

THE LEGAL PRINCIPLE OF COLLATERAL IN FINTECH LENDING

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Abstract

Simple procedures and quick service on fintech lending gives an ease for fulfilling capital needs. Indeed, it does not require any collateral which may constrain debtors to deal with it. However, although this activity brings convenience, efficiency, quickness, and simplicity in lending services, many possible risks such as debtors' delayed payment or even default which may burden the creditors are likely to follow as well. Without any collateral as assurance, the risks may become much higher on fintech lending as the creditor becomes a concurrent creditor who only has relatively individual rights whose position is equal to the other creditors, no *droit de suite* principle, and the claim is individual with general assurance.

Keywords

Principle, Collateral, Fintech Lending

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Introduction

Fintech Lending or Fintech Peer-to-Peer Lending (Lending) or Information-Technology-Based Credit Service (i.e., *Layanan Pinjam-Meminjam Uang Berbasis Teknologi Informasi*) is an innovation in financial service sector by utilizing an appropriate technology for credit transactions without having to meet in person. (Schüffel, Patrick:2016). The mechanism is through a system the fintech lending provider has made, either through applications or websites (Chiu: 2017). What we need to note is fintech differs from fintech lending. Fintech is more general, not limited on particular industry of financial services, and it has been set under the Regulation of Bank Indonesia No. 19/12/PBI/2017 about the Organizers of Financial Technology (PBI 19/2017). The rule mentions that what it is classified into the organizers of fintech involves payment system, market support, investment and risk managements, loan, finance, and capital grant as well as the other financial services (You: 2018, 85).

On the other hand, FinTech Lending only deals with innovations of financial services on lending transactions, as set under the Regulation of Financial Service Authority No. 77/POJK.01/2016 (POJK 77/2016). There are 127 FinTech lending Companies registered and licensed to OJK on 30th September 2019. They may provide a quick financial service without (mostly) requiring any collateral, and it is through much easier process by utilizing smartphones (Sanicola, Lenny:2018). There are 3 (three) parties in fintech lending, including the administrator, creditor, and debtor. The creditor is an individual or corporation and/or company -either domestic or foreign or international organizations- with particular criteria to lend their fund to debtors. The debtor is either indigence (Indonesian people) or local companies with particular criteria to get loans from the creditor. The administrator is Indonesia corporations that provide, manage, and organize the FinTech-Based Lending Services. They can be either incorporated companies or cooperative unions that have been registered before implementing their activities. In addition, they should propose a service license to Financial Service Authority (i.e., OJK) after a year registered at most. Among those 127 fintech lending companies, however, some of them only provide credit service, such as *Solusiku*, *DuhaSyariah*, *Tree+*, *Awan tunai*, and *KTA Kilat*, which merely consist of administrator and debtor. Those fintech lending companies that only provide credit without involving any creditors are called *Peer-to-Peer Lending* as mentioned in POJK 77.2016 that regulates 3 (three) parties including creditor, administrator, and debtor.

Although FinTech Lending brings convenience, quickness, and efficiency in lending services, any possible risks such as delayed payment and debtors' default should be taken into account as well (Investree:2018). As long as it is not due to system failure, the administrator of fintech lending service has nothing to do with those risks. Hence, it belongs to the creditors. The risk becomes much higher without any specific collateral to be agreed to such as individual or material collateral (Lerong Lu: 2018, 320). Unfortunately, many administrators of fintech lending service such as Amarnya, Koinworks, Dompot Kilat, Awan Tunai, Cash Wagon, Kredit Cepat, Kredito, Esta Kapital, tunasaku, edufund, etc. do not mention any specific collateral in their T&C.

