# RISK MITIGATION OF NEGATIVE PLEDGE COLLATERAL FOR SYNDICATED LOAN IN OIL AND GAS COMPANY

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**Abstract**

Lending by banks carries the risk of default, which may affect the bank's financial stability. To reduce this risk, banks apply prudential principles in syndicated loans, including the Negative Pledge mechanism, which prohibits debtors from encumbering their assets to other parties without creditor approval. However, as a state-owned company, PT P has limitations in using its assets as collateral, so using a Negative Pledge is an alternative solution. The challenge is that this clause has no specific regulation in Indonesia, which can weaken the creditor's position in the credit agreement. This research aims to analyze the application of Negative Pledges in syndicated loans in the oil and gas sector and identify risk mitigation strategies for creditors in Indonesian law. The research method used is descriptive with a normative approach based on analysis of positive law, jurisprudence, and legal doctrine. The findings reveal that although the Negative Pledge clause provides significant protection to creditors, its implementation in Indonesia faces challenges due to the absence of specific regulations governing the clause in detail. Additional clauses such as Disposal Restrictions are recommended to mitigate risks, along with enhanced oversight through more stringent agreement mechanisms. This study offers practical contributions to banks in managing syndicated loan risks and provides new insights into the development of banking legal policies related to the Negative Pledge in Indonesia.

***Keywords***: Risk Mitigation; Negative Pledge; Syndicated Loan.

## INTRODUCTION

Credit or financing provided by banks contains risk, so in its implementation the bank must pay attention to the principles of healthy credit or financing. To mitigate this risk, the bank must ensure that it grants credit or financing with confidence in the debtor's ability to fulfill its obligations as per the agreement.To obtain such confidence, before granting credit, the bank must conduct a careful assessment of the character, ability, capital, collateral, and business prospects of the debtor. Given that collateral plays a crucial role in credit granting, the bank can only accept collateral in the form of goods, projects, or receivable rights financed by the credit in question, provided other factors confirm the debtor's ability to repay the debt. Law-based land ownership and similar assets can serve as collateral. Banks are not required to request collateral, commonly known as additional collateral, in the form of goods not directly related to the financed object.

Bank lending carries the risk of failure or congestion in repayment, which can impact the bank's overall health. Since the bank sources its credit or financing from public funds deposited with it, the risks it faces can also impact the security of these public funds. Therefore, to maintain its soundness and increase its resilience, banks are required to spread the risk by arranging the distribution of credit, providing guarantees, or other facilities in such a way that it is not concentrated on certain debtors or groups of debtors.

In order to limit the risk in the lending activities of banks, Bank Indonesia stipulates provisions regarding the maximum limit of credit, guarantee, investment in securities, or other similar things that can be done by the bank to a borrower or a group of related borrowers, including to companies in the same group as the bank concerned.

To overcome the provisions of the maximum lending limit from Bank Indonesia or the Financial Services Authority, banks can use the mechanism of providing joint credit facilities or syndicated credit facilities. Syndicated credit facilities are often used to provide large amounts of credit, where there are several creditors who provide credit facilities to one debtor and are contained in one syndicated credit agreement.

Creditors or in this case banks in Indonesia choose to implement lending through syndication schemes, among others, to fulfill the rules of the regulator regarding the Maximum Lending Limit (LLL) where POJK no.32/POJK03/2018 has regulated LLL for related parties, unrelated parties and BUMN based on the percentage of core capital (tier 1) of each bank as a potential creditor. In addition, banks also consider risk sharing with other creditors because the nominal credit to be disbursed is large, so that if in the future there are obstacles to the fulfillment of the debtor's obligations to creditors, the risk received by the bank can be shared with other banks who are creditors of syndicated participants.

Being a state-owned company restricts PT.P.'s ability to secure credit facilities from banks, particularly when it comes to using company assets as collateral. As a result, creditors must find other alternatives that meet the prudential principles of syndicated lending. The arranged syndicated loan utilized a negative pledge as a credit guarantee.

Negative pledge, according to Hardwick, has the definition that the debtor will not enter into or permit any security agreement over its assets(Hardwick, 2017). This clause often extends to all members of a group or group of companies, although the debtor may choose to restrict it to specific subsidiaries or to the borrower alone.

However, there are issues with the implementation of the Negative Pledge clause in credit agreements in Indonesia. The collateral principle exists with the aim of ensuring that there is a second source of payment that can fully pay off the debtor's debt in the event that the debtor does not keep his promise to pay installments. Therefore, it can be said that apart from principles such as character, capital, capacity, and condition of economy, the use of the Negative Pledge of Assets clause itself on the basis of Article 1132 of the Civil Code is less able to fulfill the collateral principle so that it can be said that it is less able to fulfill the prudential principle as a whole (Tjahjono et al., 2022).

A negative pledge in the glossary of the Supreme Audit Agency (BPK) of the Republic of Indonesia is defined as a limitation promise, or in corporate law, a company's promise not to reinsure, which will only benefit other creditors. In practice, negative pledge clauses are used in credit agreements between banks as creditors and companies or legal entities as debtors.

A negative pledge is a clause in a credit agreement stating that the debtor will not provide collateral for its assets to third parties. This aims to protect the creditor so that the debtor's assets are not guaranteed to other creditors, which can cause the creditor's position to become subordinate. According to Hardwick, a negative pledge means that the debtor will not make or allow any security agreement over its assets, and in most cases, this clause is extended to cover all members of the corporate group (Hardwick, 2017).

