



## Implementation of Mortgage Imposition by Land Deed Officials in Practice

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### ABSTRACT

Research on the Implementation of Mortgage Imposition by Land Deed Making Officials in practice was carried out to know the implementation of Mortgage Imposition made before the Land Deed Making Officer (PPAT) in practice and to find out the importance of clauses without prior approval from the Debtor (First Party) in the event of default in order to make a public sale by auction of the Mortgage object, either in whole or in part, following the applicable laws and regulations. The method used is a normative juridical approach. The study results the show that in practice, the Mortgage Granting Deed (APHT) is done, reads out, and then signed by the Giver and Mortgage Recipient in front of the Land Deed Making Officer (PPAT) in the presence of two witnesses. The importance of the clause without prior approval, regulated in the APHT format, is more to emphasize that the debtor giving the mortgage must complete his obligations according to the credit agreement. If a default occurs, the creditor can take an execution parate or executorial title to return the loaned capital to the debtor. Including the word for without prior approval is not by the agreed terms for the agreement's validity as stipulated in Article 1320 of the Civil Code. PPAT, in filling out the identity data of the Mortgage Giver, must be more careful in tracing the identity in the form of KTP and Family Card from the Mortgage Giver and need to revise the APHT editor, especially without prior approval from the debtor.

## **INTRODUCTION**

National development aims to create a just and prosperous Indonesian society based on Pancasila and the 1945 Constitution of the Unitary State of the Republic of Indonesia (Tobing, 2014). This can be seen from the increasing need for funds as capital for businesses and other needs by business actors and the public in general. Therefore, capital is the main factor for the continuity and success of entrepreneurial activities. Business activities in any form and carried out by anyone are very dependent on the capital factor. Capital is significant for every business activity because capital is a good source of energy for the continuous development and growth of business entities. One of these funding services is through banking financial institutions, which are the most important and have a significant role in people's lives. According to Sentosa Sembiring, a bank is a legal entity engaged in financial services. Banks, as legal entities, can bind themselves with third parties (Hartono, 2000).

In Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1998 concerning Banking, Article 1 number 2 states that a Bank is a business entity that collects funds from the public in the form of savings and distributes them to the public in the form of credit and cash. Other forms order to improve the standard of living of the people at large. Furthermore, Article 1 point 7 states that credit is the provision or equivalent of a claim based on a loan agreement or agreement between a bank and another party that requires the borrower to repay the Debt after a certain period with interest.

In this regard, OP Simorangkir in Muhamad Djumhana argued that in carrying out their role, banks act as a form of the financial institution that aims to provide credit and other financial services. The provision of credit is carried out with own capital or funds entrusted by third parties or by circulating new means of payment in the form of demand deposits (Djumhana, 1993).

This trust is the basis of every engagement; a person can demand something from another. The elements of credit are two parties, a loan agreement, trust, achievement, reward, and a specific period. The definition above shows that credit has a broad meaning, which has objects (Badrulzaman, 1994).

This contract or agreement is a legal event in which one person promises another person or two people promise each other to do or not do something. A loan agreement as a reference for a credit agreement is regulated in Article 1754 of the Civil Code, which reads: a loan agreement is an agreement by which one party gives another party a certain amount of goods that are used up due to use on condition that the latter party will return the same amount of the same type and condition (Miru, 2013).

According to Djumhana (1993), banks cannot avoid bad credit. Therefore, to provide legal certainty for this credit, the Bank as a creditor has required guarantees for repayment of debts in case of a problem or bad credit by the debtor.

This is emphasized in the Explanation of Article 8 of the Banking Law (UU No. 7 of 1992): "Lending of credit by banks contains risks so that banks must pay attention to the principles of good credit. To reduce this risk, credit guarantees in

the sense of confidence in the debtor's ability to pay off his debts by what was agreed is an important factor that the Bank must consider. To obtain this assurance, the Bank must thoroughly assess the debtor's character, ability, capital, collateral, and business prospects before extending credit. Given that collateral is one of the elements of collateral for granting credit. If, based on other elements, confidence in the debtor's ability to repay the Debt can be obtained, the collateral can only be in the form of goods, projects, or claim rights financed by credit. The land whose ownership is based on customary law, namely land whose proof of ownership is in the form of "girik," "petok," and other similar things, can be used as collateral. Banks are not required to ask for collateral in the form of goods related to the financed object, commonly known as "additional collateral."

