CHAPTER II
LITERATURE REVIEW

A. Theoretical Framework

1. Theory of Contract

The theory used in this undergraduate final project is the theory of contract. This theory is used to analysis and determines the problems occur in the process of purchasing and charging a flat owned by foreigner to banking or non-banking institution. Contracts may be bilateral, multilateral or unilateral. A bilateral contract is an agreement in which each of the parties to the contract makes a promise or set a promise to each other. In a contract for sale of a home, the buyer promises to pay the seller an amount of money in exchange for the seller’s promise to deliver title to the property. Less common are unilateral contracts in which one party makes a promise, but the other side does not promise anything. In these cases, those accepting the offer are not required to communicate their acceptance to the offeror. For example, a person has lost a pet could promise a reward if the pet is found, through publication or orally. Those who learn about the reward are not required to search for the lost pet, but if someone finds the pet and delivers it, the promisor is required to pay. In similar case of advertisements of deal or bargain.

In the theory of, the deal is the most important part. According to George Whitecross Paton, the will “in real” not will as “declared” as
he mentioned “a secret mental reservation should be a bar to enforcement since the test is the real will and not the will as declared”. The will must be disclosed to the other party, it does not matter whether the will is submitted orally or in writing, even through sign language or by silence can still occur the agreement, provided that there is a deal.

This means that the word deal is not only the “consensus” of will of the promising party, but also the will and declaration of each party’s will must be corresponding, not simply compliance so that no defects will arise.

The traditional theory of contract according to Suharnoko, has the character that emphasizes the importance of legal certainty and predictability. The modern theory of contract according to Suharnoko, tends to have the tendency to ignore formalities of legal certainty to achieve substantial justice. The exception on the implementation of Consideration doctrine and the application of Promissory Estoppel doctrine and the principle of good faith in agreement are example of modern law theory on contract.

Consideration and Promissory Estoppel are two basic principles of law on contract in the common law tradition. A promise without

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14Ibid.
consideration cannot bind and cannot be executed. Consideration is a feedback such as promise, price or action. To bound the doctrine of consideration, court in England and United States of America creates the Promissory Estoppel doctrine. Promissory Estoppel doctrine according to Paul Latimer is a doctrine that prevents a promisor to take back the promise, in terms of the promisee because of the good faith to the promise has been doing something or not to do something, so that the promisee can suffer loss if the promisor is able to take back the promise given.

In the law of contract, it is known that a variety of theories, each of which describes the various segments of the relevant contract. Here are some of the legal theory of the contract in accordance with each group using certain criteria, as follows:

a. Theories Based on Both Sides’ Achievement (Teori-teori Berdasarkan Prestasi Kedua Belah Pihak)

Judging from the achievements of both parties in a contract, then in various parts of the world there are various theories of contract, which as follows:

1) Will Theory (Teori Hasrat)

This theory has its roots in the Roman law and has made remarkable progress in law, especially countries that uses the Continental Europe Legal System. In the Common
Law System, this theory has no place in it, through here and there in practice, mainly developed by the courts and the law of equity, which influenced this theory of will.

This Will Theory emphasizes the importance of will or intend (*hasrat*) from the party which gives out promises. The size of existence, the power of force and substance of a contract is measured from the will. So according to this theory, the most important in a contract is not what is done by the parties in the contract, but what they want. The most important thing is the “manifestation” of the will of the parties, not the will of the “actual” from them. So a contract was first formed in advance (at will), while the implementation (or not implemented) of the contract is a matter for later on. It should be recognized that the Will Theory which by nature is very subjective are increasingly driven out by theories oriented on the things with a more objective and factual nature.

2) Bargaining Theory (*Teori Tawar Menawar*)

This theory is a theory formed from the development of Equivalent Theory and gained its place in countries which embrace the Common Law System. This theory teaches that a contract is only binding as far as what
is negotiated (bargained) and which is then approved by the parties.

Even though so, this theory cannot or difficult to answer many parts of the law of contract. Things that are difficult to be answered by this theory are as follows:

a) Contract which performance is only done by one party only;

b) Contract to a third party (*Pactum in Favorum Tertii*);

c) Formal contract, such as:
   - The agreement which has to be written,
   - The agreement which must be done by or in front of certain official, such as notary or PPAT and others,
   - Agreement which has to be done with any particular procedure such as having to wear seals or stamps;

d) Subscription contract;

e) Reasonable contract (Indonesian: *Perjanjian Wajar*, Dutch: *Natuurlijke Verbin tenis*), such as:
   - Agreement on gambling,
   - Agreement which have not been fulfilled by person who has been declared bankrupt and have been conducted settlement;
f) The contract which is based on a moral obligation;

g) New contract which takes over the rights and obligations of the old agreement which is expired, declared bankrupt and so forth;

h) And others.

3) Equivalent Theory (Teori Sama Nilai)

This theory teaches that a new contract binds only if the parties of the contract provide a balanced or equal performance (equivalent). The understanding of equivalent is growing towards to things that are more technical and constructive. This theory began to emerge in the 17th century. Hegel accepts this theory based on the doctrine of Laesio Enormis from the Roman law, which is a doctrine which teaches that it is a huge loss suffered by the vendor in terms of sales price of a goods is less than half the price/value of goods sold.

The original Equivalent Theory historically got its place in the Common Law legal system, for example, look at all of the requirements for the existence of “consideration” in any contract. However, due to this theory cannot answer a lot of things, and have the opposite direction with the development of the law on contract, including those practiced in Anglo-Saxon countries.
themselves, the this theory gradually becoming obsolete. Because so many in the contract for any reason to do with the performance were not balanced between both parties.

4) Injurious Reliance Theory (*Teori Kepercayaan Merugi*)

This theory teaches that the contract is deemed to exist if the relevant contracts have resulted in trust for the parties to whom the promise was made so that the parties accept the appointment because of his belief it would cause losses if the promise was never realized. This theory is also growing very well in Common Law countries as a complement of the Equivalent Theory, though also recognized also by Civil Law countries.

b. Theories Based on Contract Formation (*Teori-Teori Berdasarkan Formasi Kontrak*)

In conjunction with the formation of a contract, in the science of law, there are four basic theories, namely:

1) Implied in-Fact Theory (*Teori Kontrak De Facto*)

This kind of contract which is firmly a contract which was never mentioned explicitly, but in reality, in principle, be accepted as a perfect contract.

2) Expressive Contract Theory (*Teori Kontrak Ekspresif*)

It is a theory with the power to come into effect strongly, which that each contract stated (expressive) by the
parties, either in written or orally, as far as the contract meets the requirements of the validity of contract (for the countries with Anglo Saxon Law System, it is the fulfillment of the element which are “offer”, “acceptance” and “consideration”), is regarded as the perfect bond to both parties.

3) Promissory Estoppel Theory (Teori Promissory Estoppel)

The theory of Promissory Estoppel is also called “Detrimental Reliance” which teaches that it is considered that there is a match among the parties if the other party has done something as a result of the actions of the other parties which are considered a bid for a contract bond.

4) Implied in-Law Theory (Teori Kontrak Quasi)

The Implied in-Law Theory teaches that in certain cases, if a certain condition is met, then the law may regard that there is a contract between the parties with a variety of consequences, even though in reality that contract never existed.

c. Basic Classical Theories (Teori-teori Dasar yang Klasik)

In addition, there are also some underlying theory (underlying presup-positions) which are classic, which is the bases of a contract, which as follows:

1) Will Theory (Teori Hasrat)
As already explained that the theory is more of a
underlying to “desire” (intention or will) of the parties
to the contract rather than what is in reality has to be
done from the contract. This theory has been explained
previously.