A negative pledge on the Thomson Reuters Practical Law website is defined as a promise made by a debtor to a lender not to create, allow to pledge, or otherwise encumber certain assets under certain circumstances without the prior written consent of the lender. This is a covenant usually found in loan agreements or in the terms of bonds. In a bond, it may only prohibit the creation of collateral in certain circumstances unless the same collateral is created for the bond pari passu. The purpose of a negative pledge is to ensure that other creditors do not obtain a preferential right of collection over the debtor's assets in the event of insolvency.

The Negative Pledge clause is not absolute, meaning that all of the debtor's assets serve as collateral; it is not droit de suite, meaning that creditors cannot demand repayment from assets that the debtor has transferred or sold. Frieda Husni Hasbullah said that *droit de suite*, or *zaaksgevolg*, is one of the characteristics of property rights, namely a right that continues to follow the owner of the object or a right that follows the object in the hands of anyone (Hasbullah, 2002). The property right is an absolute right, which attaches to an object, grants direct control over it, and is subject to defense against claims from anyone.

Negative pledge is also not droit de preference; according to Frieda Husni Hasbullah, droit de preference is one of the characteristics of property collateral. Droit de preference means that property rights that occur first will take precedence over those that occur later, often also called the principle of priority (Hasbullah, 2002). With the use of negative pledge as collateral, the creditor does not have the right to prioritize the repayment of its debt; does not adhere to the principle of specialty where there is no privilege to carry out execution; does not adhere to the principle of publicity because there is no object that is pledged specifically so that there is no form of publication.

Negative Pledge clause as collateral until now has no format or regulation in Indonesia, so that its use will make the creditor in the credit agreement as a creditor who has receivables with general collateral as referred to in Article 1132 of the Civil Code. Article 1132 of the Civil Code provides as follows: *"Kebendaan tersebut menjadi jaminan bersama-sama bagi semua orang yang mengutangkan padanya, pendapatan penjualan benda-benda itu dibagi-bagi menurut keseimbangan, yaitu menurut besar kecilnya piutang masing-masing, kecuali apabila diantara para berpiutang itu ada alasan-alasan yang sah untuk didahulukan"* (Subekti & Tjitrosudibio, 1999).

The ability and management of uncertainty in management science is known as risk management. In the process, risk management can be included in management planning, where planning activities perfectly must involve elements of risk in order to answer and anticipate the possibility of harming the organization in the future. Risk management in corporate governance is critical to achieving goals and maximizing opportunities, which requires integration into operations and decision-making processes (Caraiman, 2020).

This description suggests that risk management involves making and implementing decisions to enhance the likelihood of achieving goals and mitigate the negative impact of an event on the organization. Additionally, risk management oversees the organization's progress towards achieving its goals and objectives. Risk management partially mediates the relationship between firm management size and financial performance, as well as foreign ownership and financial performance in emerging markets (Rehman et al., 2021).

Lie (2023), has conducted research related to Negative Pledge. In his research, Gunardi Lie outlines several issues related to the relationship between creditors and debtors which are often unbalanced and tend to suspect each other. The purpose of this research is to explain how negative pledge can be used to achieve the *pari passu pro-rata parte* principle. Furthermore, Gunardi Lie said that negative pledge can ensure a fair and equal position between creditors and debtors through Master Credit Agreement (MCA) where all creditors agree in one credit agreement contract with the same structure and Security Sharing Agreement (SSA) where all creditors agree that all credit guarantees are managed together in a transparent manner (Lie, 2023). However, in practice this is very difficult to realize because each creditor has different risk preferences so that the application of MCA and SSA is considered less effective.

Wen et al. (2023), conducted research on the application of Negative Pledge in companies thatpledgetheir shares and their influence on Corporate Social Responsibility (CSR). In this study, the main topic is the effect of shares pledged by controlling shareholders on corporate social responsibility (CSR). This study aims to determine how shares pledged by controlling shareholders affect the company's CSR performance. Furthermore, it is found that the pledged shares of controlling shareholders can affect CSR performance, where the CSR performance of companies tends to be worse when controlling shareholders have more pledged shares. Further analysis shows that the negative relationship between pledged shares and CSR only exists in financially constrained firms and private (non-government) firms, where controlling shareholders who pledge shares have a greater incentive to increase share prices and maintain their control rights. This study supports the margin call hypothesis that firms tend to reduce CSR spending to improve short-term financial performance and reduce the risk of losing control rights" (Wen et al., 2023).

Grigorieva (2021), discusses the study of the importance of pledgesas the most reliable way to ensure the performance of obligations. This research shows that today pledge is the most reliable way to ensure the performance of obligations, and therefore, issues related to the grounds for the occurrence of pledge are very relevant. Grigorieva specifies that a pledge arises not only on the basis of an agreement between the pledgor and the pledgee, but also on the basis of the law, which allows protecting the interests of weak parties to the maximum extent possible, providing them with the opportunity to obtain fulfilment of claims from the value of the pledged property (Grigorieva, 2021).