One type of collateral in granting credit is collateral in the form of immovable objects, namely land, because the land has a high economic value. Most of the land is the land of indigenous peoples. According to customary law, the concept of land tenure is based on layout rights, namely a customary law community's right as a unit with internal and external authority. Within the scope of ulayat rights, there are individual rights to land, namely rights born due to land clearing whose exploitation is carried out continuously intensively on a plot of land that was previously empty land (Patitingi, 2012).

Land as collateral is regulated in Law Number 4 of 1996 concerning Mortgage Rights on Land and Land-related Objects (UUHT). In Article 1 point 1 of the UUHT, it is stated that: "Collateral rights over land and objects related to land, after this referred to as mortgage rights, are security rights imposed on land rights as referred to in Law Number 5 of 1960 concerning Regulations Basic Agrarian Principles, including or not along with other objects that are an integral part of the land, for the settlement of certain debts, which give priority to certain creditors over other creditors.

From the formulation of Article 1 point 1 of the Mortgage Law, it can be seen that a Mortgage is a form of guarantee for repayment of the Debt, with prior rights, with the object (collateral) in the form of Land Rights as regulated in Law No. 5 of 1960 concerning Basic Agrarian Regulations (Mulyadi et al., 2005).

In Articles 4 to 7 of Law Number 4 of 1996, land rights that can be used as collateral for Debt have been explicitly designated. Five types of land rights can be guaranteed with mortgage rights, namely: Freehold; Cultivation Rights; Building rights; Right to use both property rights and rights to state land; Land rights, including buildings, plants, and works that already exist or will exist are an integral part of the land and are the property of the holder of land rights whose charges are expressly stated in the deed of granting rights to the land in question (Salim, 2017).

In general, land rights that can be encumbered with mortgage rights are ownership rights, usufructuary rights, and building use rights. Debt guarantees are additional or collateral agreements for a money-borrowing agreement made as the principal agreement. Public officials related to legal actions regarding land rights and ownership rights to apartment units are Land Deed Officials and Notaries (Santoso, 2010).

According to Article 1 number 24 of Government Regulation No. 24 of 1997, what is meant by the Land Deed Making Officer (PPAT) is a public official who is authorized to make sure of land deeds (Santoso, 2010). It was further stated that the complete understanding of the Land Deed Making Officer (PPAT) is stated in Article 1 point 1 of Government Regulation No. 37 of 1998, namely public officials who are authorized to do authentic deeds regarding specific legal actions regarding land rights or ownership rights to apartment units. Whereas Article 1 number 4 of Law Number 4 of 1996, the Land Deed Making Officer (PPAT) is a public official authorized to make the deed of land rights transfer and imposition of mortgage rights according to applicable laws and regulations (Santoso, 2010).

In general, for the making of the Mortgage Deed, the parties, both the debtor as the Mortgage Giver and the Creditor as the Mortgage Holder, must be present before the Land Deed Making Official to carry out the Mortgage Imposition process. The presence of the Mortgage Giver and Mortgage Recipient is essential because it relates to the signing of the Mortgage Granting Deed before the Land Deed Making Officer. If not present, then there must be a power of attorney imposing the mortgage rights given to the creditor by the debtor.

Regarding the Deed of Granting Mortgage Rights and the Power of Attorney for Imposing Mortgage Rights, there is already a blank or format so that the existing data from the parties is filled in before the Land Deed Making Officer. The format or blank is already standard because it can be said to be a standard or standard agreement.

In the standard agreement format regarding the imposition of mortgage made before the Land Deed Making Officer (PPAT) there is a clause which states that if the debtor does not fulfill the obligation to pay off his Debt, based on the debt agreement mentioned above, by the First Party, the Second Party as the Right Holder Dependents of the First Rank with this deed are given and express acceptance of authority, and for that, the power to without prior approval from the First Party: a) Sell or order to sell publicly by auction the object of mortgage either in whole or in part; b) Arrange and determine the time, place, method and terms of sale; c) Receive sales money, sign and submit receipts; d) Handing over what is being sold to the buyer concerned; e) Take the proceeds from the sale in whole or in part to pay off the debtor's debts mentioned above, and f) Do other things that according to the applicable laws and regulations are required or according to the opinion of the Second Party necessary to do in order to exercise the power of attorney.

