

1474-Article_Text-3330-1-10- 20230813_1.docx

by Gerald Moore

Submission date: 09-Oct-2023 12:11AM (UTC-0600)

Submission ID: 2181008819

File name: 1474-Article_Text-3330-1-10-20230813_1.docx (119.01K)

Word count: 5911

Character count: 42914



Legal Implication of Mortgage Right Installation Toward Debtor's Manageability and Legal Action

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<http://dx.doi.org/10.47814/ijssrr.v6i8.1474>

Abstract

Related to the effort to guarantee the return of credits grant from credit agency, a solid and competent guarantee agency which able to provide legal certainty for interested parties is highly needed, namely in the form of mortgage right. The existence of pledge gives mortgage right in credit agreement is an unseparated part of the mortgage right pledge. Mortgage right is accessory with the main agreement. Thus, mortgage right is dependent on the part of the main agreement, specifically an agreement that provides guarantee of debt repayment called main agreement. Mortgage right as a strong guarantee agency has *droit de preference* and *droit de suite*. The mortgage right installment should be done rightly and carefully and could be followed up immediately accordant to Act of Republic Indonesia Number 4, 1996 about the mortgage right and the collateral object which has been installed mortgage right should shortly be executed by the creditor in intention to the debtor debt repayment. As mortgage right constantly keep up the object in whoever's hands is a distinctive guarantee for the interest holder mortgage right. Despite the object of mortgage right has devolved and been belong to others, the creditor is still able to use his right through execution if the debtor defaults till it causes compensation. The compensation involves fees or charges incurred, actual loss due to damage or loss of creditor's property due to debtor's negligence, and expected interest or profit. Debtors who default on credit agreements are charged to compensate for the cost incurred covering principal debt or remaining debt, interest, and fine.

Keywords: *Debtor's Legal Act; Default Consequence; Mortgage Right*

Introduction

Credit is based on a credit agreement, which is a preliminary agreement, while the loan agreement is an implementation of the predecessor agreement or credit agreement. Credit facilities that can be provided by banks and non-bank financial institutions have specific conditions that must be met by prospective debtors. One form of special condition is the existence of a guarantee. The guarantee



provided by the debtor to the creditor in the credit agreement is an accessory agreement, namely an additional agreement that follows the main agreement.

Guarantees in general are regulated in Article 1131 of the Civil Code, which stipulates that all property rights of the debtor, both movable and immovable, both existing and those that will exist in the future, are borne for all his engagements. In connection with efforts to guarantee the return of credit funds from lending institutions, a guarantee institution that is strong and able to provide legal certainty for interested parties is needed (Guntoro et al., 2020). The existence of a guarantee institution can increase the confidence of banks and non-bank financial institutions to channel credit funds to those in need. One type of guarantee institution known in Indonesia is a mortgage institution. The mortgage is expected to be able to become a strong guarantee institution and can provide legal certainty, where "the mortgage as a strong guarantee institution has a *droit de préférence* (has a priority position for the holder) and *droit de suite* (follows the mortgage object in the hands of whoever the object is). it exists) as its characteristics" (Imanda, 2020).

The process of imposing a mortgage is carried out through two stages of activity, namely: a. the stage of granting mortgage rights, which is carried out before the Land Deed Making Officer (PPAT), which is preceded by a guaranteed debt agreement. b. the stage of registration by the land office, which is the time of birth of the mortgage rights imposed (Nugrohandhini & Mulyati, 2019).

As a result of the rapid acceleration of the use of information technology in the field of government (e-governance), it has also had an impact on the development of mortgage rights in Indonesia (Silviana, 2021). The government provides electronically integrated mortgage registration services, which are regulated in the Regulation of the Minister of Agrarian Affairs and Spatial Planning and/or the National Land Agency Number 5 of 2020 concerning Electronic Mortgage Services (Permen ATR/BPN No. 5/2020), which was promulgated on April 8, 2020, and held simultaneously on July 8, 2020, in all Land Offices. The right of electronic handling, which is often abbreviated as HT-el, aims to improve services that meet the principles of openness, timeliness, speed, and convenience and can make it easier and faster for the community and PPAT to access services compared to conventional services.