## RESEARCH METHOD

This research uses descriptive research methods. According to John W. Creswell and J. David Creswell, descriptive research method is an approach used to describe the phenomenon or population under study without influencing or manipulating existing variables. This method aims to provide a systematic and accurate description of the facts and characteristics of a phenomenon or population(Creswell & Creswell, 2018). Data collection in the research is carried out by means of literature studies in the form of secondary data as basic material to be researched by conducting a search for regulations and other literature related to the problem under study or often referred to as library legal research (Soekanto & Mamudji, 2014).

The method used in collecting primary and secondary legal sources based on the topic of the problem is to collect relevant legal materials using the interview method. Interviews were conducted with Key Person from banks and PT P Oil and Gas Company which is conducting a cooperation agreement in the form of funding cooperation in the form of credit facilities for the needs of one of the Oil and Gas Companies in Indonesia. This is expected to provide comprehensive and relevant information to the research conducted.

Researchers also studied the Credit Agreement/Facility Agreement document between the Bank as a syndicated lender and PT. P oil and gas company, where the syndicated credit agreement used a guarantee clause in the form of Negative Pledge. The dominant primary and secondary legal sources are literature in the field of banking law, especially collateral issues in banking credit.

Legal sources that are successfully obtained will be analyzed in a qualitative juridical manner. Qualitative juridical analysis is to discuss research that leads to theoretical studies regarding principles, rules and legal notions related to the implementation of the principle of horizontal separation. The results of the analysis produce a solution to take the steps that must be taken based on the flow of thought that has been prepared in a continuous and sequential manner, so as to obtain answers to the problems that are the starting point of this research.

## RESULTS AND DISCUSSION

PT P as a state-owned company faces limitations in using assets as credit collateral. To fulfill the prudential principle in syndicated loans, a Negative Pledge clause is used as a form of protection for creditors. Negative Pledge is a clause that prohibits debtors from pledging their assets to other parties without creditor approval (Komara, 2014). The use of this clause aims to prevent other creditors from obtaining priority rights over the debtor's assets, thereby reducing risks for creditors in syndicated loans (Komara, 2014; Tjahjono et al., 2022). However, the application of the Negative Pledge clause in Indonesia still faces challenges due to the absence of regulations that specifically regulate the mechanism and sanctions (Komara, 2014). In the Indonesian legal system, the creditor's right to Negative Pledge only refers to the general guarantee provisions in Articles 1131 and 1132 of the Civil Code (Utama et al., 2015), so the creditor could potentially lose stronger legal protection if the debtor violates the clause. Therefore, this study aims to analyze the effectiveness of the Negative Pledge clause in the syndicated loan agreement between banks and PT P and formulate risk mitigation strategies for creditors in the face of legal uncertainty in Indonesia.

### Legal Basis for the Application of Negative Pledge in Indonesia

1. Civil Code (KUHPer)
   a. Article 1320 of the Civil Code
   *Article 1320 of the Civil Code reads as follows:*
   *"Supaya terjadi persetujuan yang sah, perlu dipenuhi empat syarat:*
   *1) kesepakatan mereka yang mengikatkan dirinya;*
   *2) kecakapan untuk membuat suatu perikatan;*

3) *suatu pokok persoalan tertentu;*
4) *suatu sebab yang tidak terlarang."*

The first and second conditions are referred to as subjective conditions because they concern the parties entering into an agreement. Meanwhile, the third and fourth conditions are referred to as objective conditions because they concern the object of the agreement.

A subjective condition is a condition that if not fulfilled can result in the contract/agreement being canceled, while an objective condition is a condition that if not fulfilled can result in the contract/agreement being null and void(Gumanti, 2012).

Agreements containing negative pledge clauses must fulfill the four conditions for the validity of an agreement, namely the agreement of the parties, the ability to make an agreement, a certain thing, and a halal cause (Subekti & Tjitrosudibio, 1999). In this case, the negative pledge clause must be agreed by all parties involved in the agreement and must not violate the law or public interest.

b. Article 1338 of the Civil Code

Article 1338 of the Civil Code reads as follows:

*"Semua persetujuan yang dibuat sesuai dengan undang-undang berlaku sebagai undang-undang bagi mereka yang membuatnya. Persetujuan itu tidak dapat ditarik kembali selain dengan kesepakatan kedua belah pihak, atau karena alasan-alasan yang ditentukan oleh undang-undang. Persetujuan harus dilaksanakan dengan iktikad baik."*

Article 1338 of the Civil Code which states that all agreements made in accordance with the law shall apply as law to those who make them, is the basis for the principle of *pacta sunt servanda*.

*Pacta sunt servanda* means that the agreement that has been agreed upon then applies as a governing law (Gayo & Sugiyono, 2021). This principle regulates that the agreement must be carried out until it is kept by both parties. This means that every agreement or agreement has the force of law and is binding on the parties. So if the negative pledge clause is included in the credit agreement, then the clause must be respected and implemented by the parties.

2. Law Number 10 of 1998 concerning Banking

Credit or financing provided by banks contains risk, so that in its implementation banks must pay attention to the principles of healthy credit or financing. To reduce this risk, the guarantee of granting credit or financing in the sense of confidence in the ability and ability of the Debtor to pay off its obligations in accordance with the agreement is an important factor that must be considered by the bank (Undang-Undang RI Nomor 10 Tahun 1998 Tentang Perbankan).