2) Thing Theory (Teori Benda)

In the Thing Theory, the contract is an “object”
(thing) that has been in existence objectively before the
performance provision of contract. Thus, a contract is
an object made, deviated or cancelled by the parties. So
according to this theory, there is nothing wrong with the
concept of anticipatory breach of contract (anticipatory
repudiation), a concept which states that a contract may
be considered breached even before the implementation
of the contract.

The theory of a contract as an object got its form
from the tendency of the formalization of a contract,
such a contract is made in written form, so it seems, is
becoming the object called such contracts are papers
bearing the contract signed by each parties.

3) Enforcement Theory (Teori Pelaksanaan)

This theory teaches that the most important from a
contract is the performance (enforcement) of the
relevant contracts, which in this case carried out by agencies of the courts or other dispute resolution body. Therefore, the main objective of every part of the contract is that in order to encourage the parties to pay their debts, carrying out its promises and act correctly in relation to the contract between the parties, so it is necessary to take actions to give effect to hinder tort (deterrent effects). So the implementation of the contract (including sanctions for the violators of the contract) in contract law is as important as the protection of property rights in a legal matter or conviction in criminal law.

4) Theory of General Principles (Teori Prinsip Umum)

According to this theory, a contract still refer to the general effect of the concept of the contract itself. so, even though many existing contract arrangements are detailed in the legislation or in the drafts of contract model that is commonly accepted, or self-regulated by the parties based on the principle of freedom of contract, but in general still refers and does not deviate significantly from the general principles and universal contained in the concepts of traditional contract.
d. The Theory by Holmes on the Legal Responsibility (Legal Liability) with Regard with Contract (Teori Holmes tentang Tanggung Jawab Hukum (Legal Liability) yang Berkenaan dengan Kontrak)

The theory by Holmes (well-known legal expert from United States) in principal the underlying principle are based on two principles as follows:

a) The main purpose of the legal theory is to adjust the external things to the rule of law, and
b) Moral mistakes is not an element of an obligation.

Therefore, the Holmes’ theory has the essence as follows:

a) The role of morality does not apply to contracts.
b) The contract is a way to allocate risk, i.e. the risk of default.
c) The most important thing for a contract is the standard external responsibilities, while the actual intention of the internal is not important.

e. Liberal Theory of Contracts (Teori Liberal tentang Kontrak)

In principle, the Liberal Theory of Contract teaches that everyone wants security. So someone must have respect to other person and property. But people also need some cooperation, and this cooperation can be done without the loss of liberty, which in this case is done through trust and
agreement. Thus, in contrast with lies or will statements, then a contract requires a moral commitment that these commitments should be implemented, but without such a commitment, there is no moral obligation to carry out the related liability.

B. Conceptual Framework

1. Overview on Flats and Strata Title

a. Overview on Flats and Strata Title in Indonesia

1) Term and the Base of Law on Flats and Strata Title

The term “Rumah Susun” based on the notion from Kamus Besar Bahasa Indonesia is “rumah atau bangunan bertenagkat terbagi atas beberapa tempat tinggal (masing-masing untuk satu keluarga; flat)”.

Which if the writer translates literally in English, means: “house or multi-storey buildings divided into multiple dwellings (each for one family; flat)”.

Further provision governing the flat regulated in Act Number 20 of 2011 regarding flats. Based on Article 1 number 1 of Act Number 20 of 2011, flats are:

“rumah susun adalah bangunan gedung bertenagkat yang dibangun dalam suatu lingkungan yang terbagi dalam bagian-bagian yang distrukturkan secara

\[17\] Tim Penyusun Kamus Pembinaan dan Pengembangan Bahasa, op. cit., pg. 851-852.
flats are multi-story buildings built in an environment that is divided into sections structured functionally, either in horizontal or vertical direction and consist of units that can be owned and used separately, especially for shelter, equipped with common portion, common goods and common land”

Flats are multi-storey buildings for residential purpose with each unit can be owned separately. As a residential building that can be owned separately, flat dweller have restrictions on the use of space and objects contained in the flats.18

According to A.P. Parlindungan, flats (rumah susun) is actually a term that was created by our legislation which existed as a form of housing that is owned by several person/legal entities separately with

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18Dr. H. Suriansyah Murhaini, S.H., M.H., Hukum Rumah Susun: Eksistensi, Karakteristik dan Pengaturan, (Surabaya: LaksBang Grafika, 2015), pg. 35.
all its fittings and as a residential or non-residential purpose, for offices, commercial business and others. In an flat complex its specially and separately provide its occupants with a special access to get out to main road and with all is rights and obligations. In the ownership of flats, it is proven with an ownership rights/title. The proof of ownership are granted with regard to the horizontal and vertical dimensions of a flat, i.e. there’s rights that are vertically held by groups or on collective rights and there’s rights that are horizontally that can be owned by individuals.¹⁹

Viewed by the residential flats concept, there are parts that can be owned individually and separately called the Strata Title and there are parts that constitute the common rights of all owners of the flat, consisting of common portion, common goods and common land. Beside the strata title that is divided and owned separately and common portion of the building with all of the common goods and common land of which have been built a flat above it that because of the nature and

¹⁹Ibid., pg. 36.
function should be used and enjoyed together and cannot be owned individually.\textsuperscript{20}

Common portion (\textit{bagian bersama}) is a part of a flat that is owned not separately for common use with the unified function of flat, this section cannot be owned and monopolized by an owner of the strata title unit. Common portion are foundation, stairs and roofs.\textsuperscript{21}

Common Goods (\textit{Benda bersama}) are objects that are not part of flat, for sharing and jointly used, which is owned together undividedly, this common goods complements the flats so it function optimally. For instance, parking lots, sports field, place for worship which are all located outside the apartment but remains above the Common Land.\textsuperscript{22}

Common Land (\textit{Tanah bersama}) is a piece of land that is used in the basis of common rights which upon it stands a flat with the limitation in terms of the building permit (\textit{Izin Mendirikan Bangunan}). The ratio of joint ownership of the piece of land on which above it stand a flat has a sufficiently strong legal basis, as mentioned in Article 4 paragraph (1) \textit{juncto} Article 2


\textsuperscript{21} Ibid., pg. 3.

\textsuperscript{22} Ibid.
Act Number 5 of 1960 regarding Base Agrarian Regulation indicating that land ownership can be owned or controlled jointly with other parties. While the provision of Act Number 20 of 2011 regarding Flats is the basis for setting flat units. Regulation on flats stems from the arrangement in Act Number 5 of 1960 regarding Base Agrarian Regulation, and thus in the process of its development, possession until the transfer of rights and title is to be fixed according to the rules as stated in Act Number 5 of 1960 regarding Base Agrarian Regulation. Thus the rules in Act Number 20 of 2011 regarding Flats must not collide with the rules in Act Number 5 of 1960 regarding Base Agrarian Regulation.\textsuperscript{23}

\begin{center}
\begin{tikzpicture}
\node[fill=blue!20!white, rounded corners] at (0,0) (A) {Rights Included in Strata Title Ownership};
\node[fill=red!20!white, rounded corners] at (0,-1) (B) {Personal Rights (Hak Pribadi)};
\node[fill=red!20!white, rounded corners] at (0,-2) (C) {Common Rights (Hak Bersama)};
\node[fill=green!20!white, rounded corners] at (0,-3) (D) {Common Portion (Bagian Bersama)};
\node[fill=green!20!white, rounded corners] at (0,-4) (E) {Common Land (Tanah Bersama)};
\node[fill=green!20!white, rounded corners] at (0,-5) (F) {Common Goods (Benda Bersama)};
\end{tikzpicture}
\end{center}

\textsuperscript{23}Ibid., pg. 3-4.
Figure 2.1 Classification of Rights by the Ownership of Strata Title

