

Mitigaciones del Riesgo de Ley de Derechos de Marca como Garantía del Banco de Crédito

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Abstract
The efforts to minimize legal risk over brand certificate is guaranteed, in banking practices. by conducting a professional analysis of brands. The main action done by the bank is to identify whether the rights to the mark meet the legal and economic requirements as a guarantee. It is important the imposition of perfect pawn or fiduciaries that cause the born of property rights and the bank domiciled as a preferred creditor. The guarantee's analysis is the bank effort to ward off legal risk such as weakness of the alliance until the contractual terms are not fulfilled or not perfect of collateral binding even the cancellation of the brand certificate. If this is not mitigated, it will be detrimental to the position of the bank as a creditor, because the bank is only located as a concurrent creditor.

Keywords: Bank; Guarantee; Legal risk; Trademark guarantee.

Resumen
Los esfuerzos para minimizar el riesgo legal sobre las garantías de marcas registradas en la práctica bancaria se llevan a cabo mediante el análisis profesional de la marca Lo principal que hace el banco es determinar si los derechos de la marca cumplen con los requisitos legales y económicos como garantía. Es importante imponer garantías, o fideicomisarios, perfectos, lo que conlleva al hecho de que los derechos de propiedad nacen y el banco reside como el mejor acreedor. El análisis de garantía es el esfuerzo del banco para evitar un riesgo legal, como la debilidad de la alianza, hasta que se cumplan los términos contractuales, o las obligaciones de garantía perfecta, incluso la revocación del certificado de marca registrada. Si esto no se mitiga, dañará la posición del banco como prestamista, ya que el banco está ubicado solo como co-prestamista.

Palabras clave: Banco; Garantía; Garantía de marca; Riesgo legal.

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Credit, from the bank balance sheet assets, is the largest portion of operational funds but, at the same time, it is the largest business risk sources. Credit problem, and even bad credit, are a problem for banks, because their existence not only decrease the bank incomes, but decrease the profit. Each credit is categorized as problem credit so the bank's obligation is to make the provision for loan losses (PPKA) (Presiden Republik Indonesia, 2019), this condition can destabilize the bank and, eventually, detriment to depositors. Therefore, in Article 2 Constitutions Number 7/1992 juncto Constitutions Number 10/1998 (Bank Indonesia, 1992)toxic chemical products formed as secondary metabolites by a few fungal species that readily colonise crops and contaminate them with toxins in the field or after harvest. Ochratoxins and Aflatoxins are mycotoxins of major significance and hence there has been significant research on broad range of analytical and detection techniques that could be useful and practical. Due to the variety of structures of these toxins, it is impossible to use one standard technique for analysis and/or detection. Practical requirements for high-sensitivity analysis and the need for a specialist laboratory setting create challenges for routine analysis. Several existing analytical techniques, which offer flexible and broad-based methods of analysis and in some cases detection, have been discussed in this manuscript. There are a number of methods used, of which many are lab-based, but to our knowledge there seems to be no single technique that stands out above the rest, although analytical liquid chromatography, commonly linked with mass spectroscopy is likely to be popular. This review manuscript discusses (a, regarding to banks (banks constitutions), regulated the Indonesian Banking in doing business based on economic democracy with using the precautionary principle. The application of the precautionary principle aims to the bank in stable condition, always in the conditions of liquid, solvent and profitable. The application of this precautionary principle is expected so that the level of public trust in the banks keeps high until the citizen is ready and without hesitation in depositing funds in the bank (Sjadeini, 1994).

One of the efforts made by banks to minimize credit risk is by conducting credit analysis. The credit analysis is the preventif effort which must be carefully and deeply done by the bank and it plays a role as first filter in Sharia bank effort to ward off the danger of credit problem. The credit analysis activity aims to assess the will and ability from prospective recipients of credit facilities in fulfilling the achievements in accordance with the clause in credit agreement. Based on the results of the assessment the bank can estimates the level of risk bank, and agreed, or not, those credit.