Banks as creditors can include a negative pledge clause in the credit agreement to protect their interests. This means that the debtor may not pledge its assets to a third party without the consent of the bank. This is to ensure that the assets pledged as collateral remain available for repayment of obligations to the bank in the event of default.

3. Law Number 40 Year 2007 on Limited Liability Companies

Authority of the Board of Directors and Approval of the Board of Commissioners / GMS. The Board of Directors of a limited liability company must obtain approval from the board of commissioners or the General Meeting of Shareholders (GMS) for actions that may significantly affect the company's assets, including providing collateral for the company's assets (Undang-Undang Nomor 40 Tahun 2007 Tentang Perseroan Terbatas). Negative pledge can be regulated to limit the actions of directors in providing guarantees without the necessary approval.

4. Law Number 42 Year 1999 on Fiduciary Guarantee

Fiduciary Guarantee is a security right over movable objects, both tangible and intangible, and immovable objects, especially buildings, which cannot be encumbered by mortgage rights as referred to in Law Number 4 of 1996 concerning Mortgage Rights, which remain in the possession of the Fiduciary, as collateral for the repayment of certain debts, which gives the Fiduciary Recipient priority over other creditors (Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia).

In a fiduciary agreement, the debtor may be prohibited from granting another pledge of the same asset to a third party. Negative pledge serves to protect the creditor's rights over the asset that has been fiduciarily pledged, ensuring that the asset is not encumbered by other security rights that may reduce its value or interfere with the first creditor's rights.

5. Financial Services Authority (OJK) Regulation

OJK does not explicitly regulate the governance of the application of negative pledge in lending, but OJK regulates bank governance in carrying out risk management, including credit risk. Credit risk is the risk due to the failure of other parties to fulfill obligations to the Bank, including credit risk due to debtor failure, credit concentration risk, counterparty credit risk, and settlement risk (Peraturan Otoritas Jasa Keuangan Nomor 18/POJK.03/2016 Tahun 2016 Tentang Penerapan Manajemen Risiko Bagi Bank Umum, 2016).

Banks and other financial institutions are allowed to apply negative pledge in their credit agreements as part of credit risk management efforts, to ensure that the debtor does not provide additional collateral that may reduce the bank's ability to execute its rights on the asset.

**Purpose of Negative Pledge**

Negative Pledge has a number of different functions, depending on the circumstances in which the agreement is applied. The use of a negative pledge clause can be used inunsecured finance orsecured finance.

1. Purpose of Negative Pledge for Unsecured Finance

Negative pledge clauses in unsecured finance serve to protect the pool of assets available to the lender in the event of the borrower's bankruptcy. While cash flow projections are critical to assessing creditworthiness, lenders also need to know which assets will be available for distribution in the event of default. As secured assets are often excluded from the bankruptcy estate and unavailable to creditors, it is important to place restrictions on the ability of debtors to create security interests over their assets.

Negative Pledge clauses ensure that the debtor's assets are available to all creditors by preventing the debtor from pledging them to another party. Negative Pledge clauses are commonly used in international finance, where unsecured loans are more common due to the complexity of securing assets across national borders. This relates to the different legal systems in each country, especially regarding security rights. The laws applicable to security rights usually follow the doctrine of lex situs, which requires compliance with local laws. This can be an obstacle when the assets belonging to the borrower are located in several countries with different regulations or legal systems" (Tamasauskas, 2003).

In addition to limiting the use of assets as collateral, Negative Pledge clauses indirectly limit the excessive borrowing that a debtor can do. Companies that want to borrow above a certain level need to secure the loan, and by limiting the ability to provide collateral, the Negative Pledge can limit the amount of additional borrowing.

In addition, the Negative Pledge clause promotes the principle of equality among creditors when the debtor has many creditors. If some creditors are secured and others are not then an imbalance may occur, especially if the debtor is facing financial difficulties. Unsecured creditors may be more likely to negotiate debt rescheduling or restructuring, while creditors secured by the payment of liabilities through pledged assets may opt for a phased sale of assets, potentially damaging the value of the debtor's business. A Negative Pledge clause can prevent such conditions by maintaining a level playing field among creditors.

2. Purpose of Negative Pledge forSecured Finance

In secured lending, the Negative Pledge clause has a different function compared to unsecured lending. Although it serves some of the same purposes, the main purpose of a Negative Pledge in secured lending is to address the problems that may arise with the collateral that a debtor submits to another junior creditor (Junior Loan). This raises two main issues: first, it complicates the ability of the senior creditor to provide additional funds using the original collateral without the consent of the junior creditor. Secondly, junior lenders can often enforce their guarantees separately, which can interfere with the senior lenders' plans to execute the guarantees" (Wood, 1995).

**Structure and Content of Negative Pledge**

1. Obligations Imposed on the Borrower or Debtor

Negative Pledge is a promise by the borrower not to provide collateral for other lenders which is usually given to the creditor in connection with the signing of the credit agreement. Negative Pledge is often found in corporate credit facilities.

In corporate credit facilities, the statement not to pledge assets owned by the debtor includes assets that are currently owned and assets that will be owned in the future. The reason for including existing assets is an investigative function for creditors. It is possible for creditors to find out whether there is a collateral binding on the debtor's assets. If there is a violation of the agreement in general and a violation of the Negative Pledge, it will be considered a default, so that the debtor has an expressly regulated obligation to inform the creditor about the binding of collateral on the assets owned.