however, some others (e.g., Aktivaku) mentions a specific collateral in their T&C. The collateral is in the form of asset, people fund with collateral invoice on lending service. Akseleran is another example as more than 90% of their service portfolios are with collateral and only 2% are not. The collateral is in the form of invoice, goods, vehicles, land and building, jewelry, stock or securities. Additionally, other companies such as Dana Merdeka, Danamas, Toko Modal and Indodana decide to mention 70%-95% credit insurance in their T&C as the collateral of lending service they provide. Financial services with no specific collateral for assurance are very risky for both creditors and service administrators. It is consistent with Pranoto that Indonesian people, who are mostly middle to lower class, need effective and efficient financing, therefore the existence of fintech innovations that offer effectiveness and efficiency can increase inclusion in Indonesia's economic aspects. Because of the depth of Indonesia, many region have not been served by bank industry. (Pranoto, Mumawar Kholil dan Kukuh Tejomurti: 2019). Similarly, Sari Murti argues that The emergence of fintech industry actually aims to make financial services, banking and non-banking industries, more efficient. Access to financial services providers become easier and faster as well. But unfortunately, the arrangements and the supervision of the OJK is still weak and has not been effective. (Sari Murti:2019).

Every lending administrator has risk disclaimer mentioning that any possible credit risk and loss in lending services fully belongs the creditors. Neither state authority nor organization is responsible on such default and loss. On the legal context of agreement and collateral, the debtors' liabilities may not immediately disappear, and thus, any risk of loss and default entirely belongs to the creditors. Therefore, the issue to be discussed here is about the positions among parties and the application of legal principle of collateral in fintech lending.

Discussion

a. The position among parties in Fintech Lending

Referring to POJK 77/2016 about lending, there is no consistency in mentioning the term "credit" and "lending." POJK uses the term "lending" and it relates to credit risk, not lending risk. In regard to the definition of credit risk as what POJK No. 18/POJK/03/2016 mentions about the Implementation of Risk Management for Public Bank (POJK 18/2016), it happens due to particular default by customers or other parties in accomplishing their liability to the bank as what they have dealt with, including due to debtor's default. Hence, credit risk should belong to the bank for the customer has failed accomplishing his/her liability as mentioned in mutual agreement.

Based on POJK 77/2016, there are 2 (two) legal relationships framed in fintech lending agreements (Nibusinessinfo.Co.Uk:2018). They are one agreement between the administrator and the creditor and another agreement between the creditor and the debtor. Those two agreements are all mentioned in an electronic document. Taking a look on some examples such as in Dana Syariah, Akseleran, and Dana Cita, the clause that should be mentioned in the first agreement (i.e., between the administrator and

the creditor) includes the amount of fee, and thus, this agreement is characterized into the agreement of authorization as set under Article 1792 BW that authorization is an agreement through which one party may authorize another party on behalf of his/her name to do particular affair. Subekti argues that what refers to organizing an affair is having a legal action; an action that has legal consequence. The authorized has the legal action on behalf of the authorizer's name or as the representative of the authorizer. Hence, any action the authorized has belongs to the authorizer's responsibility, including the rights and obligations due to that legal action (Subekti: 1995). In this case, the administrator is authorized by the creditor to give credit to the debtor.

On the other hand, the second agreement (i.e., between the creditor and the debtor) in fintech lending is characterized into lending agreement as set under Article 1754 BW – Article 1773 BW, not a credit agreement as in bank. The agreement that frames the legal relationship between the creditor and the debtor is a credit agreement as mentioned in Article 1754 BW that credit agreement is an agreement, which determines the first party to surrender a number of items that can be used up to the second party on condition that the second party will return similar goods to the first party in the same quantity and condition. Article 1765 BW states that for lending money or goods that are used up, it is permissible to make a condition that the loan will be paid interest. Therefore, if the debtor does not carry out the performance as agreed, that is, to return the loan principal and the interest at a predetermined time, it is said that the debtor is considered default. (Trisadini:2019).

Sutan Remy Sjahdeini argues that credit agreement is classified into no-name agreement, not lending agreement as set under Article 1754 BW – Article 1773 BW (Sutan Remy Sjahdeini, 1993). Those two agreements have different characteristics. Credit agreement is classified into consensual agreement with firm conditions. Signing this agreement does not make the bank obligate to provide the finance yet until the customers fulfill all the T&C mentioned, such as they should cover all the objects of collateral with insurance. FinTech Lending, however, is a real agreement through which the debtors have a registration by completing their personal data including ID, bank account, the slip of the last salary or the statement of salary, Family Statement, and Tax Identification Number. All of the data should be uploaded to be analyzed and selected by the administrator through credit-scoring system. If all the data is approved, the agreement will be signed electronically and the credit will be immediately transferred to the debtor's or educational institution's account (if it is educational credit). Additionally, it should have a credit purpose which becomes a clause that must be mentioned in bank credit agreement. Therefore, when it goes out of the track (i.e., *sidestreaming*) of the initial purpose, the debtor is considered as default. As the consequence, it will terminate the agreement and thus, the credit should be paid off at once. The inclusion of this clause is the manifestation of circumspection by bank. On FinTech Lending, however, the agreement will not be terminated although the debtor deviates from the initial purpose. Such *sidestreaming* on credit purpose is unlikely to happen in credit for education since the credit is transferred to educational institution.