One of the assessment in credit analysis conducted by bank is by assessing objects to be submitted by debtor customer as guarantee object. The existence of guarantee (collateral) for credit is considered important even though it cannot be said to be absolute. Realizing in Constitution of Banks, as confired in Article 8, the first thing to note is bank confidence in the ability of debtor customers to pay the

credit until the guarantee is not become the main requirement in granting credit, eventough the exitence of collateral will be important if there is a credit problem. Then, if the bank feels confident about the ability and capability of the debtor customer, the guarantee is a form of goods, project or bill rights financed with the concerned credit.

Intellectual Property Rights (HKI), can become the guarantee object, it involves trademark rights, copyright, patent, trade secret, industrial design and integrated circuit layout design, besides the guarantees commonly received by banks, which is land rights, the motor vehicle, machine, gold, receivables or claim rights. One of the HKI that has been accepted as guarantee object to conventional bank, as well as to syaria bank, is trademark rights although only accepted at Banks of BNI Company (persero) and Bank Muamalat Indonesia, as has been done by Sri Mulyani and in the research that I have done (Usanti, 2017). The land service has been carried out through various activities using computers, starts from the information until the last result product in the form of decree or freehold title (Widodo et al., 2019).

The trademark right is accepted as object of collateral. both on conventional banks, as well as to sharia banks, if the trademark rights has been registered in General Register at the Directorate General of Intellectual Property (DJKI) with proven brand certificate. But the existence of a trademark certificate does not guarantee the bank will be safe because it is possible for the mark to be canceled. When that happens, the bank is at a clearly disadvantaged because, with the cancellation of the brand results in the guarantee agreement being deleted it impacts on the position of the bank as a creditor. Based on the descriptions above then the problem will be analyzed in risk mitigation conducted by the bank on the object of collateral rights to the brand.

METHODOLOGY

This study aims to analyze the risk mitigation on object guarantee in the form of trademark rights that are conducted by bank, using normative method with a statutory and conceptual approach. The legal material used is primary legal material, which is Burgerlijk Wetboek (BW), the Constitutions Number 20/2016 about Brands and Geographic indication (Presiden Republik Indonesia, 2016), the Constitution of Bank (Presiden Republik Indonesia, 1999) and the Constitution Number 42/1999 about the Fiduciary Guarantee and Implementing the Regulation. The secondary legal material are books, journals, research reports, and articles.

TRADEMARK RIGHTS RISK AS GUARANTEE OBJECT

As stated before, the effort of activity that conducted by banks are full of risks so banks are required to manage those risks. According to Bramanto Djohanoputro, that risk is often said to be uncertainty. This uncertainty is often interpreted as a situation with several possible event and each event will cause a different result. But the level of probability of the event itself is

not known quantitatively, while the basic understanding of risk is related to the uncertainty measured quantitatively (Djohanoputro, 2006). In the realm of Civil Law there are teachings about risk (risico leer) which teaches that risk is an unexpected effect. In other words, in the law context the risk contains nuances of legal uncertainty (Januarita, 2020).

The meaning of risk, based on the Article 1, point 2 Financial Services Authority Regulations Number (Presiden Republik Indonesia, 2019) 18/P,OJK.03/2016 about Application of Risk Management for Commercial Banks (POJK 18/2016), is a potential loss cause occurring by certain event. While in Dictionary of Banks, the meaning of risk is the level of possible losses that must be borne in the provision of credit, investment or another transaction it can be form of wealth, losing profit or another economic ability because of a change in interest rates, government policy and business failure (risk). Therefore, bank must apply risk management in effectively way. Efforts to apply risk management is not only intended for the benefit of bank but it is also for customer interest since to control the risk information related with the product or Bank activities must be transparent. One risk, related to object guarantee of trademark rights, that must be managed by banks is legal risk. The meaning of legal risk based on POJK 18/2016 is that legal risk appear because of lack of supporting constitutions or bound weakness, such as the contract's legal requirements are not fulfilled or the binding of collateral is not perfect. Based on Black's Law Dictionary legal risk means: Potential affect in debt service or loan recovery as a probability caused by a defect in loan documentation (The Law Dictionary, 2020).