The parts that are separated by ownership of individuals are managed by the owner of the strata title units, as for common portion, common goods and common land are managed together by all owners of the flat through Association of Residents and Owners of Strata Title (Indonesian: Perhimpunan Penghuni dan Pemilik Satuan Rumah Susun abbreviated PPPRS). The principle that applies in the law of flats (including condominium, apartment and strata title), are:

1) principle of horizontal separation (asas pemisahan horizontal), in separating each strata title unit with another strata title unit next door (on the same level/floor);

2) principle of vertical separation (asas pemisahan vertikal), in separating each strata title unit with another strata title unit that is above or below it (different level or floor).24

24Ibid., pg. 5-6.
When linked with the principles of our national land law which does not use the principle of attachment or asas perlekatatan in Indonesian (accessie beginsel), but instead uses the horizontal separation principle, namely the principle in Indonesian customary law (hukum adat), then the notion of flat meets all these requirements, because according to the customary law, ownership of strata title are not required to own the land as well. The house is considered as a standalone object that can be separated from their land rights, thus the same applied to strata title. Ownership of flat unit with the title of strata title is a form of application of the horizontal separation principle.²⁵

2) Types of Flats

Flats are divided into several types by its function and usage. According to Act Number 20 of 2011 regarding Flats, the types of flats consists of:

a) Public Housing Flats (rumah susun umum)

Public housing flats are organized to meet the needs for houses for the law-income communities. Public housing flats is also known as simple public

²⁵Ibid., pg. 6-7.
housing flats, Indonesian terminology: *rumah susun sederhana* (Rusuna) given to the people with the rights of lease (known as “*rumah susun sederhana sewa*” or “Rusunawa”) and with ownership rights/freehold title (*hak milik*) known as “*rumah susun sederhana dengan hak milik*” or “*Rusunami*”.

Public housing flats are organized to meet the needs for houses for the law-income communities (Article 1 number 7 Act Number 20 of 2011 regarding Flats).

b) Special Flats (*rumah susun khusus*)

Special flats are flats organized to meet the special needs (Article 1 number 8 Act Number 20 of 2011 regarding Flats).

c) State’s Flats (*rumah susun negara*)

State’s flats are flats owned by the state and serves as a residence or dwelling, fostering families, as well as supporting the implementation of the state’s official and/or civil servant duties (Article 1 number 9 Act Number 20 of 2011

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26 Dr. H. Suriansyah Murhaini, S.H., M.H., *op. cit.*, pg. 51.
Regarding Flats.\textsuperscript{29} These types of flats were reserved for state’s official and/or civil servant who carries out task of state. This kind of flats are not given with rights of lease or property rights, but only given the rights to occupy only.\textsuperscript{30}

d) Commercial Flats (\textit{rumah susun komersial})

Commercial Flats are flats organized to gain benefit out of it (Article 1 number 10 Act Number 20 of 2011 regarding Flats).\textsuperscript{31} The term often used by developers are apartment, flat atau condominium. This type of flat are usually a luxury flats built for sale to the middle-upper class and expatriates working in Indonesia.\textsuperscript{32}
Flats by the usage, are classified into:\textsuperscript{33}

a) Residential flats (rumah susun hunian), i.e. flats that is entirely serves as a residence purpose.

b) Non-residential flats (rumah susun bukan hunian) i.e. flats that is whole fully serves as a place of business.

c) Miscellaneous flats (rumah susun campuran) i.e. flats that is partially serve as shelter/residence and partially functions as a place of business.

b. Overview on Flats and Strata Title in Singapore

1) Term and the Base of Law on Flats and Strata Title

The term for “rumah susun” in Singapore are flat, condominium and apartment. Despite the different terminology in Singapore, only flat that is explicitly interpreted in the laws and regulations of Singapore. Based on Article 3 of Land Titles (Strata) Act (Chapter 158) and Article 2 of Residential Property Act (Chapter 274), a flat is:

“flat means a horizontal stratum of any building or part thereof, whether such stratum is on one or more
levels or is partially or wholly below the surface of
the ground, which is used or intended to be used as a
complete and separate unit for the purpose of
habitation or business or for any other purposes, and
may be comprised in a lot, or in part of any
subdivided building not shown in a registered strata
title plan”

The laws and regulation that governs about flats,
apartment and condominium in Singapore can be seen
in several Acts, such as: Residential Property Act
(Chapter 274), Land Titles (Strata) Act (Chapter 158),
Housing and Development Act (Chapter 129), Housing
and Urban Development Company Housing Estates
Act (Chapter 131), Urban Redevelopment Authority
Act (Chapter 340), Executive Condominium Housing
Scheme Act (Chapter 99A) and Housing Developers
(Control and Licensing) Act (Chapter 130).

84% of Singapore’s population currently resides in
high-rise public housing. The remaining 16% of
Singapore’s population reside in a variety of private
housing comprising of landed and non-landed property.\textsuperscript{34}

![Diagram of Housing Stock in Singapore]

\textbf{Figure 2.4} Housing Stock in Singapore

As in most countries which practice the common law system, in Singapore, one of the main considerations that determine the value of land is its tenure. The system of landholding as based on the feudal English concept of tenures and estates in land was received into Singapore by the Second Charter of Justice. As a result of this, there exist the estates of freehold and leasehold in Singapore.\textsuperscript{35}

\textsuperscript{34}Alice Christudason, \textit{Private Sector Housing Redevelopment in Singapore: A Review of the Effectiveness of Radical Strata Title Legislation}, (Singapore: University of Cambridge, 2004), pg. 4.
\textsuperscript{35}Ibid., pg. 6.
Public housing in Singapore is managed by the Housing Development Board (HDB). The majority of the residential housing developments in Singapore are publicly governed and developed. These flats are located in housing estates, which are self-contained satellite towns with schools, supermarkets, clinics, hawker centres and sports-recreational facilities.\(^\text{36}\)

The year 1964 marked another milestone in Singapore’s public housing when the Housing Development Board (HDB) introduced the Home Ownership Scheme to help the people own flats. The scheme not only provides citizens a stake in the country, but also a means of financial security and a hedge against inflation and rising rents.

In the ownership of strata title in Singapore, there’s a term called the “Share Value”. The share value of a property is a figure that represents the proportionate share entitlement assigned to each strata title unit in the same development. The purpose of a share value is to determine the amount of shares each owner has in relation to the other owners in the development. For example, if the share value of a unit in a condominium

is represented by the figure 5/350, then 350 represent the share value of all the units in the condominium and 5 is the share value allotted to the unit. The share value shares almost an identical definition on the term of “Nilai Perbandingan Proporsional (NPP)” in Indonesian strata title.

The share value determines the amount of contributions for maintenance that an owner has to pay to the management corporation of the estate for maintaining the common areas in the development.

Second, the share value of a strata lot determines the voting right of a unit owner. The higher the share value an owner has, the more voting rights he or she has.

Third, the share value determines the share an owner has in common property, which is jointly owned by all the owners in a development.

2) Types of Flats

In Singapore, housing is divided into 2 (two) types. Public housing and private housing. As mentioned, flats are also divided into 2 (two) types. Flat that’s in the public housing category is HDB Flats. These kind

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of flat are held under leases from the Housing and Development Board (HDB), including HUDC (Housing and Urban Development Company) flats which the Housing and Development Board takes over the management in 1982. Now, the Housing and Development Board is the only sole provider of public housing in Singapore. Flat that’s in the private housing category are condominium, executive condominium and apartment that the development are carried out by private sectors.

