

Legislation Reform for Trade Secrets to Become Collateral for MSMEs in Indonesia

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Legislation Reform for Trade Secrets to Become Collateral for MSMEs in Indonesia

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ABSTRACT

In the year of 2010 the Government of Indonesia started the discussion on the use of the Intellectual Property Rights (IPRs) certificates as collateral by SMEs. The forms of IPRs discussed were: patents, copyrights, trademarks and lay out of integrated circuit designs. Nevertheless, actually there is one more IPRs form which is recognized by other countries, which can be used as collateral also, that is trade secrets.

This work will examine three matters, why trade secrets were excluded from the plan; how should the Government of Indonesia change the laws to classify trade secrets to be used collateral and what the contents of regulations which should be amended and established to qualify trade secrets can be used as collateral for MSMEs.

This study applied the framework of documentary research in the style of comparative legal research. Regulations which are used to make comparison with the Indonesian's regulations are regulations related to collateralization on trade secrets in Australia, the USA, Thailand and the PRC. In order to get insightful from the Indonesian authorities' perspective, the writer conducted consultations with officers of the Ministry of Cooperation and SMEs and Directorate General of IP Office of Indonesia.

The finding of this study shows that, trade secrets were excluded from the plan to use IPRs certificates as collateral because the officer did not mention trade secrets explicitly like the other forms of IPRs. In order to qualify trade secrets as collateral, the procedures to change the law should be conducted based on the Law Number 12 Year 2011 regarding the Establishment of Regulations. There are some regulations which should be amended, The Law Number 30 Year 2000 regarding Trade Secrets, The Law Number 42 Year 1999 regarding Fiduciary matters, The Law Number 37 Year 2004 regarding Bankruptcy and Suspension of Payment and a Ministry Regulation. In addition there are some technical regulations need to be established.

The finding of this study is significant for knowledge and hopefully can give contribution to the Government of Indonesia to not be reluctant to establish policies or regulation to include trade secrets in the plan to use certificates of IPRs as collateral. Furthermore, this study proposes recommendations on what regulations which should be amended and established to qualify trade secrets as collateral and matters which should be stated in those regulations.

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ABBREVIATIONS

APEC	Asia-Pacific Economic Cooperation
IPRs	Intellectual Property Rights
IP	Intellectual Property
MSMEs	Micro, Small and Medium Enterprises
OECD Development	The Organization for Economic Co-Operation and
PPSA	Personal Property Security Act
PRC	People's Republic of China
RWAs	Risk-Weighted Assets
SMEs	Small and Medium Enterprises
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UCC	Uniform Commercial Code
UNCITRAL	United Nations Commission on International Trade Law
USA	the United States of America
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

GLOSSARY

- Bankruptcy** means: 1. Jurisdiction or proceedings under or by virtue of (CTH) Bankruptcy Act 1966 SS 27, 5 (1). 2. The state of a person's affairs after becoming a bankrupt. 3. The process by which the State takes possession of the property of a bankrupt through the Official Trustee in Bankruptcy or a registered trustee and such property is realised and subject to certain priorities, distributed rateably amongst the person to whom the debtor owes money: (CTH) Bankruptcy Act 1996.
- Borrower** means: A person to whom money is lent. Borrowing necessarily implies repayment at some time and under some circumstances: See *Southern Brazilian Rio Grande Do Sul Railway Co Ltd* [1905] 2 Ch 78 at 83.
Source: Butterworths Concise Australian Legal Dictionary
Source: Butterworths Concise Australian Legal Dictionary
- Certificate** means: 1. a document in which a fact is formally attested <death certificate>. 2. A document certifying the bearer's status of authorization to act in a specified way <nursing certificate>. 3. A notice by one court to another court of the action it has taken <when issuing its opinion, the Seventh Circuit sent a certificate to the Illinois Supreme Court>.
Source: Black's Law Dictionary
- Civil Law** means: 1. One of the two prominent legal systems in the Western world, originally administered in the Roman Empire and still

influential in continental Europe, Latin America, Scotland, and Louisiana, among other parts of the world. 2. The body of law imposed by the state, as opposed to moral law. 3. The law of civil or private rights, as opposed to criminal law or administrative law.

Source: Black's Law Dictionary

Collateral

Property that is pledged as security against a debt; the property subject to a security interest or agricultural lien

Source: Black's Law Dictionary

Commune

A community of people who share property and responsibilities.