If the contract's legal requirements are not fulfilled, as stipulated in Article 1320 BW, which means that the subjective requirements, such as agreement element and proficiency, are not fulfilling, then the agreement can be cancelled (vernietig baar), while if the objective requirement are not fulfilled, it is related when the element of object and cause is allowed then the agreement is cancelled (nietig). If the credit agreement as main agreement is cancelled, then the guarantee of agreement as accessory / additional agreement is cancelled. It must be realized that the existence of the agreement guarantee depends on the basic agreement, which is credit agreement. If the guarantees of agreement are cancelled then the position of the bank will be only as concurrent creditor, which means that the creditor is only guaranteed by the general guarantee as stipulated in Article 1131 BW.

Legal risk can cause if the binding of agreement is not perfect. If the brand has not been registered so. there is no brand certificate. and the bank accepts it as guarantee the binding of guarantee is not perfect because the brand certificate is the proof of ownership on those brands. Brand certificate includes:

a. name and full address of registered trademark owner

b. name and full address of the power of attorney, in the case of an application through a proxy

c. receipt date

d. the country name and the receipt date of the application for the first time in the case of an application being filed using Priority Rights

e. brand labels that are registered, including information on the kinds of colors if the brands use color elements, and if the brands use a foreign language, letters other than Latin letters, or numbers that are not commonly used in Indonesian accompanied by translations in Indonesian, Latin letters and numbers that are commonly used in Indonesian and how to pronounce them in Latin spelling

f. number and registered date

g. class and types of goods or services whose marks are listed

h. the period of validity of a trademark registration

The other legal risk is the existence of the cancellation of the brand taken by one of the parties to search and remove the registration existence of a brand in General Brand List or the existence of invalidates rights based on brand certificates. In general, if the party believes that he has been harmed by the registration of a brand so he may submit a cancellation petition (Cantika, 2018). The claim for cancellation of a registered brand is submitted to the Commercial Court by an interested party based on reasons as regulated Article 20 and/or Article 21 of the Trademark and Geographical Indications Law in (Presiden Republik Indonesia, 2016).If the brand owner is not registered can file a lawsuit after submitting an application to the minister. The claim of cancellation of a registered brand can only be submitted within a period of five (5) years from the date of trademark registration. Cancellations can be filled indefinitely if there is an element of bad faith or the brand concerned is against the ideology of the state, laws and regulation, morality, religion, decency, and general order. Commercial Court Decision on the cancellation can be submitted a cassation. The brand cancellations cause the brand crossed out in General Brand List and brand certificate is no longer valid. If the brand certificate is no longer valid, again, then the guarantee agreements become removed realizing that the guarantee object was considered destroyed. As a result of the law the bank is no longer positioned as a preferred creditor but changed as a concurrent creditor.r.

RISK MITIGATION BY BANK

The efforts to minimize legal risk that must be carried out by banks on collateral objects in the form of rights to brands is conduct an analysis of collateral objects. The main thing to do is to identify whether the rights to the mark meet the legal and economic requirements as collateral (Usanti, Trisadini Prasastinah, 2017):

- Preferred trademark rights are owned by the potential debtor customer, if the third party owned then ownership must be ensured.

- Trademark rights are not in disputes because it is possible that brand certificates can be canceled, making it risky for banks.

- Trademark rights are accepted as guarantee object if the trademark rights are registered trademark rights in General Register of Trademark Rights in Directorate General of Intellectual Property Ministry of Law and Human Rights Republic of Indonesia with evidenced the existence of a brand certificate.