Development of the HDB flats as well as private development began to diversify due to the diversity of the needs of Singaporean, such as:

a) Studio Apartment, designed to fulfill the need of senior citizen which is sold with 30 years leasehold, located in a region with a sufficient facilities and good access.

b) 2-Room Flexi, 3-Room, 4-Room, 5-Room, 3Gen Flat and Executive Flat, that is a living are with various floor area, number of bedroom and bathroom, designed for various need and purposes with different price ranges.
c) Executive Condominium (EC) are comparable to private condominium in terms of design and facilities. Build and sold by private developers. They are attractive options for higher-income Singaporean.  

d) Condominium or Condo is a term used for housing buildings developed by private companies, such as Far East Organization or Keppel. Condos generally include some special amenities and services such as 24-hour security, gyms, swimming pools, tennis course and spas.  

e) Apartment is a term refers to housing that has been built primarily for the purpose of rental, such as service apartment and student dormitories/hostels. This hostels offer highly affordable accommodation prices for students, hence being an attractive option to those here (in Singapore) with student passes.  

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2. Overview on Foreign Nationals
   
a. Overview on Foreign Nationals in Indonesia

1) Definition on Foreign Nationals

The term Nationality in Indonesian is “Warga Negara” which according to Kamus Besar Bahasa Indonesia is “penduduk sebuah negara atau bangsa berdasarkan keturunan, tempat kelahiran dan sebagainya yang mempunyai kewajiban dan hak penuh sebagai seorang warga dari negara itu”\(^{40}\) which in English means “population of a certain country or nation based on ancestry, birth place and so on which

\(^{40}\)Tim Penyusun Kamus Pembinaan dan Pengembangan Bahasa, op. cit., pg. 706.
have obligation and right as a citizen of the said country”

While foreigner or foreign national in Indonesian is “Orang Asing” which according to Kamus Besar Bahasa Indonesia is “orang lain, orang dari negara lain, orang yang tidak dikenal”\(^{41}\) which in English means “other person, person from another country, unknown person (foreign)”

According to Act Number 12 of 2006 regarding Indonesian Nationality, Article 1 number 1, a Nationality is a citizen of a country as appointed by the law. In Article 7 of Act Number 12 of 2006 regarding Indonesian Nationality, the term foreigner (orang asing), is “every person which is not an Indonesian Nationality is treated as foreigner”. Thus, in Article 4 of Act Number 12 of 2006 regarding Indonesian Nationality, have been detailed that an Indonesian Nationality are (the Writer translate literally from the original Indonesian text):

a) everyone as based on the law and/or agreement between Indonesian government and another

\(^{41}\)Ibid., pg. 1125.
country before this Law is valid, has already became an Indonesian;

b) a child born from legitimate marriage of a
Indonesian father and mother;

c) a child born from legitimate marriage of an
Indonesian father and mother with another nationality;

d) a child born from legitimate marriage of a father
with another nationality and an Indonesian mother;

e) a child born from legitimate marriage of an
Indonesian mother and a father with no nationality
or the law of the father’s country of origin didn’t
give a nationality to that said child;

f) a child born in within 300 (three hundred) days
after the father pass away and from a legitimate
marriage and the father is an Indonesian
nationality;

g) a child born not from a legitimate marriage and the
mother is an Indonesian nationality;

h) a child born not from a legitimate marriage of a
mother with another nationality that is recognized
by the Indonesian father as his child and the
recognition is done before the child reaches 18 (eighteen) years old or not yet married;

i) a child born in the territory of the Indonesia which at the time of birth, it’s not clear the nationality of the father nor the mother;

j) a child which is born and found in the territory of Indonesia as long as the father nor the mother is unknown;

k) a child which is born in the territory of Indonesia if the father nor the mother didn’t have a nationality or its whereabouts is unknown;

l) a child born outside the territory of Indonesia from an Indonesian father and mother which because of the regulation of the country where the child was born gives nationality to the child;

m) a child from a father or mother which is approved with an Indonesian nationality, then the father and mother passed away before the saying of the oath or declaration of allegiance.

2) Types of Foreign Nationals

According to the Circulars Letter of the State Minister of Agrarian Number 110-2871 of 1996, from
the presence in Indonesia, a foreigner or foreign national can be categorized into 2 (two) category/types, namely:

a) foreigner that stay in Indonesia permanently (resident/penduduk Indonesia), and

b) foreigner that do not stay in Indonesia permanently, hence just temporarily staying in Indonesia.

From the Circulars Letter of the State Minister of Agrarian Number 110-2871 of 1996, then distinct the difference between the 2 (two) types of foreigner above with the documentation it needs to purchase or acquire a property (house) in Indonesia, namely:

a) for foreigner that stay in Indonesia permanently: 

*Izin Tinggal Tetap* (Permanent Residence Permit),

and

b) for other foreigner: *Izin Kunjungan* (Visit Permit) or other immigration permit in the form of a sign applied in passport or other immigration documentation that the foreigner possess.

b. Overview on Foreign Nationals in Singapore

1) Definition on Foreign Nationals
Singaporean nationality law is derived from the Constitution of Singapore and is based on *jus sanguinis* and a modified form of *jus soli*. There are three ways of acquiring Singaporean citizenship, such as citizenship by birth, citizenship by descent and citizenship by registration. Citizenship by naturalization is no longer granted.\(^{42}\) Foreigner in Singapore referred to as a non-Singaporean and non-Singapore Permanent Resident.\(^{43}\)

2) **Types of Foreign Nationals**

According to the Section 2 of the Residential Property Act (Chapter 274), a foreigner means any person who is not any of the following:

- a) a citizen of Singapore;
- b) a Singapore company;
- c) a Singapore limited liability partnership;
- d) a Singapore society.

3. **Publicity Principle (Asas Publicited)**


Publicity principle is the principle which states that all charges, weather encumbrance right, fiduciary guarantee and mortgages have to be registered. Registration is intended for the third party to know that the object afore mentioned are being charged as collateral.

Registration of encumbrance rights in the city/district Land Office (Badan Pertanahan Nasional kabupaten/kota), registration of fiduciary guarantee is done in Fiduciary Registration Office (Kantor Pendaftaran Fidusia) of the office of the Ministry of Law and Human Rights, while the registration of ship mortgages is made in front of the registrant and registrar official i.e. harbor master (Indonesian: Syahbandar).\textsuperscript{44}

4. Specialties Principle (Asas Specialited)

Specialties principle is the principle which provides that a charge, such as encumbrance rights, fiduciary guarantee and mortgage can only be charged on a plot or on certain goods that have been registered in the name of particular person.\textsuperscript{45}

5. Undivided Principle (Asas Tidak Dapat Dibagi-bagi)

Undivided principle is the principle that states that although a certain debt can be divided cannot cause to the division of encumbrance rights, fiduciary rights, mortgages or pledge even

\textsuperscript{44}H. Salim HS, S.H., M.S., op. cit., pg. 9.
\textsuperscript{45}H. Salim HS, S.H., M.S., op. cit., pg. 9.
though there is already a partial payments on the debt and the object used as collateral must be an integral part in ensuring a debt.\textsuperscript{46}

6. **Livery Principle (Asas Inbezitstelling)**

Livery principle (inbezitstelling) is a principle which stipulates that the collateral (pledge) should be on the receiving party (pledgee).\textsuperscript{47}

7. **Principle of Horizontal Separation (Asas Pemisahan Horizontal or Horizontale van Scheiding Beginsel)**

The principle of horizontal separation is the principle that states that the building and land is not a single unity. This can be seen in use of the rights to use (hak pakai), either on state land (tanah negara) or land ownership rights/freehold title (hak milik). The building belong to the concerned or the giver of encumbrance right, but the land belongs to someone else, based on the right of use can be used as collateral.\textsuperscript{48}