2. Scope of Negative Pledge

Negative Pledge clauses are used to prohibit the creation or provision of collateral by the debtor, covering various types of transactions that act as collateral. There are two main approaches in formulating negative pledge: 1. The use of "security interest" which provides broad coverage, but reduces predictability such as mortgages, fines; 2. The inclusion of a list of specific types of collateral such as mortgages, pledges, and liens.

Another issue that arises is quasi-security transactions such as leasing, sale-and-lease-back, or retention of title which can have a security-like effect. To prevent debtors from providing this form of collateral, such transactions should be included in the scope of the negative pledge clause.

3. Exclusions in Negative Pledge

The Negative Pledge clause in its drafting has a very broad scope, so it is necessary to arrange some exceptions. This is necessary so as not to hamper the routine operations of the borrowing company. Although the scope of exceptions for Negative Pledge is case by case depending on the condition of the borrower, but in general, the exceptions can be: 1) Guarantees made with the consent of the bank or majority creditor, 2) Liens arising by operation of law provided that the lien is repaid within a certain period of time, 3) pledges of assets acquired to secure the source of funds used for the acquisition process and 4) pledges that are of minimal value or do not have a significant impact on the company's finances" (Wood, 1995).

**Negative Pledge Covenant Enforcement**

1. Negative Pledge Violation

A breach of the Negative Pledge clause in a credit agreement is an event of default, so the lender can take certain actions, including requesting accelerated payment (partial or lump sum) or pursuing other legal remedies. However, in syndicated credit agreements, the majority creditor, which often holds two-thirds of the loan participations, can waive the borrower's obligations, potentially overriding the rights of minority creditors.

If the breach does not necessarily lead to default, the lender may seek damages under the credit agreement. In these circumstances the loss incurred may be of an insignificant amount or the lender may not directly suffer a financial loss.

In other circumstances where a breach by the borrower may trigger an event of default, the lender may apply for termination of the credit agreement where generally the credit agreement has provided for matters that may lead to termination of the agreement with consequent lump sum payment (repayment) and freezing of the remaining undrawn credit facility if still available.

Negative Pledge clauses can often be applied if the breach is considered intermediate or does not significantly result in the borrower being categorized as a default.

2. Specific Activities

Specific activities that must be carried out by the debtor contained in a credit agreement or a Negative Covenant are generally not relevant for breach of a negative pledge clause because it only contains a negative promise. However, in one example of a eurobond where the issuer promises to provide a similar guarantee if it subsequently issues a secured bond, a specific activity claim may be an option in addition to damages.

In general, specific activity will only be awarded if this remedy succeeds in providing a better principle of justice for both parties than the obligation to provide damages (Tito and Others v Waddell and Others (No 2), 1977; Wilson v Northampton and Banbury Junction Railway Co, 1874). However, for negative pledge breaches in eurobonds, damages are often considered sufficient, as the loss suffered as a result of the issuance of the secured bond can be easily calculated. However, there are situations where specific activities are considered fairer, for example if damages could threaten the liquidity of the issuer or if losses are difficult to determine.

Another factor that may hinder the granting of specific activity is the vagueness of the issuer's obligations, especially if the security provided is not well-defined. If the obligation is unclear, the court may not grant a specific activity order as it may lead to ongoing litigation regarding compliance.

Specific activities have limitations, for example, they only apply if the issuer still has assets that have not been pledged. If the breach is due to poor financial condition, then a legal injunction on the debtor's obligation to carry out specific activities may not be effective.

3. Injunctions

Injunctions are a preventive measure that differs from other covenants, in that an injunction functions after the breach has occurred (post). Injunctions aim to prevent breaches of the clause in the first place. Although injunctions are common covenants. Granting a prohibitory injunction to stop a breach of a Negative Pledge is usually not very difficult, especially if the breach is obvious.

One of the main obstacles is that the lender may not be aware of the breach until late in the process. If the borrower breaches the clause knowingly due to financial difficulties, the borrower may hide this breach until the transaction is completed. As these restraining orders are not granted retrospectively, this remedy is often ineffective in many practical situations.

In certain cases if the borrower breaches the clause or exhibits behavior that clearly leads to future breaches, a quia timet injunction may be available. However, evidence that a breach is highly likely is required, for example if the borrower starts negotiating with other credit institutions and is willing to provide collateral.

If the planned transaction may damage the lender's rights before the trial is completed, an interim injunction may be a solution. An interim injunction can stop the borrower's actions until the court decides the case. Based on the decision in American Cyanamid Co v Ethicon Ltd, the standard for granting an interim injunction is now more relaxed, provided there is a balance of interests in favor of granting the injunction.

If the borrower is allowed to proceed with the transaction during the interim period, the lender may suffer irreparable losses. Even if the court ultimately rules in favor of the lender, the assets may no longer be reachable. In such cases, a claim for damages may not provide sufficient satisfaction, especially if the borrower is unable to pay.

4. Appointment of a Caretaker

The appointment of a receiver by the court may be an option to protect assets if the borrower breaches the negative pledge clause significantly, thereby reducing the assets available to the lender. The court's jurisdiction to appoint a receiver is governed by the Supreme Court Act 1981 s. 37(1), which authorizes the court to appoint a receiver if it deems it just and proper.