- Bank must notice the period of protection of trademark rights because the legal protection on trademark rights is registered for 10 years from the date of receipt. As example: if receipt date of the application for registration of trademark right is 1 May 2019 then the protection will apply until 1 May 2029. The period of protection of trademark rights can be extended every 10 years continuously as long as the trademark rights concerned are still in used in the goods and services as listed in the trademark certificate and goods or the service is still in production or traded. If it is not used and no longer produced or traded, the application will be rejected. The holder of trademark rights can apply for an extension of trademark rights from six (6) month before the end of the trademark rights protection period is registered and applications for extension can still be submitted no later than six (6) months after the end of the trademark rights protection period. This provision means that the owner of trademark rights it is not easy to lose the trademark right as a result of the delay in submitting an extension of registration of the trademark right.

- Banks must request the financial statements of the company which owns the rights to the trademark to know whether the rights to the brand have value or not.

- Banks considering that the trademark right is trademark right that has a good reputation and has a market share.

- Economic value in trademark right must be stable and it will be better if it increases.

- Especially for sharia bank, must make sure that trademark rights are from halal products, not from illegitimate products.

- The trademark right is free and is not being guaranteed by another party.

If is already fulfill the juridical and economic requirements, then the most important thing the bank must do is burden it with the guarantee agency. The guarantee agency that is possibly to burden is fiduciary guarantee agency or mortgage insurance agency (Usanti, Trisadini Prasastinah dan Silvia, 2018). The Bank of BNI Company (Persero) is using fiduciary guaran-

tee agency while mortgage ensure agency is used by Bank Muamalat Indonesia. Guarantee burden on trademark right become very important realizing the position of the bank as a creditor is determined by the imposition of a perfect guarantee. The meaning of perfect is the guarantee burden cause the goods right born until the bank position as preference creditor. This thing can be illustrated in the table below:

Table 1 Burden rights to trademark rights as guarantee

No.	Information	Mortgage	Fiduciary Guarantee
1	Legal Basis	Article 1150-1160 BW	Constitutions Number 42/1999 Regarding the Fiduciary Guarantee (UUJF)
2	Deed Form	Based on The Article 1151 BW pledge agreement in written form	Based on the Article 5 paragraph (1) UUJF must be in the form of an authentic deed drawn up by a notary
3	Property rights born	When the object is handed over to a creditor or third party (inbezitstelling), Article 1152 (1) BW	When registered in electronically with the Law and Human Rights Office and recorded in the fiduciary registry office database, Article 14 paragraph (3) UUJF juncto Government Regulation Number 21/2015 concerning Procedures for Registration of Fiduciary Guarantees and Costs for Making Fiduciary Guarantees Deed
4	Parties Who Registered	In the mortgage there is no registration	Submitted by Fiduciary Recipients, their attorneys or representatives

Note: own study.

Between the perfect burdens is needed a prepared clause in a pawning and fiduciary guarantee agreement to provide legal protection for banks as creditors. For example, the minimum requirements contained in a pawn agreement are as follows: (Usanti, 2017)

- In connection with the use of trademark right by pawnbroker, that means that while *wanprestasie* (breach of contract) is not happen and discontinue the pawnbroker have the right to use the entire right in connection with the trademark right and gives the right to the third party to use trademark right as contained in the trademark rights certificates.

- Related with benefits and shares. If there is no breach of promise the pawnbroker has the right to receive and maintain any, and all other profits and shares paid in connection with the trademark right. After the breach of promises the entire rights from pawnbroker to grants third-party name usage rights and other divisions cease to exist and, after that, all such rights become mortgagee. The mortgagee has

solitaire right to receive and maintain the trademark right and profit sharing.

- In connection with a prohibition that must be obeyed by the pawnbroker. The pawnbroker no transfer or burdening of trademark right is permitted in any form. Pawnbroker is prohibiting using trademark right which are contrary to the interests of the pawn recipient.