The disbursement of both bank credit and fintech lending can be through cheque, transfer form, cash withdrawal, or ATM. Toward any interest on both credit and fintech lending, it is considered as profit, but syari'ah-based fintech lending companies that have set particular margin or profit sharing as their profit.

Moreover, it notes that although on P2P lending fintech is based on a credit agreement, there is the difference among the bank and P2P lending fintech. As public intermediary institution, Bank has function to collect the public funds and to channeling public funds. On the other hand, in P2P lending fintech has power of attorney agreement which it ss made by the funder and the P2P lending fintech service provider as the financial service institution. (Trisadini: 2017).

The agreement between the engaged parties in fintech lending as seen in Dana Syariah, Akseleran, and Dana Cita is not set under POJK 77/2016. It is between the creditor and the administrator and between the administrator and the debtor. The following table presents the examples in detail.

Table 1. Fintech Lending Agreement in Dana Syariah, Akseleran and Dana Cita

No	Note		Dana Syariah	Akseleran	Dana Cita
	POJK77/2016	Practice	Contract Name	Contract Name	Contract Name
1	Agreement between the administrator and the creditor	Agreement between the administrator and the creditor	Tech-Based Financial Service Agreement with Syari'ah Principle	Lending and Agent Assignment Contract	Contract of Cooperation to Provide Finance for Education
2	Agreement between the creditor and the debtor	Agreement between the administrator acting as the authorized party of the creditor and the debtor	Financial Agreement for <i>Murabahah</i>	Credit Agreement	Credit Agreement
3	The position of administrator		The representative of the creditor	Agent of facility	The representative of the creditor

b. Legal Principle of Collateral in Fintech Lending

As previously discussed that loan cannot be apart from risks; the debtor's default on accomplishing their liability. Referring to the organization of credit agreement in banking affair, lex provides assurance for every creditor and on the debtor's assets, including moving and still objects, current and future ones, all of those are put as collateral of the debtor's bill. The sales of those assets will be then allocated fairly based on the amount of each bill. The collateral provided for all the creditors and deals with the debtor's entire assets is called general collateral. It means that the collateral object is neither specifically appointed nor intended to particular creditor, otherwise, the sales of the collateral object is distributed fairly among the creditors based on their credit (Ninis Nugraheni: 2017). The presence of material security is one element of both preventive and curative protection for the creditor due to the material security with economy value, and it can be shifted to give convenience for the creditors to execute the collateral object. For credit settlement in case that the debtor is default (Herowati Poesoko: 2008).

In case that fintech lending does not mention any collateral (i.e., material security) in its T&C, the creditor is classified into concurrent creditor who is equal to the other concurrent creditors. The rights that stem from this agreement is a relatively individual right that can only be upheld on the engaged party. Thus, the settlement on which the debtor falls into default is general collateral as set under Article 1131 BW. Therefore, it will not be appropriate to bestow all the credit risk on the creditor, as if the debtor had no responsibility on his/her liability and any loss the creditor might suffer. It is inevitable that fintech lending has some possible risks that creditors and administrator should anticipate, such as credit risk, operational risk, and legal risk. Hence, based on OJK Circular Letter No. 18/SEOJK.02/2017 about the Governance and Risk Management of Information Technology in Information Technology-Based Money Lending Service, the administrator should identify, appraise, and mitigate any possible risk by at least considering the debtor's assets, the business they do, data and information classification, risk in-charged party, acceptable limits of risk, and the determination of impact and risk appraisal.