The appointment of administrators usually occurs in two situations: first, when the plaintiff wishes to enforce its rights to the property and other legal remedies are inadequate, and second, to protect the property from harm.

In one such case between Bond Brewing Holdings Ltd v. National Australian Bank Ltd, the Supreme Court of Victoria held that the court has jurisdiction to appoint a caretaker even if the applicant has no property interest in the assets. However, courts rarely appoint administrators unless the case is very viable, especially if the borrower is still solvable, as legal action for damages is usually considered adequate.

If the borrower is insolvent or near insolvent, legal action for damages may not be adequate. However, the appointment of a board in this situation may not be made due to the applicable insolvency principles. The Bond Brewing case shows that courts tend to reject the appointment of a board to manage a company in financial difficulty, especially if the company opposes the appointment.

Lenders and borrowers may contractually agree that the lender has the right to appoint an out-of-court administrator in the event of a breach of certain clauses. However, an out-of-court appointed administrator is different from one appointed by the court. An out-of-court appointed administrator acts as an agent of the lender, whereas a court-appointed administrator is an officer of the court.

**Covenant Enforcement Against New Lenders**

Legal remedies against borrowers who breach negative pledge clauses may not always be effective, especially if the borrower is insolvent. These clauses are more likely to be breached in a bankruptcy situation, making legal remedies inadequate.

To protect their position, lenders have developed two approaches. The first approach strengthens the clause by adding an obligation to provide a similar guarantee or inserting an automatic guarantee clause.

The second approach focuses on the application of economic torts to pursue third parties who play a role in the breach of the clause. In every breach of clause, there is usually another party who received or requested the collateral at issue. This third party could be another creditor, either an existing one or a new one.

The original lender may consider limiting losses resulting from a third party (e.g., another bank) facilitating a breach of the clause. Such claims can be based on economic torts, which are actions that allow a party whose economic interests are violated by a third party to sue for damages.

Of the various types of economic torts, only the allegation of inducing breach of contract has a chance of success in this context. Negative pledge plays an important role in protecting the rights of existing creditors and safeguarding their interests in the assets pledged as security by the debtor.

**Application of Negative Pledge in Syndicated Credit Agreement "PT. P"**

Negative Pledge Clause is a provision in a debt agreement that prohibits the debtor (Debtor) from providing security over its assets, either in direct or indirect form (quasi-security), which can reduce the position of creditors if the debtor defaults. The explanation of the above clause can be described as follows:

a. Prohibition on Creating Direct Security (Clause 20.4(a))

Debtors are not allowed to create or maintain anysecurity over their assets. This means that the Debtors may not pledge their assets to secure the debts of third parties or to secure their own financial obligations to other parties.

b. Prohibition on Creating Quasi-Security (Clause 20.4(b))

Debtors must also not enter into transactions or arrangements that may be considered as a form of quasi-security, which fall into the following categories:

1) Selling assets with the possibility of leasing them back or repossessing them: For example, selling an asset to a third party and then leasing it back, which essentially serves as disguised debt financing.
2) Selling receivables with recourse: Selling receivables on the condition that the Debtor remains liable for the unpaid receivables.
3) Retention of title arrangement: This is an arrangement where the seller retains title to the asset until payment is made in full, which serves as security for payment.
4) Set-off arrangement or combination of bank accounts: There should be no arrangement where money in a bank account is used as collateral by way of set-off or combination of accounts.
5) Other preferential arrangements with similar effects: Other arrangements that effectively serve as collateral to secure financial obligations or asset purchases.

c. Exceptions to Negative Pledge (Clause 20.4(c))

Despite the prohibition, there are some exceptions where the Debtor may still create a pledge or quasi-security, including:

1) Existing guarantees: Guarantees listed in the schedule to the agreement (Schedule 8) are allowed as long as they do not exceed the agreed amount limit.
2) Netting or set-off in ordinary banking transactions: Netting arrangements in ordinary banking activities to offset debit and credit balances are permitted.
3) Set-off arrangements for hedging transactions: Set-offs arising from hedging transactions entered into to hedge commercial risks or for interest rate or currency management are also permissible, provided they are entered into in the ordinary course of business and not for speculative purposes.
4) Liens arising by operation of law: Liens arising under law in the ordinary course of commercial activities are permissible, provided the debt is paid on time or challenged in good faith.
5) Security over assets acquired subsequent to the agreement: If assets acquired subsequent to the agreement have been previously pledged, such pledges remain permissible provided that they are not created for the purpose of securing new debt.
6) Guarantees made under financial documents: Guarantees provided for in financial documents relating to loan agreements are also permissible.
7) Guarantees in sale and purchase transactions: A retention of title arrangement in a sale and purchase transaction is also permissible if it occurs in the ordinary course of commercial activity.
8) Guarantees with a maximum limit of 5% of the net equity of the consolidated group: Guarantees are permissible to the extent that the total value of the debt pledged does not exceed 5% of the consolidated group's net equity.

Overall, this clause is designed to protect creditors from a potential decline in priority in terms of repayment, while still providing limited flexibility for Debtors in managing their assets and liabilities.

In the syndicated credit agreement between PT P as the debtor and the syndicated bank as the creditor, it is necessary to impose restrictions as a risk mitigation measure. mentioned, risk is defined as the chance of loss, the possibility of loss, uncertainty , the dispersion of actual from expected results, the probability of any outcome different from the expected(Vaughan & Vaughan, 2007).