There are differences in the procedures for implementing the registration of mortgage rights in terms of regulations and in terms of mechanisms. In terms of regulations, conventional registration of mortgage rights is explained in Article 13 and Article 14 of Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land (hereinafter referred to as RI Law No.4/1996). The electronic mortgage rights are explained in Articles 9 and 10 of Permen ATR/BPN No. 5/2020 (Wiguna, 2020). In terms of the implementation mechanism, conventional mortgage rights are carried out by granting full power of attorney to PPAT in managing the registration of mortgage rights.

The PPAT must come directly to the land office to submit the required documents. HTel PPAT must use the application provided by the ministry of ATR/BPN by becoming a BPN partner as well as banks. PPAT and Banks are required to register and create an account first online. through the work partner portal in a browser at the address: <https://mitra.atrbpn.go.id/datappat/login/>, then submit a copy of the deed and land certificate to the Bank (Mariadi & Arta, 2022).

The bank makes the application file electronically (without the need to come to the BPN), pays the registration fee, and receives the HT-el certificate on the seventh day. The HT certificate product is in the form of a PDF file with a digital signature. Next, the Creditor prints and attaches the registration note to the certificate of Land rights, which is the object of collateral. If you do not update the data, you cannot access and register services in the land service application electronically, so the PPAT cannot become a user in the HT-el service.

Mortgage guarantee institutions with collateral in the form of immovable objects or fixed objects in the form of land (land rights) have collateral that occupies the highest rank of the many existing collaterals both in quantity and quality. Collateral in the form of land is considered the safest and has a relatively high economic value in terms of future land values showing a tendency to increase (Deswita, 2020).

Based on Article 51 in conjunction with Article 57 of RI Law No. 5 of 1960, before there was an Act governing mortgage rights, the provisions for mortgages and credit unions were applied as a step to fill the legal vacuum. The temporary enforcement of the provisions of the two institutions as a vehicle to fill the legal vacuum during the transitional period, in fact, resulted in the emergence of legal dualism, which had a negative impact and caused confusion in the implementation of guarantee law.

The binding of credit agreements and debt agreements in which, in one of the articles, it is agreed that the debtor promises to provide mortgage rights as collateral for debt repayment. The credit agreement, which contains the debtor's promise to provide mortgage rights, is a basic agreement (principal agreement), which functions as the first document to prove the existence of a debt agreement (Sesarina, 2018).

According to Article 10 paragraph (1) of RI Law No. 4/1996, the existence of a promise to provide mortgage rights in a credit agreement is an integral part of the promise to grant mortgage rights. Mortgage rights are included in the main agreement. Mortgage rights cannot stand alone but follow a form of the main agreement, namely an agreement that guarantees the repayment of debt, which is called the main agreement.

According to Article 10 paragraph (1) of Republic of Indonesia Law No. 4/1996, the main form of the agreement that contains the granting of mortgage rights can be in the form of an underhanded deed (underhandse akte) or an authentic deed (authenticeke akte). It can be made at home or abroad; there is no requirement for validity; it must be made domestically, but it is still legal to make it abroad. At the level of subject or party to the mortgage agreement, it can be an individual (natural person), a legal entity (legal entity), or a foreign person or legal entity with the condition that the credit concerned is used for development in the territory of the Unitary State of the Republic of Indonesia.

Making a Deed of Granting Mortgage Rights (APHT) The granting of mortgage rights is carried out by drawing up a deed of granting mortgage rights in the form of a deed drawn up by the Land Deed Making Officer (PPAT). The deed of granting mortgage rights serves as evidence regarding the granting of mortgage rights and is domiciled as the second agreement document that complements the debt agreement document as the principal agreement. The contents and format of APHT are regulated in Article 11 of UU RI No. 4/1996, which determines the following matters: (Hidayat, 2019): First, it must be included in APHT: (a) the name and identity of the holder and giver of the mortgage right; (b) the domicile of the parties; (c) a clear designation of guaranteed debt; (d) dependent value; and (e) a clear description of the object of the mortgage right.