The making of Deeds for Granting Mortgage Rights is often also represented by the creditor without the presence of the debtor because a Power of Attorney for Imposing Mortgage Rights has been drawn up before the Land Deed Making Officer. The problem that arises is that there is a land location or certificate of land rights that is used as collateral by the debtor, which is land owned by a third party that, because of trust, is loaned or is under the control of the debtor, which is then used as collateral for the Debt at the Bank (the creditor). The presence of the debtor and the Third Party Owner of Land Rights is

significant so that they are willing to accept the consequences, which will arise in the future and need to be regulated so as not to cause problems in practice.

Regarding the Deed of Granting Mortgage Rights and Power of Attorney for Installing Mortgage Rights, if one looks closely, it is a standard or standard agreement, according to Mariam Darus Badruzaman, as quoted by Assegaf (2014), which says that a standard agreement is an agreement that is prepared unilaterally in advance and is built on terms standard, offered to other parties for approval with almost no freedom for the parties which are offered to negotiate on what is offered. The form or format of the Deed of Granting Mortgage Rights (APHT) is regulated in the Regulation of the Head of the National Land Agency, so it is only possible to add the form or format provided. So the Land Deed Making Officer only works based on the existing provisions. So the question of this research is how is the implementation of the Mortgage Imposition made before the Land Deed Making Officer (PPAT) in practice? Moreover, to what extent is the importance of the clause without prior approval from the debtor (First Party) in the event of default in order to sell in public by auction the object of mortgage either in whole or in part by applicable laws and regulations.

## LITERATURE REVIEW

### Credit Agreement and Mortgage Right

According to J. Van Dunne, as quoted by Purwahid Patrik, the agreement can be interpreted as a legal relationship of offering from one party and legal acts of acceptance from another (Patrick et al., 1994). Article 1338 of the Civil Code states that all agreements made legally apply as laws for those who make them. For an agreement to be valid, it must meet the requirements stipulated in Article 1320 of the Civil Code: the existence of an agreement, competence, a particular matter, and a lawful reason.

Concerning the development of the country's economy, the need for funds through banks is carried out through credit agreements. The credit agreement is a bond or written evidence between the Bank and the debtor, so it must be structured and made so that it is easy for everyone to know that the agreement made is a credit agreement (Sutarno, 2004).

Credit agreements are a very strategic part of banking life. Because the credit agreement is a media or party intermediary concerning parties with surplus funds *with* those lacking and needing *funds*. The fundamental reality of the Credit Agreement is a simple service from the Bank in life and economic development (Widyadharma, 1997). The credit agreement here is a medium or means for the flow of funds from creditors to debtors. Widespread Lending appears to be an attempt to provide protection and stimulation for economically vulnerable groups, small entrepreneurs, to encourage the growth of small companies within the scope of credit policy (Sofwan, 1982).

According to Sri Soedewi Masjchoen Sofwan, activities in the various fields mentioned in advance, which consequently require credit facilities in their business, require guarantees for the provision of said credit for the sake of security of capital and legal certainty for the capital provider. This is where guarantee institutions are important (Sofwan, 1982). Capital security and legal

certainty referred to here are related to the certainty of receiving payment of receivables from the execution of collateral objects.

Given the importance of the position of credit funds in the development process, it is only natural that creditors, credit recipients, and other related parties receive protection through a vital collateral rights institution that can also provide legal certainty for interested parties (Kashadi, 2002). Interested parties here are primarily creditors.

In essence, material security rights do not have an independent position but are always an *accessory* to a principal engagement. Even though it is only an *accessory*, the collateral rights for those who are entitled (creditors) play a vital role because they give preference (*voorang*, preliminary) if he *verhaal* particular objects from the debtor's assets in order to cover the debtors *should go to him* (Kashadi, 2002). There is a possibility that a debtor has debts to several creditors. Therefore it must be guided by Article 1132 of the Civil Code. Therefore, according to Subekti (1991), Article 1132 mentioned above states that there is a possibility that the law will grant particular positions or *privileges*, or preferences to certain creditors. Creditors like that take precedence in payment.