8. **Nationality Principle (Asas Nasionalitas)**

The main principle in the Act Number 5 of 1960 is the nationality principle. The nationality principle only gives the rights of land to Indonesian citizen (Warga Negara Indonesia) in terms of owning the rights of land, which has closes the possibility for foreign nationals to own the rights of land. The implementation of Act Number 5 of 1960

\textsuperscript{46}H. Salim HS, S.H., M.S., *op. cit.*, pg. 9.
\textsuperscript{47}H. Salim HS, S.H., M.S., *op. cit.*, pg. 10.
\textsuperscript{48}H. Salim HS, S.H., M.S., *op. cit.*, pg. 10.
has the consequence of the difference in treatment for Indonesian citizen and foreign nationals. This difference in treatment is fair, primarily associated with the position of land for Indonesian which has an important position.\textsuperscript{49}

The nationality principle in Act Number 5 of 1960 does not completely prohibit foreigners to own rights of land. But restricts foreigners to own only the rights of use (Hak Pakai). Thus the difference in the treatment between foreigners and Indonesian citizen as a consequence of the nationality principle is not rigidly applied. This means that the law makers view that the foreign control over the land is possible, but in the framework of national development.\textsuperscript{50}

C. Legal Framework

1. Overview on the Law of Security

a. Overview on the Law of Security in Indonesia

1) Definition on the Law of Security

The term security, assurance or guarantee in Indonesian is “Jaminan” which from the root word of “Jamin” that according to Kamus Besar Bahasa Indonesia is “menanggung (tentang keselamatan, ketulenan, kebenaran dari orang, barang, harta benda dan sebagainya)” which is “to bear (about safety, ...

\textsuperscript{49}\textsuperscript{Martin Roestemy, Konsep-konsep Hukum Kepemilikan Properti Bagi Asing Dihubungkan dengan Hukum Perarian, (Bandung: Alumni, 2011), pg. 52.}

\textsuperscript{50}\textsuperscript{Ibid.}
genuineness, the truth of people, goods, property and so on)“ while “jaminan” according to Kamus Besar Bahasa Indonesia is “tanggungan atas pinjaman yang diterima”\textsuperscript{51} which in English means dependent on the loans received. One vocabulary for guarantee in Dutch-Indonesian Law Dictionary is Onderpand which means the pawned goods, guarantee.\textsuperscript{52}

A guarantee (collateral) according to Thain is something that has a value of the debtor that are included in the agreement, in order to guarantee it's debt. Without the collateral, the agreement is merely a contract for loan and for receivables or just an obligation to fulfill.\textsuperscript{53}

The collateral as a sort of security for loan in banks in essence serves to ensure the certainty of the settlement of that loan if the debtor do not obey its obligation or declared bankrupt.\textsuperscript{54} Collateral is the ultimate source for the prepayment of loans granted by banks to debtor, if it turns out that the primary source of repayment is from the debtor’s company’s earnings are

\textsuperscript{51}Tim Penyusun Kamus Pembinaan dan Pengembangan Bahasa, Kamus Besar Bahasa Indonesia, ed. 2, cet. 9, (Jakarta: Balai Pustaka, 1997), pg. 399.
\textsuperscript{52}Yan Pramadya Puspa, Kamus Hukum, (Semarang: CV Aneka, 1977), pg. 637.
\textsuperscript{53}Ivida Dewi Amrih Suci dan Herawati Poesoko, Hak Kreditor Separatis dalam Mengeksekusi Benda Jaminan Debitor Pailit, (Yogyakarta: Laksbang Pressindo, 2011), pg. 20.
\textsuperscript{54}Djoni S. Gazali, Hukum Perbankan, (Jakarta: Sinar Grafika, 2010), pg. 270.
no longer sufficient to pay the existing loan. Often though the debtor has been tied with a loan agreement in such legal force that is still applicable and already been carried out with an analysis toward the debtor, giving out loan to debtor still contains risk of failure in repayment so in practice, banks are often faced with the problem of bad loans and this causes the performance of banks do not always runs smoothly.55

Law of security is the legal regulations governing the security (collateral) especially regarding security for the debt of a debtor to creditor. According to J. Satrio, law of security is the law governing a collateral on someone’s credit.56 According to Hemat Salim, law of security is the entirety of legal rules governing the relationship between the giver and the recipient of the security in relation to the encumbrance of collateral to obtain credit facilities.57

From the opinion on the 2 (two) experts above, it can be concluded that the law of security is a device in the form of rules or laws that are set, in this case more

specifically governing about the legal relationship between the guarantor or debtor with the insured or the creditor, in order to guarantee a particular debt, whether it be material as well as individual guarantee (borgtoch).

At this time, there has been created various of legislation regarding security, collateral and security institution (lembaga penjaminan). Based on the understanding above, the elements contained in the formulation of the law of security are as follows:

1) The Existence of Rule of Law (Adanya kaidah hukum)

Rule of law in the field of law on security can be divided into 2 (two) types, namely the unwritten rule of law on security and the written rule of law on security. Written rule of law on security is a legal principle contained in the legislation, treaties and jurisprudence. While the unwritten rule of law on security are the rule of law that grow, live and thrive in the society.

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58 Ibid., pg. 7.
2) The Collateral Giver and Collateral Recipient

(Adanya pemberian jaminan dan penerima jaminan)

Collateral giver is a person or legal entity that delivers the collateral and gave it to the collateral recipient. The collateral giver can also be the person or legal entity which needs credit/loan.

The person or legal entity which needs credit/loan is referred to as debtor. The collateral recipient is a person or legal entity that receives collateral from the collateral giver or the debtor. Collateral recipient is generally a legal entity that provides credit facilities/loan. The said legal entity can either be a non-banking institution or a banking institution.

3) Security (Adanya jaminan)

Basically collateral given to the creditor is a material collateral which is in the form of moveable or immovable properties.

4) Giving of Credit Facilities (Adanya pemberian fasilitas kredit)

The charge of collateral that is done by the debtor is to aim for obtaining the credit facilities.
from banking institution or non-banking institution.

Giving out credit is essentially giving money based on trust. The meaning of trust here is that the banking institution or non-banking institution belief the debtor is able to repay the loan given including the principal loan and interest as well as the cost incurred to maintain the collateral object.

Likewise, the debtor believes that the banking institution or non-banking institution will provide credit to him/her.

According to Rachmadi Usman, the elements contained in the formulation of the law on security are as follows:\textsuperscript{59}

1) A series of legal provisions, both of which is sourced from the provisions of the written and unwritten laws. The written legal provision is a legal provision derived from the legislation, while the unwritten legal provisions are legal provision that is from the society.

2) The provision on the law of security is governing the legal relationship between the guarantor (debtor) and the creditor. Guarantor is referred to

\textsuperscript{59}Rachmadi Usman, \textit{Hukum Jaminan Keperdataan}, (Jakarta: Sinar Grafika, 2008), pg. 2.
as debtor, that is the party which owe certain sum in a relationship of debt and receivables, which hand over a specific object as a security to the lender (creditor). In this case, the one acting as a guarantor is a person or legal entity that will acquire a specific amount of credit facility or the owner of the object of security for a particular debt.

As for the lender referred to as creditor, namely those who being indebted in a specific debt in a relationship of debt and receivables, that receives a specific object as a security. In this case, acting as object recipient can be an individual (person) or legal entity. Similarly, legal entity referred here is either a banking institution or non-banking institution.

3) There is collateral submitted by the debtor to the creditor. Because of the secured debt is in the form of money then the collateral herein shall be able to be valued in money too.

4) The handover of an object is made by collateral giver as a collateral which is intended as a security for a repayment of a certain debt, which means the handover of collateral is done for the purpose of
obtaining a certain debt, the debt or loan granted by a person or legal entity to an individual or legal entity based on trust. The imposition of a collateral is intended to ensure the repayment of a certain debt obligation to the creditor if the debtor experiencing default.