The inclusion of this element in the APHT is cumulative; therefore, it must be stated in full. If there is negligence in including one of them, it will result in the APHT being null and void by law, as explained in Article 11 paragraph (1) UUHT. Second, promises that can be included in the APHT. In Article 11 paragraph (2) of RI Law No. 4/1996, there are a number of clauses that can be included in the deed granting mortgage rights, including (Dengan & Hak, 2016): (a) a promise that limits the authority of the mortgage right to lease the mortgage object and change the shape and structure of the mortgage object; (b) a promise that gives authority to the mortgagee to manage the object based on a district court ruling, saves the mortgage object in the context of execution (prevents the erasure or cancellation of land

rights on the mortgage object), the mortgage holder first has the right to sell on his own power (*eigenmachtige verkoop*), and the mortgage right will vacate the mortgage object at the time of execution of the mortgage right.

Furthermore, in imposing mortgage rights, it is necessary to describe the object of mortgage rights, namely (Jaenudin Umar, 2021): (a). Property Rights (HM); (b) Cultivation Rights (HGU); (c) Building use rights (HGB); (d) Right to Use (HP): 1) usufructuary rights over state land: a) already registered (Article 4 paragraph (2) of RI Law No. 4/1996 and general explanation of point 5 of RI Law No. 4/1996); b) their nature can be transferred (transferability); and 2) usufructuary rights over property rights.

The usufructuary right over the right of ownership is possible to be used as an object of mortgage in accordance with the provisions of Article 4 paragraph (3) and the general elucidation of number 5 of the Republic of Indonesia Law No. 4/1996, except for freehold land that has been donated and lands used for worship purposes and other sacred needs, even though they are registered, because according to their nature and purpose they cannot be transferred and they cannot be burdened with mortgage rights (Aziz & Sutaargaarga, 2020).

Next, regarding the obligation to register the granting of mortgage rights as stipulated in Article 13 of RI Law No. 4/1996, Registration of mortgage rights is an imperative requirement, meaning that it is obligatory to register mortgage rights at the Land Office. Apart from that, according to Article 13 paragraph (1) of RI Law No. 4/1996, it is stated that the registration of this mortgage right in a series fulfills the principle of publicity and at the same time is an absolute requirement for the birth and binding of mortgage rights to the parties and also to third parties.

Obligations for PPATs as APHT makers, based on Article 13 paragraph (2) of RI Law No. 4/1996, to send or deliver APHT and other documents include: documents of evidence relating to the object of mortgage rights and the identity of the parties; certificates of land rights, required by the Land Office. Delivery of the APHT and other documents referred to by the PPAT is no later than 7 (seven) working days from the date of signing the APHT. The delivery method is, according to the Elucidation of Article 13 paragraph (2) of RI Law No. 4/1996, through a PPAT officer or via registered mail.

In principle, the method of delivery used by the PPAT must be the best and safest method according to the conditions and facilities in the area concerned. A PPAT who is negligent in fulfilling these obligations is threatened with administrative sanctions in the form of an oral or written warning, temporary dismissal, and dismissal from office.

After registering the mortgage at the local Land Office, a mortgage certificate is issued. Issuance of mortgage certificates is regulated in Article 14 of RI Law No. 4/1996, which states that the Land Office issues the Mortgage Certificates by including *irah-irah* with the words "For the sake of Justice Based on Belief in the One and Only God". The function of the mortgage certificate is to become proof of mortgage rights and the basis of executive power (*executory kracht*) (Dewi, 2022). Its executive power is the same as a court decision that has permanent legal force. Furthermore, the Land Office returns the land certificate containing notes on the granting of mortgage rights to the land rights holders, and the mortgage certificates are given to creditors.

The documents that must be completed in making the Mortgage Deed (APHT) are as follows (Santi Dewi & Ardani, 2020): 1. Proof of the identity of the parties concerned and/or complete data from the parties concerned 2. A letter of consent from the husband or wife; if according to statutory regulations there must be one, 3. A certificate of Land Rights that will be encumbered with Mortgage Rights (Property



Rights, HGB or HGU) along with the IMB (Building Permit) if there is a building on the land.4. The credit agreement listed in the Authentic Deed or Underhanded deed.