Source: Black's Law Dictionary

Common Law

means: 1. The body of law derived from judicial decisions, rather than from statutes or constitutions; CASE LAW <Federal common law>. 2. The body of law based on the English legal system, as distinct from a civil-law system; the general Anglo-American system of legal concepts, together with the techniques of applying them, that form the basis of the law in jurisdictions where the system applies <all states except Louisiana have the common law as their legal system>.

Source: Black's Law Dictionary

Confidential Information

Facts or knowledge that are not in the public domain.

Source: Butterworths Australian Legal Dictionary

Copyright

means: 1. The right to copy; specifically, a property right in an original work of authorship (including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, and architectural

works; motion pictures and other audio visual works; and sound recordings) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work. 2. The body of law relating to such works.

Source: Black's Law Dictionary

Creditor

A person to whom a debt must be paid. A creditor can look directly to the debtor and assert a direct entitlement to the benefits or fruits of the order or judgment that is made against the debtor: (CTH) Bankruptcy Act 1996 ss 40, 41 (2); *Abigroup Ltd v Abignano (1992)* 39 FCR 74; 112 ALR 497 at 508. A person entitled to enforce a final judgment or order for the payment of money is deemed to be a creditor under a bankruptcy notice: (CTH) Bankruptcy Act 1996 S 40 (1) (d), (g).

Source: Butterworths Concise Australian Legal Dictionary

Debtor

means: Someone who owes money to another, the creditor.

Source: Butterworths Concise Australian Legal Dictionary

Fiducia

means: An early form of transfer of title by way of mortgage, deposit, etc., with a provision for conveyance upon payment of the debt, termination of the deposit, etc.

Source: Black's Law Dictionary

Fiduciary

Relating to or based on a trust.

Source: Encarta Dictionary

Franchise

means: 1. the right to vote. 2. The government-conferred right to engage in a specific business or to exercise corporate powers.

Source: Black's Law Dictionary

Industrial Design

The shape, configuration, pattern, or ornament applied to finished article of manufacture, often to distinguish the product's appearance.

Source: Black's Law Dictionary

Intellectual Property

A group of legislative and common law rights affording protection to creative and intellectual effort and includes laws on copyright, design, patent, circuit layouts, plant varieties, confidential information, trade mark and business reputation (passing off and trade practices). Intellectual property encompasses both industrial property (patent, design and trade mark) as well as intellectual property. The term originally referred to copyright.

Source: Butterworths Concise Australian Legal Dictionary

Intangible Property

means: Property which lacks a physical presence. It is constituted by a right enforceable in a court of law or equity. An example is copyright.

Source: Australia Legal Dictionary

Invention

means: 1. A patentable device or process created through independent effort and characterized by an extraordinary degree of skill or ingenuity; a newly discovered art or operation. 2. The act or process of creating such a device or process. 3. Generally, anything that is created or devised.

Source: Black's Law Dictionary

License	<p>means: 1. A permission, usu. revocable, to commit some act that would otherwise be unlawful; esp., an agreement (not amounting to a lease or profit à prendre) that it is lawful for the licensee to enter the licensor's land to do some act that would otherwise be illegal, such as hunting game.</p> <p>Source: Black's Law Dictionary</p>
Patent	<p>means: 1. the governmental grant of a right, privilege, or authority. 2. The official document so granting.</p> <p>Source: Black's Law Dictionary</p>
Property	<p>means a word which can be used to describe every type of right (that is, a claim recognised by law), interest, or thing which is legally capable of ownership, and which has a value.</p> <p>Source: Butterworths Concise Australian Legal Dictionary</p>
Trade Secrets	<p>Any formula, pattern, device, or compilation of information that is used in a person's business and that gives that person an opportunity to derive an advantage over other persons who do not know or use it: <i>Bacchus Marsh Concentrated Milk Co Ltd (in liq) v Joseph Nathan & Co Ltd</i> (1919) 26 CLR 410.</p> <p>Source: Butterworths Concise Australian Legal Dictionary</p>
Trademark	<p>A word, phrase, logo, or other graphic symbol used by a manufacturer or seller to distinguish its product or products from those of others.</p> <p>Source: Black's Law Dictionary</p>

Valuation

means: 1. The act or process of ascertaining the worth of a thing.
2. The assigning of a value to land, property, or assets, in principal to establish the current likely market price.

Source: Butterworths Concise Australian Legal Dictionary

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