Meanwhile, risk management is an effort to find out, analyze, and control risks in every company activity, with the aim of obtaining higher effectiveness and efficiency (Darmawi, 2006). On the other hand, defines risk management as a field of science that discusses how an organization or company applies measures in mapping various existing problems, by placing various management approaches comprehensively and systematically (Fahmi, 2014).

From these three theories, in general, risk management must meet the requirements of organizational goal parameters. Risk management must also be analyzed and risk management can be monitored and controlled. The risk-oriented management system in the enterprise can ensure financial stability, liquidity, and solvency in unstable economic conditions, while ensuring the risk culture of enterprise development (Nasikan et al., 2021). explains that enterprise risk management can ensure microeconomic stability and optimize corporate activities in an uncertain environment, with information technology as a key role (Kulinich et al., 2023).

**Risk Mitigation on the Application of Negative Pledge on Syndicated Credit Agreement of Oil and Gas Company "PT P"**

1. Article 20.5

This clause regulates the restrictions imposed on Debtors in disposing (selling, transferring, or transferring) assets. The aim is to protect the interests of creditors by ensuring that Debtors do not carelessly sell assets that may affect their ability to fulfill financial obligations.

a. Prohibition of Asset Disposition (Clause 20.5a)

Clause 20.5a stipulates that each Debtor must not enter into one or a series of transactions involving the disposition of some or all of their assets. This disposition may include the sale, transfer, or other means of transferring ownership or control of assets.

b. Exceptions to the Disposition Prohibition (Article 20.5b)

However, there are some exceptions allowed under clause 20.5b. Debtors can still dispose of assets in certain situations that are deemed not to reduce the financial security of creditors. These exceptions are:

1) Disposition in arm's length transactions and in the ordinary course of business: Transactions that are conducted atarm's length and are part of the Debtor's normal business operations. For example, selling merchandise as part of regular sales operations.
2) Replacement or exchange of assets with comparable or better assets: Debtors may exchange or substitute their assets with other assets of equivalent or better value, type, and quality. This can happen, for example, when old equipment is exchanged for new, better equipment.
3) Dispositions related to GoI restructuring (Government of Indonesia Reorganization): If the disposition of assets is done in the context of or in support of a government reorganization (GoI Reorganization), this is allowed.
4) Sale of obsolete or redundant equipment or plant on arm's length terms: If Debtors have equipment or facilities that are no longer in use or required, they may sell them at fair market price.
5) Disposition to other members of the group: Assets sold or transferred to other companies within the same group are allowed, as internally they do not significantly affect the total wealth of the group.
6) Disposals with market value or consideration received do not exceed 10% of the group's consolidated net equity in a financial year: If the disposition has a market value or consideration received (when aggregated with other dispositions not covered by the above exceptions) not exceeding 10% of the total consolidated net equity of the group, the transaction is allowed. This provides flexibility for the Debtor to sell assets within certain limits without breaching the covenant.

c. Purpose of Clause:

This clause aims to prevent the Debtors from disposing of assets on a large scale or under conditions that may harm creditors, unless such dispositions are made for reasonable reasons and do not jeopardize financial stability. The stated exceptions ensure that the Debtors still have the flexibility to carry out day-to-day business operations, replace assets, or sell assets that are no longer useful, without harming the position of creditors.

2. Article 19 (Financial Covenants)

This clause discusses Financial Covenants which serve as financial restrictions that companies must comply with to ensure creditors that the company's financial condition remains stable.

a. Definitions in Article 19:
This clause defines important terms used in the calculation of financial covenants, namely:
1) Calculation Date: The date on which the financial covenant calculation is performed, which is June 30, 2022 and every December 31 and June 30 thereafter.
2) Calculation Period: The 12-month period ending on the Calculation Date. This period is used to calculate several financial ratios.
3) Consolidated EBITDA: The net income of the consolidated company, which is calculated before taking into account interest payable (Consolidated Interest Payable), taxes, and depreciation and amortization. EBITDA also excludes unrealized gains or losses, asset revaluations, and gains or losses from the sale of assets outside of ordinary trading activities.
4) Consolidated Interest Payable: The amount of interest and other financing costs incurred by the company during the relevant period, whether paid, outstanding, or capitalized.
5) Consolidated Net Debt: The total net debt held by a group of companies at a given time, which includes various forms of debt such as:
   a) Outstanding principal loan debt.
   b) Notes, bonds or similar instruments.
   c) Capitalized debt elements of finance leases.
   d) Receivables sold or discounted with the exception of on a non-recourse basis.
   e) Debt arising from deferred payments for the purchase of assets.
   f) Other debts that have a commercially loan-like effect.
   g) Debts guaranteed by other group members.
6) Tangible Net Worth: This is the Consolidated Group Net Worth adjusted by removing the component of goodwill or other intangible assets. It is a measure of the company's net worth based on tangible assets.