By looking at some of the explanations above, the researcher provides a research focus by leading to the juridical implications of installing mortgage rights on power patterns and all forms of debtor's legal actions in a contract.

Research Method

The research used in this research process uses a type of normative legal research (Soekanto & Mamudji, 2015). By using library materials or secondary materials that have been collected. Legal research is also a process to determine legal rules, legal principles, and legal doctrines in order to answer the legal issues faced.

1 Result and Discussion

A. The Effect of the Cooperation Agreement in the Context of Installing Mortgage Rights on the Pattern of Power and Legal Actions of the Debtor

It should be noted that the purpose of self-mortgage guarantees is to give rights and powers to the bank to obtain repayment from the proceeds from the sale of these collateral items if the debtor defaults by not paying off his debt at a predetermined time. Guarantee that customers or debtors play an active role in transactions to finance their business, thus preventing the possibility of leaving their business or project to the detriment of themselves or their company. Give encouragement to debtors to fulfill credit agreements (debt).

Talking about credit agreements is of course inseparable from the cooperative relationship of debt and credit; the creditor holding the mortgage has a very big interest in the continued high value of the mortgage object, especially when he is about to execute the mortgage object (Verawati & Safrina, 2019). The greater the proceeds from the sale of the mortgage object, the greater the probability that the claim will be settled from the proceeds of the sale. There is concern for the creditor holding the mortgage right, and therefore the prospective creditor holding the mortgage right is given the opportunity to make certain promises, the purpose of which is to avoid or at least reduce the possibility of loss due to a decrease in the value of the mortgage object.

These promises are for protection against actions or events that are likely to occur. The promises mentioned in Article 11 paragraph 2 of RI Law No. 4/1996 do not mean that such promises may be made by creditors because the law states so and provides such an opportunity (Fibrianti, 2020). RI Law No. 4/1996 in this case only reminds creditors of the possibility of making promises like that because, in principle, people can promise anything as long as it does not conflict with coercive laws, manners (decency), or order. general.

Mortgages provide several basic principles for fulfilling credit agreements, including giving preference to the creditor and always following the object in the hands of whoever the object is, meaning that the objects that are made the object of the mortgage are still burdened with the Mortgage even if they are in the hands of anyone. The object is located, fulfilling the principles of speciality and publicity (Supianto & Tri Budiman, 2021). The principle of speciality means that it is obligatory to include several collaterals and objects used as collateral, as well as the identity and domicile of the holder and mortgage rights, which must be included in the Deed of Granting Mortgage Rights (APHT).

The principle of publicity (Hisbullah et al., 2019) means that it must be carried out with the deed of the Land Deed Making Officer (PPAT) and must be registered with the Land Office, and the execution is easy and certain, meaning that it can be executed like a judge's decision, which has permanent and definite legal force.

The cooperation agreement itself is not recognized in the Civil Code, so it is classified as an anonymous agreement (*innominaat*), as stipulated in Article 1319 of the Civil Code. The article states that anonymous agreements are also subject to general provisions regarding agreements in the Civil Code, so that the Civil Code also applies to cooperation agreements, in addition to other regulations, so that cooperation agreements remain valid (Nuralifah, 2021).

One of the cases that occurs in this description is when the Cooperation Agreement between the Education and Housing Welfare Foundation (YKPP) and CV Bangun Sejahtera, which was made before Notary Raden Mas Soediarso Soenarto, SH., SpN, Deed Number 108 dated 30 (thirty) August 2013 at Jalan Pembangunan 2 Number, Central Jakarta, where the FIRST PARTY contributed funds to the SECOND PARTY in the amount of IDR 10,000,000,000.00 (ten billion rupiah) for a joint project for the construction of a restaurant counter on Jalan Kledokan Raya number 999, Catur Village Tunggal, Depok District, Sleman Regency, Special Region of Yogyakarta, with an agreement that the FIRST PARTY receives a profit sharing of 15% / year (fifteen percent per year) in a professional manner or calculated in the amount of Rp. 2,276,250,000.- (two billion two hundred and seventy six million two hundred and fifty thousand rupiah) within a period of 2 (two) years, but in practice the SECOND PARTY has defaulted, in other words, default (Restudyani, 2018).