The guarantee agreement is an additional agreement to the main agreement in the form of a loan agreement. This is also regulated in UUHT. Article 1 point 1 of the UUHT determines, among other things, that "A Mortgage Right is a guaranteed right for repayment of certain debts." Types of Debt that are guaranteed repayment with Mortgage Rights, as stipulated in Article 3 paragraph (1), namely: Existing Debt; or Debt agreed upon with a certain amount, or Debt that at the time the application for execution of the Mortgage Right was submitted can be determined by the amount based on the debt agreement or other agreement that gave rise to the related debt relationship.

Subekti (1991) states that not every land right can be collateral for a debt. However, land rights that can be used as collateral must meet the following conditions: 1) can be valued in money because the guaranteed Debt is in the form of money; 2) include rights registered in the public register because they must meet publicity requirements; 3) has a transferable nature, because if the debtor defaults on the promise, the object used as collateral for the Debt will be sold in public; and 4) require appointment by law.

In connection with the above conditions, Purwahid Patrik and Kashadi argued that the object of the mortgage includes: 1) What is stated in Article 4 paragraph (1): a) Property rights; b) Cultivation Rights; c) Building Use Rights. 2) As mentioned in Article 4 paragraph (2): Utilization rights over state land, which, according to applicable regulations, must be registered, are transferable according to their nature (Patrick et al., 1994).

What is mentioned in Article 27: a) Flats that stand on land with ownership rights, building use rights, and usage rights granted by the state; b) Ownership rights to apartment units, whose buildings stand on land with ownership rights, building use rights and usufructuary rights granted by the state. So the object of the Mortgage Right can include land and buildings on it as well as plants and works that already exist or will exist. Meanwhile, the subject,

in this case, is the Mortgage giver and the Mortgage holder (Kashadi, 2000). The subject here can mean an individual or a legal entity.

The subject of mortgage is regulated in Article 8 to Article 9 UUHT. In the two articles, it is determined that those who can become legal subjects in imposing a mortgage are the Mortgage giver and the Mortgage holder. The Mortgage giver can be an individual or legal entity with authority to take legal action against the Mortgage object. Mortgage holders consist of individuals or legal entities which are domiciled as debtors. Usually, in practice, the mortgage giver is called the debtor, the person who borrows money from a banking institution. In contrast, the mortgage recipient is called the creditor, a person or legal entity domiciled as a debtor (Salim, 2017).

In Article 8 UUHT, it is stated that "the giver of the Mortgage is a person or legal entity that has the authority to take legal action against the object of the Mortgage in question." The granting of Mortgage Rights is regulated in Article 10 and Article 15 UUHT. Article 10 regulates the procedure for directly granting Mortgage Rights. In contrast, Article 15 regulates the granting of authorization for the imposition of Mortgage rights by the giver of Mortgage rights to the recipient of a power of attorney.

The process of imposing a mortgage is carried out through two stages of activity, namely: 1) The stage of granting a mortgage, by making APHT by PPAT, which is preceded by a guaranteed debt agreement; 2) The stage of registration by the Land Office, which is when the mortgage is imposed (Kashadi, 2000).

The debt agreement can be notarized or underhanded as the underlying stage for granting Mortgage Rights. In granting the mortgage before the PPAT, it must be attended by the Mortgage giver and the recipient and witnessed by two witnesses. If the land being used as collateral has yet to be certified, those obliged to act as witnesses are the Village Head and a government member from the village concerned. (Article 25 PP. 10 of 1961). The village head and members of the village government are considered to know more about the history of the land. Thus, the PPAT is obliged to refuse a request to make APHT if the land in question is known to be still in dispute/dispute.

According to Fuady (2014), many legal theories teach that law must be stable but cannot be *still* or rigid. At first glance, these statements contradict one another, but in fact, they are not. Because that is one of the essential *facets* of law where on the one hand, the law must contain elements of certainty and predictability so that it must be stable, but on the other hand, the law must be dynamic so that it can always follow the dynamics of the development of human life. This research is based on the rule of law theory as *the grand theory* or the leading theory, the contract theory as the middle *theory*, and the theory of justice as *the applied theory*.