The scope of legal study on the law of security covers security into 2 (two), namely general securities and special securities. Special securities are divided into 2 (two) types, namely material security (collateral) and personal guarantees. Collaterals are also divided into moveable collaterals (chattels) and immovable collaterals. Collaterals on moving objects include liens (gadai) and fiduciary (fidusia) whereas collateral in immovable objects includes encumbrance right (hak tanggungan) and mortgage (hipotik). While an individual (personal) guarantee consist of borg, corporate guarantee and a bank guarantee.
Act Number 10 of 1998 regarding the Amendment of Act Number 7 of 1992 regarding Banking in Article 1 number 23 reads:

“Agunan adalah jaminan tambahan yang diserahkan Nasabah Debitur kepada Bank dalam rangka pemberian fasilitas kredit atau pembiayaan berdasarkan Prinsip Syariah”.

Which the Writer translates literally from the Indonesian into English, the provision above will said:

Figure 2.6 Classification of Securities in Indonesian Law System
“Collateral is an additional security that the Debtor submitted to the Bank in the provision of giving credit facilities or financing based on Sharia Principles”.

Collateral in its construction is an additional security in order to get credit facilities from banks and other non-banking institutions. Collateral have several elements, that’s an additional security, and submitted by the debtor to the bank in order to get credit facilities or financing.

The convenience in terms of loan collateral is a realization of the banking with the principle of economic democracy with its main function as a gatherer and distributor of public funds, having a strategic role to support the implementation of national development in order to improve the distribution of development and its results, economic growth and national stability toward improving the standards of living for the people. Despite the ease thus, the collateral must remain ideal for the collateral has an important task of carrying out and securing the credit given, namely by providing the right and power to the
bank to obtain repayment from the collateral if the debtor defaults.\textsuperscript{60}

In the case of giving out credit facility in practice the collateral is evens more dominant and preferred, so the actual collateral is more important than security or just a form of confidence in the debtor’s ability to repay their debts. It thus is very founded because security is an abstract thing, where assessment toward security is highly subjective, different from collateral which is clearly more objective and economically if in case the debtor defaults or the loan is in state of bad loan/credit, the bank can immediately convert them to a more liquid money.\textsuperscript{61}

In the perspective of banking law, the collateral can be divided into 2 (two) types, namely principal collateral (\textit{agunan pokok}) and additional collateral (\textit{agunan tambahan}). This is confirmed in the explanation of Article 8 paragraph (1) of Act Number 10 of 1998 regarding Amendment of Act Number 7 of 1992 regarding Banking, principal collateral is goods, securities or warranty relating directly to the object financed by credit in question, such as items purchased

\textsuperscript{60}Drs. Muhamad Djumhana, S.H., \textit{Hukum Perbankan di Indonesia}, (Bandung: PT Citra Aditya Bakti, 2000), pg. 397.
\textsuperscript{61}Ibid., pg. 397.
with the credit concerned, project financed with the loan concerned, while additional collateral is goods, securities or guarantees that are not directly related to the objects that are financed with loans in question that were added as an additional collateral. Banks are not required to request additional collateral that is not directly related to the objects that are financed by the credit facilities in question.

2) **Source and System of the Law of Security**

The source of law is where the rule of law is found. In this regard, the source of law on security and guarantee derived from the Indonesian Code of Civil Law (*Burgerlijk Wetboek voor Indonesie*) which is the result of an adjustment between the law and situation in Indonesia and the Netherlands. The Netherlands’s *Burgerlijk Wetboek* ensouls the spirit of the Indonesian Code of Civil Law which is the result of codification on the material civil code that is announced on the 30 April 1847 and entered into force in January 1848 and
still being used until now based on the principle of concordance (asas konkordansi). \(^{62}\)

Provisions on the law of security can be found in the second book (Buku II) of the Indonesian Code of Civil Law, which governing about object/thing (kebendaan). Judging from the systematic of the Indonesian Code of Civil Law, the law on security is part of the law on object/thing, as the setting of the second book (Buku II) of the Indonesian Code of Civil Law that is governing about the definition, procedures for distinguishing objects and rights on objects, be it in giving pleasure to the holder/bearer or even the right to apply charge to the object (as a security/guarantee).

Articles governing the law of guarantee and security including the security institution (lembaga penjaminan) starting from Article 1131 to Article 1232, second book of the Indonesian Code of Civil Law. Such articles governing about the privileged receivables (piutang-piutang yang diistimewakan), pledge (gadai) and mortgages(hipotik).

In connection with the issuance of Act Number 4 of 1996 on the Encumbrance Right over Land and Land-

Related Objects, the charge over land and land-related objects is no longer charged using the mortgage instruments as provided in Article 1162 to Article 1232 of the Indonesian Code of Civil Law.

In addition to regulating about the object as a security, the Indonesian Code of Civil Law also regulates about the individual guarantees, namely debt coverage (borgtoch) and engagement-engagement about the joint liability (tanggung-menanggung). Individual guarantees or the personal guarantees is regulated under Article 1820 until Article 1850 of the Indonesian Code of Civil Law. In those articles mainly regulates about the definition and nature of individual guarantees, the effects of the individual guarantee toward a debt between a debtor and the guarantor as well as the abolition of a legal relationship of debt guarantee.

According to Soebekti, personal guarantee is an agreement between an indebted (lender) with a third party that ensures the compliance of the obligation of the indebted (debtor). This agreement of the third party can even be held outside (without) the indebted. The purpose of this guarantee is for the fulfillment of the
obligations of the debtor that is guaranteed entirely or to a specific part, the property of the guarantor can be seized and auctioned according to the provision concerning the execution by court’s decision.63

Security is very closely related to law of objects. Under Article 499 of the Indonesian Code of Civil Law, objects are any goods and rights that can be the object of rights. Objects can which sometimes become an integral part of the rights due to the principle of attachment (recht van natrekking), either obtained naturally (natuurlijke vruchten) because its generated by soil or by animals, or form craftsmanship (vruchten van nijverheid) by the way of human intervention.64

Types of guarantee or security according to H. Salim HS, S.H., M.S., can be divided into 2 (two) kinds, namely:65

1) Material Security (Jaminan materiil/kebendaan)

Material security has a characteristics of “materials” in the sense of giving the rights or title to precede over certain objects and inherent the nature to follow the objects in question.

64Tan Thong Kie, Studi Notariat dan Serba-Serbi Praktek Notaris, (Jakarta: PT Ichtiar Baru Van Hoeve, 2013), pg. 151.
2) Immaterial Security/Individual Guarantee

(Jaminan imateriil/perorangan)

Individual guarantees do not entitle a right to precede over certain objects, but only secured by the assets of a person through people who guarantee the fulfillment of the obligation of the debtor.

Material security can be classified into 5 (five) types, namely:

1) Pledge (Indonesian: gadai; Dutch: pand) as stipulated in Chapter 20 of the Second Book of the Indonesian Code of Civil Law;

2) Mortgage (Indonesian: hipotik) as stipulated in Chapter 21 of the Second Book of the Indonesian Code of Civil Law;

3) Creditverband (particularly for unregistered land) as stipulated in Law Gazette (Staatsblad) Stb. 1908 Number 542 as amended by Stb. 1937 Number 190;

4) Encumbrance Rights (Indonesian: Hak tanggungan) as stipulated in Act Number 4 or 1996 regarding Encumbrance Right over Land and Land-Related Objects;
5) Fiduciary Guarantee (Indonesian: Jaminan fidusia) as stipulated in Act Number 42 of 1999 regarding Fiduciary Guarantee.