By looking at this case, it can be described that under Article 6 of RI Law No. 4/1996, if one day the debtor defaults, the holder of the first mortgage right has the right to sell the mortgage object on his own power through a public auction and take the proceeds from the sale of the mortgage object for the settlement of the debt. The creditor holding the first mortgage is preferable to other creditors. The holder of the mortgage right in the case under study has the right to execute the collateral object for which the mortgage has been installed (Meralda Amala Istighfarin, 2018).

In the context of legal actions, it is found in the installation of mortgage rights carried out by several Notaries appointed by both parties, in the clause on the encumbrance of mortgage rights not based on accounts payable, as determined in the mortgage rights norms by means of the initial agreement (*pactum de contra hendo*), which in this case is a cooperation agreement.

The transformation of the main agreement, which was originally a financing transaction, into a debt transaction occurs when there has been a binding of collateral in the form of land. This debt-based guarantee institution is then implemented, and the principal agreement, whose substance is financing, will change in its clause (*accessoir*) contained in the APHT based on a payable agreement (Subekti & Suyanto, 2021).

The clause was found, which should have been based on debt according to the norms of mortgage rights, but the Notary/PPAT transformed the debt into the cooperation agreement in the Deed of Granting Mortgage Rights (APHT) he made, so that the APHT that was made changed the provisions that apply in the regulations for installing mortgage rights.

In other words, in this description, according to the researcher's point of view, there are still deficiencies or weaknesses, namely that the initial agreement (*pactum de contra hendo*) is a cooperation agreement, so innovation or debt renewal must be carried out. What needs to be updated is an



"agreement", namely from a cooperation agreement to a loan agreement, so that the creditor or provider of funds has no weaknesses.

Novation or renewal of debt is one of the reasons for the cancellation of the engagement. Novation can be interpreted as an agreement that replaces the old engagement with a new one (Amin, 2018). This replacement can occur for creditors, debtors, or the object of the engagement.

Debt renewal is regulated in Article 1413 of the Civil Code, which states that there are three ways for innovation and debt renewal to occur, namely (Subekti & Suyanto, 2020):

- a. If a debtor makes a new debt agreement for the person who owes him that replaces the same debt, which was written off accordingly;
- b. If a new debtor is appointed to replace the old debtor who is released from the contract by the creditor;
- c. If, as a result of a new agreement, a new creditor is appointed to replace the old debtor, the debtor is released from the agreement.

A novation can only occur at the will of the parties and cannot be presumed, as regulated in Article 1415 of the Civil Code. Novation only occurs because of an agreement, so it must meet the legal requirements of the agreement regulated in Article 1320 of the Civil Code.

Mortgage rights regulate land rights that can be burdened with mortgage rights, including property rights, usufructuary rights, building use rights, and usufructuary rights. The mortgagee is obligated to have the authority to take legal action against the mortgagee. Before a mortgage right arises over land or a building object, it first requires a basis for surrendering the mortgage right. The form is in the form of a credit agreement between the bank and the debtor, which is the main agreement in imposing mortgage rights. The imposition of mortgage rights cannot stand alone, which means that it cannot be carried out without a credit agreement because of its nature, which is an *accessoir* agreement.

The accessoir agreement is an additional agreement made based on the main agreement. The nature of the accessoir agreement itself includes:

- a. The existence and elimination of additional agreements depend on the main agreement;
- b. If the principal agreement is canceled, the additional agreement will also be canceled;
- c. If the principal agreement changes, then the additional agreement also switches. d. If the principal agreement is transferred due to *cessie* or subrogation, then the additional agreement is also transferred without special submission.