## **METHODOLOGY**

This research examines the rules of positive law, especially the UUHT and the Civil Code, PPAT, so the approach is normative juridical and analytical descriptive. This research uses literature or document studies. Legal materials that have been collected are compiled regularly, then analyzed qualitatively.

## **RESEARCH RESULT**

### ***The Rule of Law Theory***

The use of the rule of law theory as a grand theory in applicable law in this research is related to the principles of the rule of law, which include the principle of legality and the principle of Equality, and the principle of *due process* law. The principle of legality (*legality principle*) is a principle that is consequence of Indonesia as the rule of law, which states that every action, action, and or policy of government officials must be based on applicable law. The principle of Equality (*equality principle*), namely the legal principle that obliges all government officials in their every action and policy, is based on placing themselves in the same position as other parties (Basri, 2017). Munir Fuady said that the procedural due process of law is based on "fundamental fairness." It was further stated that substantive *due process of law* is a juridical requirement that states that making a legal regulation may not contain matters that could result in unfair, illogical, and arbitrary treatment of humans (Fuady, 2011).

This legal principle is the basis for realizing justice for everyone who will defend their rights by the provisions of the applicable laws and regulations, which is based on Article 1 paragraph (3) of the 1945 Constitution, which stipulates that the State of Indonesia is a State of law. In the explanation, it is stated that the State of Indonesia is based on legal principles (*Rechtsstaat*), not based on sheer power (*Machtsstaat*). Furthermore, Munir Fuady argued that the concept of a rule of law or *the rule of law* was intended to limit state power so as not to abuse power to oppress its people (*abuse of power, abuse de droit*). It was further stated that in a rule-of-law state, everyone must be subject to the law equally, namely, subject to fair laws (Fuady, 2011).

Ilhami Bisri stated that the Republic of Indonesia, through Article 27, paragraph 1 of the 1945 Constitution, adheres to the principle that every citizen has an equal position before the law and government and is obliged to uphold the law and government without any exceptions. This is by the universal legal principle of "*Equality before the law and government.*" It was further stated that with this principle, the State of Indonesia adheres to the principle of a balance between rights and obligations for every citizen or resident without discrimination (Bisri, 2017).

Regarding the position of objects in Civil law, the principle of dividing human rights into material rights and individual rights is put forward. Material rights are the right to control objects directly over an object, and this power can be maintained over everyone. These rights are in the law of absolute rights (absolute). Examples of absolute rights are property rights, usufructuary rights, building use rights, and so on (Bisri, 2017).

Regarding the principles of engagement in civil law as stipulated in Article 1233 of the Civil Code, which states that engagement can be born because of an agreement or agreement or because of a law.

### ***Contract Theory***

Contract theory, also known as the *contract theory* (English) or *contract theory* (Dutch), has a significant meaning in society, nation, and state life. This theory analyzes the legal relationship between one legal subject and another. According to Ahmadi Miru, this contract or agreement is a legal event in which

one person promises another person or two people promise each other to do or not to do something. Usually, suppose someone promises to another person. In that case, a contract is a contract that is usually termed a unilateral contract where only one person is obliged to hand something over to another person, while the person receiving the handover does not give in return (counter-performance) for something he has received (Muru, 2013).

Meanwhile, if two people promise each other, each party promises to give something/do something to the other party, which also means that each party has the right to receive what the other party promised. This means that each party is burdened with obligations and given the rights as promised.

A contract is an event that is concrete and observable, whether it is a written or unwritten contract. This is different from an engagement that is not concrete but abstract or cannot be observed because the event is only a result of the existence of the contract, which causes the person or parties to be bound to fulfill what was promised. The parties to the contract can be individuals or business entities that are not a legal entity or legal entities (Muru, 2013).

According to Badruzaman (1994), the Civil Code distinguishes three groups involved in the agreement, namely: a) The parties who agreed on themselves; b) Their heirs and those entitled to it; c) Third parties. For an agreement to be valid, four conditions are needed: a) They agree to be bound; b) they can engage; c) A particular thing; and d) a legal cause.