Debtors are considered default if they fail to accomplish their liability. The default refers to an engagement that deals with the implementation of either performance or promise in an agreement. The default includes: no performance is accomplished, too late accomplishing the performance, accomplishing the performance inappropriately, and violating the T&C (Leonora Bakarbesy and Gansham Anand, 2018). In this case, the debtor is likely to be late in performance or even not performing at all as what has been agreed to. The defaults is considered as a legal institution. However, no specific and explicit regulation on *Burgerlijk Wetboek* as does the equivalent performance. As the result, the term *default* can only be defined from the meaning of vague provisions. The default amount is equal to the performance score but in the form of reversal of the performance score, including: not completing the performance at all, being late on completing the performance or completing the performance but not as it should be.

Furthermore, Subekti adds one more category of default, which refers to violating what has been mentioned in the agreement. (Trisadini:2019).

Following M. isnaeni, *default* essentially refers to debtor's action of not performing their obligation just so the creditor may not have their rights, and it indeed injures the creditor. Thus, there must be an authorized party that takes this liability of debtor's default. Regardless this issue, the term *default* is due to 2 (two) matters (M. Isnaeni: 2017), as follow.

1. Intentional default, classified into two categories:
 - a. Due to deliberateness
 - b. Due to negligence
2. Being default due to overmatch (force majeure) or *kahar*.

Neither Toko Modal nor Danamas requires any specific collateral such as material or individual collateral in their fintech lending. Danamas empathizes on proper business as the primary collateral, while Toko Modal omits any collateral on their T&C for their customers. To minimize any risk of credit, they do selection on their prospective debtors by utilizing a scoring system. The selected debtors who passed the selection process will be recommended to get financed. Besides, both Toko Modal and Danamas cover all their lending with insurance. Therefore, they will get 70% of the total credit from their insurance companies if their lending get trouble. Another 30% of total credit that is not covered by insurance will be secured by general collateral as set under Article 1131 BW. Similarly, Indodana does not require any specific collateral to the lending they provide. However, all of their lending is covered by Asuransi Simasnet without any additional cost, and they will get 95% of the total lending although the debtor fails to accomplish his/her liability.

Compared to banking business, implementing the principle of prudence is number one priority for banks, as Ninis Nurgaheni argues (Ninis Nugraheni: 2018), as follow.

In term of implementing the principles of prudence in providing credit, the Law of Banking mentions that banks should consider the principles of financing before providing any credit to debtors. Trusting the capability of debtor to repay their loan as mentioned in an agreement is crucial for banks to consider. The creditors' trust on debtors' capability to repay their loan is seen as warranty of the credit. Furthermore, collateral is an additional warrant, as defined in Article 1 subsection (23) of Banking Law that it is a proprietary warrant in the form of goods, projects, or rights of liability. Banks may not ask for any additional warrant if they have already had the trust of the debtors' capability to repay their loan through the primary collateral. Thus, the primary function of collateral is to secure and facilitate the credit by banks.

In Akseleran, more than 98% of their lending portfolio is covered by material collateral and only 2% of those lending is not covered. The collateral will affect the expedience of credit and alleviate any credit risk. It can be in the form of invoice, goods, vehicles, land certificate, building, jewelry, stock, and securities. Additionally, they also consider mentioning individual collateral such as personal or corporate guarantor in their lending. Although they have mention specific collateral on their lending, however, Akseleran does not lose their caution by conducting an analysis on debtors' expedience and credit risk selectively to minimize any loss. They provide different lending to mitigate any possible credit risks.

Akseleran conducts an analysis of expedience and credit risk to minimize any default of payment in quantitative and qualitative ways. The quantitative analysis involves checking the amount of income, the sufficiency of cash flow to pay primary loan and credit interest, ratio of equity and liability, ratio of debtor's asset and liability. Qualitative analysis involves checking the debtor's track record, his/her educational degree, and business or working experience. Akseleran takes their best to push down any bad credit. Nevertheless, possible credit risk remains exist, such as default in credit settlement and business. Although a specific collateral has been mentioned as assurance in lending transaction, the execution of the collateral can be difficult, and the deflation of its value is another problem that should be considered as well by Akseleran. They do the analysis of expedience and credit risk through an internal credit scoring system that focuses on three items, including things that deal with finance, collateral, and credit behavior. Validation of financial aspect is conducted by having a cross-checking on the debtor's checking account or the sales transactions in an online platform in which the prospective debtor sales his/her merchandises. The debtor's collateral is one of fundamental aspect that Akseleran concerns on to value the risk and rate of interest. it can be in the form of invoice/PO/SPK/Contract, goods supply, goods, land, and building. Akseleran conducts both quantitative and qualitative analyses by checking the debtor's track record and credit behavior. They also see their debtors' educational degree and business/working experience. In case that the debtor fails to pay their bill (i.e., default), Akseleran has 2 (two) process of credit collection, as follow.