B. Power of Execution of Mortgage Certificate on Debtor's Management and Legal Actions

One of the legal consequences if the debtor defaults is that the debtor is required to pay compensation for the non-fulfillment of the debtor's achievements. According to Article 1243 of the Civil Code, civil compensation focuses on compensation for non-compliance with the agreement (default).

The compensation includes: first, fees or expenses that have been incurred; second, the actual loss due to damage or loss of property belonging to the creditor due to the debtor's negligence; and third, the expected interest or profit. Debtors who default on credit agreements are subject to compensation for expenses incurred, namely the principal debt or remaining debt, interest, and fines.



Based on the provisions of Article 1238 of the Civil Code, it is also emphasized that default only occurs after an agreement has been agreed upon by the parties. Agreements that are notarized or have gone through the correct drafting process by contract drafting experts generally contain provisions regarding the possibility of default, including the time period (grace) when one of the parties is declared in default and the sanctions that must be received in the event of default (Arba et al., 2016).

Thus, if the agreement specifies a period for fulfilling the agreement and the obligated party does not fulfill its obligations at that time, then that party has defaulted (Roesli et al., 2019). The Mortgage continues to follow the object into the hands of whoever the object is. The Mortgage is a special guarantee for the interests of the Mortgage holder; that is, even though the object of the Mortgage has been transferred and belongs to another party, the creditor can still exercise his rights through execution if the debtor defaults.

If the debtor defaults, then based on (Gitasari et al. 2019): a. The right of the first mortgage right holder to sell the mortgage object as referred to in Article 6; or b. the executorial title contained in the mortgage right certificate as referred to in Article 14 paragraph (2), Mortgage objects are sold through a public auction according to the procedure specified in the laws and regulations for settlement of receivables of mortgage holders with prior rights from other creditors. Every promise to carry out the execution of the Mortgage in a manner that is contrary to the provisions in paragraphs (1), (2), and (3) is null and void by law.

Unlawful Acts (PMH), regulated in Article 1365 of the Civil Code, reads, "Every act that violates the law and brings harm to another person, obliges the person who caused the loss because of his mistake to compensate for the loss." The elements of PMH can be drawn, including: the existence of an unlawful act; There is a mistake; there is a causal relationship between losses and actions (causality); and there is a loss. With the existence of a PMH lawsuit addressed to creditors, it is necessary to examine whether there are elements of PMH that were violated by the creditor, causing losses to the debtor. The creditor can directly execute the collateral object without having to file a lawsuit in court (*parate executie*).

If the debtor can prove himself negligent in carrying out achievements not because of his own will but as a result of an overmacht, then a space mechanism is needed for him to do so in order to obtain justice and legal certainty. Thus, it does not provide legal protection, justice, or legal provisions for debtors.

Conclusion

First, the mortgage provides several basic principles in fulfilling the credit agreement, including: giving the preferred position to the creditor; always following the object in the hands of whoever the object is; meaning that the objects that are made the object of the mortgage are still burdened with the mortgage even though in the hands of whoever it is, it fulfills the principles of speciality and publicity. The effect of the cooperation agreement itself on the installation of mortgage rights is not recognized in the Civil Code, so it is classified as an anonymous agreement (*innominaat*), as stipulated in Article 1319 of the Civil Code. The article states that anonymous agreements are also subject to general provisions regarding agreements in the Civil Code, so that the Civil Code also applies to cooperation agreements, in addition to other regulations, so that the cooperation agreement remains valid. Therefore, the installation of mortgage rights must be carried out correctly and carefully so that they can be followed up immediately in accordance with RI Law No. 4/1996, and the collateral object that has been installed with mortgage rights must be immediately executed by the creditor with the aim of obtaining repayment of his debts. Second, the creditor may execute the mortgage object immediately if the mortgagee (debtor) is in

default. When the mortgage continues to follow the object in the hands of whoever the object is, the mortgage is a special guarantee for the interests of the mortgage holder; that is, even though the object of the mortgage has been transferred and belongs to another party, the creditor can still use his rights through execution if the debtor defaults. If the debtor can prove himself negligent in carrying out achievements not because of his own will but as a result of an overmacht, then a space mechanism is needed for him to do so in order to obtain justice and legal certainty.

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