- Clause related to the solving lawsuit. In the event of injury to the pledge recipient the extent permitted by applicable law can take all actions that, in his own decision, are deemed necessary to protect each of his rights under this agreement, including but not limited, to selling, transferring, or otherwise submitting any part of the brand certificate through direct sales, auction sales or through any other method permitted by applicable conditions.

Trademark registration in Indonesia in practice, use a constitutive system. In this system, the registrant must register the brand to get protection. This system is also known as First to File System. This system confirms that the first man who register the brand has the tight on the brand. Indonesia adhere to brand register constitutive system, the protection of famous brand which not registered in Indonesia will still get the protection, because Indonesia is already ratify Paris Convention and TRIPS Agreement. Application of the principle of First to File is able to create:

1. Legal certainty to condition who owns the most important brand to be protected.

2. The proof of legal certainty, only based on the fact of register from brand certificate. Register or brand certificate become the only one proof from primary evidence.

3. Achieve alleged law who the brand owner is most entitled to with certainty, not cause the controversial between the first register and first user (Novianti, 2017).

The owner of a brand register have exclusive rights to prevent all the third party that not have the permission to use in trading activities. The same signs, for goods or services which are identical or similar, with the good or service on which the registered of trade brand where the use will cause confusion (Djuwityastuti, dan Ahmad, 2019). It was stated by Nisrina Atikah that (Atikah, 2019):

In Indonesia, registered trademark owner has exclusive right to use their trademark and give permission to another party to use their trademark. Based on TRIPS Agreement is affirmed that registered trademark owner has exclusive right to prevent third party who does not have the owner permission, to use it on trading activity, signs which have similarity, for the same commodity or service or similar with commodity or service on registered trademark, where it must be predicted before that is usage can cause a like hood of confusion. If a trademark is agreed to be registered, then registered trademark owner has exclusive right to use that

registered trademark. There are two systems which are believed in trademark registration which are declarative system and constitutive system (attributive).

Beside it there is some advantage from brand protection, which are (Novianti, 2017):

4. The Brands can product income for company from license, selling, commercialization from the protection of the brand.

5. The brands can increase values or guarantee in the eye of investor and financial institution.

6. In selling or merger asset brand can increase the company value in significant.

7. The brand increases the performance and competitiveness.

8. With brand register is help the protection and enforcement of its rights

The existence of brand as guarantee and the important meaning to minimize the risk on guarantee object in the form of trademark right must concern by credit provider, as stated by (Nguyen, Xuan-Thao and Hile, 2018):

Trademarks have an illustrious history of serving as collateral in financing deals for business. A company in need of financing as far back as in chattel mortgage could include trademarks in the mortgage grant for a loan. Then, if the company failed to repay the loan or meet its obligations under the mortgage agreement, the mortgagee would employ an agent to succeed to the mortgagor's business; it was the only way to foreclose on the trademark collateral. Much has changed in the financing landscape where trademarks are part of the collateral. One thing that does not change, however, is the creditors wanting to reduce their risks.

According to Deborah Schvey Ruff, Mayer Brown & Platt, and as quoted by Sri Mulyani, that the use of trademarks as a collateral for safe financing has become a dancing choice for borrowers. The trade brand as part of HKI recognized more interesting rather than the kind of the other guarantee because the credit risk is lower and often trademark guarantee agreements will allow borrowers to secure financing without the need to change their capital structure (Mulyani, 2012).

CONCLUSION

The trademark right is already accepting to conventional banks, or sharia banks, as guarantee object. But, bank must anticipate the legal risk which possible appeared from the brand, such as binding of principal agreement that which does not fulfill the conditions of the validity of the agreement, or the collateral agreement which is not perfect bound, even on the brand certificates that can be cancel. When those occur, it will harm the bank as a creditor because the bank's position is not as a preferred creditor but only as a concurrent creditor.

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