1. Default at 1 – 90 days since the due date

In this stage, Akseleran's desk-collection and field-collection team will contact and visit the debtor to collect the over-due liability

2. Default more than 90 days since the due date

In this stage, Akseleran will assign an attorney or third-party collection service. They delegate an attorney to execute the collateral, propose a bankrupt appeal, civil lawsuit, or submit a police report for a crime. In addition, they take a third-

party collection service to contact and visit the debtor for credit collection purpose.

In fintech lending, it mentions fine for delayed payment. For instance, Danacita mentions 6% of the monthly credit installment or at least Rp 100.000 as the fine for delayed payment. Referring to Article 1243 BW, the creditor, represented by the administrator, may claim compensation to the default debtor. This compensation involves any cost, loss, and interest. Therefore, the following table shows the position of creditor in fintech lending.

Table 2. The Position of Creditor in Fintech Lending

No.	Note	The position of creditor	
		Material collateral	Individual collateral (Borgtocht)
1	With no specific collateral	Concurrent creditor	Concurrent creditor
	Collateral	Article 1131 BW (general collateral)	Article 1131 BW (general collateral)
	The rights that evoke	Individual rights	Individual rights
	Characteristics	a. Relative b. Equal c. No droit suite d. Individual sue	a. Relative b. Equal c. No droit suite d. Individual sue
	In case that debtor is default	Sue due to default	Sue due to default
2	With specific collateral	Preferent creditor	Concurrent creditor
	Collateral	a. Fiduciary (1150 BW) b. Mortgage (1160 BW) c. Mortgage right d. Fiduciary guarantee	Article 1131 BW (general collateral) that belongs to borg/guarantor.
	The rights that evoke	Material rights	Individual rights
	Characteristics	a. absolute	a. relative

		b. <i>droit de suite</i> c. <i>droit de preference</i> d. priority e. civil sue	b. equal c. No <i>droit suite</i> d. individual sue
	In case that debtor is default	Executing the object of collateral a. Parate execution b. <i>Titel eksekutorial</i> c. Underhand sales	Borg should cover all the liability of the default debtor.

The table shows that, with no specific collateral as assurance, the position of creditors (in case represented by an administrator in fintech lending) will be very risky since they only act as concurrent creditor with general security, particularly on which the debtor fails to complete his/her payment; *default*. It is definitely unfair for the creditor, given that they do not exactly know the debtor's assets and how many creditors he/she has engaged to. Therefore, in case that the debtor is considered *default* on his/her credit payment, the creditor may take a legal action based on the applied law by suing the default debtor to public court. Nevertheless, it will be problematic when the credit is not much, as what has happened to Danamas. The minimum amount of credit that Danamas provides is Rp 500.000, and it will waste much time, expense, and energy if they file a lawsuit to public court for such small lending. Similarly, M. Isnaeni argues that, in addition to wasting much time, expense, and energy, disputing in an open court may actually tarnish the reputation and image of the business actors. Both creditor and administrator should consider such risk as well on their business (M. Isnaeni: 2016).

Conclusion

Fund distribution with quick and simple procedures through smartphones is a kind of financial service in Fintech Lending, as most of them do not require any collateral for providing credit. It may bring convenience, speed, and efficiency in one hand but evoke some possible risks in another hand, such as delayed payment or even default settlement by debtors. Such credit risks may belong to the creditor and it gets higher if the fintech lending does not mention any specific collateral as assurance for their lending. In addition, the creditor only acts as concurrent creditor who has relatively individual rights, equals to the other creditors, no *droit de suite* principle, and the claim/suit is individual with general collateral as set under article 1131 BW.

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