Whilst the security that is considered as individual guarantees are:

1) Guarantor (borg) are other who may be charged;
2) Joint liability (tanggung-menanggung); and
3) Guarantee agreement (perjanjian garansi).

Individual guarantee (personal guarantee) is an agreement between an indebted (lender) with a third party that ensures the compliance of the obligation of the indebted (debtor). This agreement of the third party can even be held outside (without) the indebted.

According to Prof. Soebekti, because of the demand of creditors against a guarantor is not given a privilege position against all other creditors, the individual guarantee is not widely practiced in the world of banking.\(^{66}\)

Out of the 8 (eight) types of guaranty or security mentioned above, the security that is still being used until now are:

1) Pledge (Gadai);

\(^{66}\text{Drs. Muhamad Djumhana, S.H., op. cit., pg. 398.}\)
2) Encumbrance Right (*Hak Tanggungan*);
3) Fiduciary Guarantee (*Jaminan Fidusia*);
4) Mortgage over Ships and Air Planes (*Hipotek atas kapal laut dan pesawat udara*);
5) Individual Guarantees (*borg*);
6) Joint Liability (*tanggung-menanggung*); and
7) Guarantee Agreement (*Perjanjian Garansi*).

The charge over land and land-related objects using mortgages (*hipotik*) and *credietverband* is no longer done because it has been repealed by the Act Number 4 or 1996 regarding Encumbrance Right over Land and Land-Related Objects, whereas the charge over ships and aircrafts are still using the mortgage.\(^6^7\)

In principle, not all objects can be charged as a collateral in banking institutions and non-banking institutions, but the objects that can be charges as collateral must fulfill certain terms and requirements. The terms and requirements for a good collateral are:
1) can be easily used to obtain credit facilities by the parties who need it;
2) do not weaken the potency (strength) of the loan seekers to undertake or continue its business;

\(^{6^7}\)H. Salim HS, S.H., M.S., *op. cit.*, pg. 25.
3) provide assurance to the creditors in the sense that the collateral given is available to be executed at any time, if necessary, can be easily be cashed to pay off debts of the recipient (taker) of credit facilities (Subekti, 1996:73).

Basically the agreement of loan can be divided into 2 (two) types, namely principal agreement (perjanjian pokok) and the additional agreement (perjanjian accesoir). Principal agreement is an agreement to obtain credit facilities from banking institutions or non-banking institutions. Rutten view that the principal agreement is an agreement to have a basis independent existence (welke zelfstandig een reden van bestaan recht). Examples of principal agreement is a bank credit agreement (Perjanjian Kredit).

Additional agreement (Perjanjian accesoir) is an agreement that is associated and added to the principal agreement. Examples of this agreement is an agreement to charge a collateral, such as pledge agreement, encumbrance right agreement or fiduciary agreement.

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69 H. Salim HS, S.H., M.S., op. cit., pg. 29.
So, the nature of security agreement is an additional agreement, which follows the principal agreement.\textsuperscript{70}

The written agreement to charge an object as collateral is usually done in the banking institution, non-banking institution or even pledge institution. This kind of agreement can be done in the form of deed made by both parties (\textit{akta di bawah tangan}) or authentic deed (\textit{akta autentik}). Usually the charge of collateral using the deed made by both parties is used on pledges. The form, content and terms have been determined unilaterally by pawnshops (In Indonesia is known as \textit{PT Pegadaian (Persero)}, which has a monopoly on pledge and fiduciary service), while the debtor only has to agree on the content of the agreement. the empty spaces in the agreement (\textit{Surat Bukti Kredit (SBK)}) comprises of name, address, collateral, estimated amount appraised, loan amount, the loan date and loan maturity date.

The charge over collateral is done in the presence of authorized official who’s competent for that reason. The competent official that is authorized to make that kind of deed is a Land Deed Official (Indonesian:

\textsuperscript{70}H. Salim HS, S.H., M.S., \textit{op. cit.}, pg. 30.
Pejabat Pembuat Akta Tanah) appointed by the Minister of Agrarian. Usually agreement for charge over collateral can be done to encumbrance right, fiduciary guarantee and mortgage on ships and airplanes.71

In the context of loan, the term guarantee/security often exchanged with the terms of collateral. If the term security is as mentioned in Article 2 paragraph (1) Decree of the Board of Directors of Bank Indonesia Number 23/69/KEP/DIR dated 28 February 1991 regarding Security on Credit, then the security in that term means that it’s a bank’s confidence on the ability of the debtor to repay the loan in accordance with the agreed terms.72

b. Overview on the Law of Security in Singapore

1) Definition on the Law of Security

The term “Collateral” in English according to Longman Business English Dictionary means “finance assets promised by borrower to a lender if the borrower cannot repay a loan”73 which in Indonesian means:

72Drs. Muhamad Djumhana, S.H., op. cit., pg. 398.
“aset keuangan yang dijanjikan oleh peminjam kepada pemberi pinjaman jika peminjam tidak dapat membayar pinjaman”.

Obtaining credit or financing and giving some security or collateral in return is an important aspect of any business. Perhaps the most common form of financing is the loan or the overdraft that is extended by banks and finance companies to their customers. Bank and finance companies may not be the only ones providing such facilities. Others such as moneylenders may do the same. However, it may be noted that, like banks and finance companies, any person who carries on the business of moneylending would have to be registered, pursuant to the Moneylenders Act, failing which he would be guilty of an offence and the loan would be irrecoverable. Loan and overdraft however are not identical.⁷⁴

When a loan is granted, the amount lent is debited to a loan account opened in the name of the customer. Interest is generally charged whether or not the customer makes use of the proceeds. Interest is normally calculated on a monthly or yearly basis and

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paid periodically (usually monthly). Interest rates cannot be increased unless the contract has an express or implied provision to this effect. However, usually the contract of loan would have an express clause allowing the bank to vary the interest rate. In Singapore, there is no limit on the maximum rate that can be charged.\textsuperscript{75}

The overdraft represents current account financing. Under an overdraft, the customer is issued with a cheque book and is given a ceiling, which defines the maximum amount he is allowed to overdraw on his account. Unlike in the case of loan, interest is normally calculated on a daily basis and paid periodically (usually monthly). The interest rates cannot be increased unless the contract has an express or implied provision to this effect. Further, an overdraft can be created informally, unlike a loan that usually created formally. For instance, if a cheque is presented and there are insufficient funds in the account of a customer, the bank may decide, at its discretion, to grant a temporary overdraft for that amount so that the cheque can be honored.\textsuperscript{76}

\textsuperscript{75}Ibid., pg. 317-318.
\textsuperscript{76}Ibid., pg. 318-319.
When a loan or overdraft is advanced and the debtor is able to repay, it may not really matter whether the creditor has taken any security in return. However, in situations where the debtor is not in a position to repay and bankruptcy or liquidation is imminent, the issue of whether the creditor or the person to whom monies are owed has taken some security that will give him priority over unsecured creditors, becomes very crucial. Thus, often, when loans or overdrafts are gained, banks will demand some security or collateral in return.77

2) Source and System of the Law of Security

Since Singapore was formerly a British colony, the roots of Singapore law lie within English law. Even today, English law still plays a significant role in Singapore. In recent years, however, this influence has decreased, especially as the Singapore legislature, judiciary and legal profession mature.78 There are 2 (two) major sources of law in Singapore. They are legislation and case law, or common law. Legislation refers to statutes made by parliament and subsidiary legislation made by various administrative bodies.