b. Financial Covenants (Article 19.2):
PT P as the debtor undertakes to comply with several financial ratios on each Calculation Date, which are tested based on the latest financial statements provided to the agent (the party monitoring the covenant). The details of the financial covenants are:
1) Consolidated EBITDAto Consolidated Interest Payable
The Company shall ensure that the ratio between Consolidated EBITDA to Consolidated Interest Payable on each Calculation Date is at least 3.00:1. This means that earnings before interest, tax, depreciation and amortization must be at least three times the total interest payable. This ratio shows the company's ability to pay debt interest.
2) Consolidated Net Debt to Tangible Net Worth Ratio
The company should ensure that the ratio between Consolidated Net Debt and Tangible Net Worth is not more than 2.00:1. This means that the company's total net debt should not exceed twice its tangible net worth. This ratio indicates the level of leverage or use of debt by the company relative to its capital.
3) Consolidated Group Net Worth
The company must ensure that the Consolidated Group Net Worth is not less than US$8,000,000,000 (Eight Billion US Dollars) on each Calculation Date. This ensures that the company has a minimum level of net worth sufficient to maintain its financial stability.

c. Purpose of Clause:
These financial covenants aim to ensure that the company maintains a healthy financial condition throughout the debt period. By maintaining the agreed ratios, creditors can have confidence that the company has the ability to repay debt and keep its financial position within safe limits.
Failure to meet these financial covenants can be considered a breach (default) of the loan agreement, which may entitle the creditor to take action, such as demanding early debt repayment or imposing penalties.

3. Article 21.6 (Insolvency)

This Insolvency Clause regulates the conditions under which the debtor (the party with debt payment obligations) is deemed to be in a state of insolvency (default or bankruptcy). This clause gives creditors or related parties the right to take action if the debtor is unable to fulfill its financial obligations. A debtor is deemed to be in insolvency when one of the following conditions occurs:

a. Inability to Pay Debt at Maturity
Debtors are officially declared unable to pay their debts when due. This can happen if the Obligor does not have sufficient funds or liquidity to meet the payment obligations due.

b. Admitting the Inability to Pay

The debtor explicitly admits that they are unable to pay the debt. This admission can be made through formal communication or specific actions that indicate that they are unable to repay their financial obligations.

c. Suspension of Debt Payment

The debtor delays payment on the debt. This means that the debtor voluntarily stops payments that should have been made, either in part or in full.

d. Debt renegotiation (Debt Rescheduling)

If the debtor is experiencing financial difficulties and as a precautionary measure starts negotiations with creditors to reschedule the debt. This usually happens when the debtor is looking for ways to extend or change the terms of debt repayment, in the hope of getting lighter or more affordable payment conditions.

In addition to the insolvency condition, this article also regulates other conditions that may arise and be experienced by the debtor, in this case, the condition of financial difficulties. This article covers actual financial difficulties experienced by the debtor as well as anticipated financial difficulties. Even before the debtor officially experiences financial difficulties, if there are signs or indications that such conditions may occur (e.g. due to liquidity problems, decreased income, or increased debt costs), the debtor can start renegotiating with creditors.

On the other hand, this article also regulates the possibility of the debtor negotiating with third parties outside the syndicated bank to obtain financial benefits for the debtor, for example by obtaining a lower interest rate or a longer period of time and a more flexible debt repayment mechanism for the debtor, this is also included in the insolvency condition so that it allows the creditor, in this case the syndicated bank, to take anticipatory steps in response to the debtor's actions.

If the creditor has prior knowledge that the debtor intends to breach the Negative Pledge or Disposal Restriction, then the creditor can demand against the debtor and or against the third party involved. The creditor in the case of a syndicated bank can advise that the third party will facilitate a breach of the credit agreement clause if they proceed with the transaction and subsequently the creditor can ask the third party to promise not to do so (Hardwick, 2017).

A third party who takes security or disposes of assets knowing that the security or disposal is in breach of the credit agreement may be liable for damages for participation in the breach of the agreement.

The consequences that a creditor may exercise for the Insolvency described in this article are as follows:

a. Demand immediate repayment of debt.
b. Accelerate the maturity of the debt (acceleration).
c. Initiate legal proceedings to demand payment.
d. File a bankruptcy claim or force the Debtor into bankruptcy proceedings.

As explained above, the Insolvency Clause aims to protect creditors from the risk of the debtor being unable to fulfill obligations to creditors. With this clause, creditors can act early before the debtor's financial situation deteriorates and can harm the continuity of debt payments and the position of creditors.

## CONCLUSION

The conclusion of this study shows that the Negative Pledge clause proves to be an effective protection mechanism for creditors in syndicated loans, by prohibiting PT P from providing collateral for assets to other parties during the credit agreement period. This protects the syndicated bank from the potential transfer of rights to assets that could reduce the debtor's debt repayment ability. In addition, the strict application of Financial Covenants also plays an important role in mitigating creditor risk by enabling the syndicated banks to monitor PT P's financial condition on an ongoing basis. Specific restrictions on the transfer of assets through various means have proven effective in maintaining the stability of the credit agreement, providing additional assurance to creditors that strategic assets will not be used as other collateral that could lower the bargaining power of syndicated creditors.

As a suggestion, companies involved in syndicated loans are advised to strengthen the Negative Pledge clause by adding specific requirements regarding the types of strategic assets that are most critical to business continuity, in order to provide more measurable protection to critical assets. In addition, while Financial Covenants are effective in monitoring financial conditions, syndicated banks should allow flexibility to adjust certain covenants, especially in volatile economic situations. These adjustments, such as revisions to debt ratios, can help ease the burden on borrowers without compromising the financial health of the company.

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