77 Ibid., pg. 319.
pursuant to powers given by the statutes. In contrast, the judge has more discretion when it comes to case law or common law. This is because it is the judge who writes the case. When two people litigate and the court delivers its judgement, that judgement becomes a case. Once a case has been decided, future cases that are the same will be bounded by the earlier decision, future provided the earlier decision was made by a higher court in the same hierarchy. This is known as the doctrine of precedent. This ability of judges to make law is unique to countries that follow the “common law” system (Anglo Saxon). Countries in the Commonwealth, as well as others such as America and the Philippines, follow such a system.79

The source of credit security law in Singapore is governed in Chapter 11 of the Singapore Commercial Law. There are many different security devices that may be created to suit the varying needs of both the debtor and the creditor. These security devices may differ in the type of asset over which the security interest may be created. The types of credit security that is implemented in Singapore are as follows:

79Ravi Chandran, op. cit., pg. 3.
a) Mortgages or Charges Over Land

One common form of security given in Singapore towards land or building unit is a mortgage or charge over land. This kind of security is governed by the Land Titles Act. With registered land, it is possible to create a legal mortgages or charges by using the prescribed forms under the Land Titles Act. Registration is compulsory in order for the mortgage or charge to be recognized as legal interests (section 45 (1)).

Under the Act, all mortgages act only as security and do not involve the transfer of title from the debtor to the creditor (section 68 (3)). However if there is a default, there is a similar right to sell the property or appoint a receiver to receive income arising out of it. Once the monies due have been paid, the mortgagor has the right to request discharge of the mortgage.

It is also possible to create an equitable mortgage. An equitable mortgage would be created, for instance, if the mortgagor has already created a legal mortgage over the
property and then subsequently tries to create further mortgage out of the same property. An equitable mortgage can be protected by means of a **caveat**. The contract between the mortgagor and mortgagee is likely to confer a right of sale or right to appoint a receiver in the event of default.\(^8\) In a mortgage, possession of the asset by the mortgagee is not required. In the event of default in repayment of the loan by the mortgagor, the mortgagee has a right to sell the asset, the subject of the security and apply the proceeds to satisfy the debt.

b) Mortgages or Charges Over Chattels

Just as with mortgages or charges over land, mortgages or charges may be created over any form of chattel or moveable property. However, if there is a written agreement to grant a mortgage or charge over chattels or moveable property, that will be governed by the Bills of Sale Act. Under the Act, such mortgages or charges have to be registered within 3 (three) days and have to meet certain other formalities.

\(^8\)Ravi Chandran, *op. cit.*, pg. 319.
In addition, there is formality that the agreement must be attested before certain persons, such as a Commissioner of Oaths.

Despite all the formalities and many other restrictions, the registration is valid only for 12 (twelve) months and will lapse unless renewed for another 12 (twelve) months. The upshot of these limitations is that mortgages or charges over chattels on moveable property are rarely created in practice. However, the Bills of Sale Act does not apply to companies and so it is common for companies to create such security interests.\textsuperscript{81} If a company is creating a mortgage or charge over chattels, as stated earlier that the Bills of Sale Act does not apply to companies. Thus a mortgage of chattels by the company need not be registered under the Bills of Sale Act and only has to be registered as a charge under the Companies Act.\textsuperscript{82}

c) Pledges

The pledge is another form of security and it is usually granted in relation to chattels or

\textsuperscript{81}Ravi Chandran, \textit{op. cit.}, pg. 320.
\textsuperscript{82}Ravi Chandran, \textit{op. cit.}, pg. 321.
moveable property. There is no transfer of title from the debtor to the creditor. Instead, the essence of a pledge is possession. The debtor transfers possession of the chattel to the creditor as security for the repayment of the debt. However, possession does not have to be actual possession; it would suffice if there was constructive possession. There could be constructive possession by the bank holding the document of the title relating to the goods.

Perhaps the most common document of title is the bill of lading.

The pledgee has the right to retain the chattel as security until the debt is repaid and also has the power of sale should the debtor default on repayment. However, upon repayment, the debtor is entitled to get back the goods pledged. Generally the pledge does not have to be registered under the Bills of Sale Act and is thus relatively simple to create.

Pledges are commonly used in certain types of transactions. For instance, in case of pawn shops, when a debtor pawns a valuable at the...
pawn shop to raise money, that is essentially a pledge. Pledges are also very commonly used in connection with the importation of goods. The buyer of the goods will have to pay the seller and for this reason, he might have obtained credit from a bank. The bank will want to have security and the security often would be the goods themselves. However, since the goods might be on board a ship at the time of credit was extended, actual possession would not be possible. Instead the buyer transfers the documents of title to the bank. By getting hold of the document of title, the bank would have constructive possession of the goods. When the goods arrive, the bank will release the document of title to the buyer, enabling him to collect the goods and sell them, but in the condition that the goods or proceeds of sale must be held on the trust or on behalf of the bank. The reason for this constructive possession so that the pledge continues until repayment.  

d) Liens

83 Ravi Chandran, op. cit., pg. 324-326.
A lien is another form of security. Like a pledge, there is no transfer of title of the property concerned from the debtor to the creditor. Similarly, the Bills of Sale Act is generally not applicable and so there is no formalities involved. However, liens and pledges are not identical. Pledges usually arise by prior agreement between the parties, whereas liens can arise without such prior arrangement. In the case of a pledge, possession of the asset is transferred by the debtor to the creditor for the specific purpose of creating the security. In the case of a lien, the creditor obtains possession of the asset for purposes other than security. Further, while pledges carry with them the power of sale, not all liens do. He is merely entitled to retain possession of the asset until he is paid.

When a person has done work for another but yet to be paid, he would, in certain circumstances, have the right to retain goods belonging to the other which are in his possession until that person has paid for the
work done. This is in essence a common law or possessory lien and as the name suggest, its validity depends on possession. Such lien may be “general” or “particular”. It is general when the right attaches to any property in the lienee’s possession, whether or not any work was done in respect to that property. Thus for instance, solicitors, bankers and stockbrokers have a right of general lien. So, if they have done some work and have not been paid and they have in their possession some property, such as shares, belonging to their clients, they may retain these until they are repaid. In contrast, particular lien arises when a person is entrusted with maintaining, storing, carrying or repairing goods and he has not been paid in respect of those services. However, they do not have a right of sale, unless the contract expressly states so. Nonetheless, it may be possible to obtain a court order to sell the goods in certain circumstances, such as when the goods are perishable.\textsuperscript{84}

e) Guarantees

\textsuperscript{84}Ravi Chandran, op. cit., pg. 326-327.
Another form of security that is relatively common is the guarantee. It need not be registered and it is comparatively a simple agreement. However, the value of the guarantee depends on the credit-worthiness of the guarantor. If the guarantor were of weak financially standing, it would not be of much value to the creditor. A guarantee can be defined as a promise to answer the debt, default or miscarriage of another. By virtue of section 6 of the Singapore Civil Law Act, a guarantee must be in writing and signed by the guarantor. Thus, if the guarantee is only to orally, it will not be enforceable. A guarantor is only liable only if the principal debtor is liable.  

Table 2.1 below provides a comparison of the basic types of security interests and the rights conferred on the holder of the security interest in each case.

<table>
<thead>
<tr>
<th>Security</th>
<th>Title</th>
<th>Possession</th>
<th>Sale</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mortgage over Land</td>
<td>√</td>
<td>×</td>
<td>√</td>
</tr>
<tr>
<td>Mortgage over Chattels</td>
<td>√</td>
<td>×</td>
<td></td>
</tr>
<tr>
<td>Pledge</td>
<td>×</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>Lien</td>
<td>×</td>
<td>√</td>
<td>×</td>
</tr>
<tr>
<td>Guarantees</td>
<td>×</td>
<td>×</td>
<td>×</td>
</tr>
</tbody>
</table>

85 Ravi Chandran, *op. cit.*, pg. 328.
Table 2.1 Types of Real Security Interests and Rights Conferred