The functions or significance of contracts in business traffic, according to Agus Yudha Hernoko, include: 1) Contracts as a legal vessel for parties to express their respective rights and obligations (exchanging concessions and interests); 2) Contracts as a framework for the rules of the game; 3) Contracts as evidence of a legal relationship; 4) The contract provides (guarantee) legal certainty; 5) Contracts support a conducive business climate (*win-win solution; profit-efficiency*) (Badruzaman, 1994).

The principle of freedom of contract is one of the essential principles in contract law. This freedom of contract by some legal scholars is usually based on Article 1338 paragraph (1) BW that all agreements made legally apply as laws for those who make them. Likewise, some base it on Article 1320 BW, which explains the terms of the agreement's validity (Badruzaman, 1994). The principle of good faith is one of the principles known in contract law. This provision regarding good faith is regulated in Article 1338 paragraph (3) that agreements must be implemented in good faith.

### ***Justice Theory***

The contract has a philosophical function: to bring about justice for the parties making the contract, even for third parties with a legal interest. Justice is what is intended to be achieved by or through contract law. This broad understanding of justice can be developed by placing justice as the goal of contract law, which, one way or another, will depend on the point of view and way of understanding justice (Syaifuddin, 2012).

Furthermore, Hillman emphasized in his theory that " *Contract law contributes to distributive justice through its program of mandatory terms and policing standards*" (Syaifuddin, 2012), which means that contract law plays a role in

realizing distributive justice through its normative clauses, which are formed by established legal standards. Has been determined.

Beauchamp and Bowie put forward five principles that must be enforced so that distributive justice is realized, namely if it is given: 1) To everyone the same share; 2) To each person according to their individual needs; 3) To everyone according to their rights; 4) To each person according to his effort; 5) To each person according to his services (merit) (Syaifuddin, 2012).

According to Rawls, as adapted by Muhammad Syaifuddin, it is unfair to sacrifice the rights of one or several people only for the sake of more significant economic benefits for the community as a whole because it is contrary to justice as fairness which demands the same principle of freedom as the basis for organizing social welfare. Therefore, economic considerations must not conflict with the principle of freedom and equal rights for all people. In other words, social decisions that have consequences for all citizens must be made based on rights (*rights-based weight*) rather than based on virtue (*good-based weight*) so that justice and fairness can be enjoyed by everyone (Syaifuddin, 2012).

Furthermore, Rawls offers a form of solving justice problems by building a theory of contract-based justice, which makes the principles of justice that are chosen together indeed the result of a mutual agreement and that all people are free, rational, and equal, capable of guaranteeing the exercise of rights while at the same time distributing obligations equally to everyone. The concept of good justice must be contractual so that any concept of justice not based on a contract must be set aside for the sake of justice itself (Syaifuddin, 2012).

Rawls defines justice as "*fairness*" (*justice as fairness*), which according to K. Bertens's explanation, in the lexical (dictionary) meaning means fair as well as fair. However, there is a difference. *Namely, it* means fair according to its content (substance), which is called substantial justice (*substantive justice*), while *fair* means fair according to the procedure, which is called procedural justice (*procedural justice*). As for *fairness*, it means justice that is based on reasonable procedures (not engineered, not manipulated).

## DISCUSSION

### *Implementation of Imposition of Mortgage Made Before the Land Deed Making Officer (PPAT) in Practice*

The process of imposing Mortgage rights is regulated in Article 10 UUHT, which begins with a promise to provide a Mortgage as a guarantee for repayment of a particular debt, which is then stated in this promise and is an inseparable part of the debt agreement or commonly known as the credit agreement concerned or other agreements that also give rise to said Debt. In addition to the existence of the credit agreement, granting Mortgage rights is carried out by making a Deed of Granting Mortgage rights which is carried out before the PPAT by applicable laws and regulations.

The Mortgage Granting Deed must include: a) the name and identity of the holder and the Mortgage giver, b) the domicile of the parties, and if one of them is domiciled outside Indonesia, a preferred domicile must also be stated for him in Indonesia, and if in the APHT of the chosen domicile does not include the PPAT office where the APHT is made is considered the chosen domicile, c) a clear

designation of the guaranteed Debt or debts as referred to in Article 3 and Article 10 Paragraph (1), d) the amount of the dependent, and f) a clear description of the object of the mortgage.

In practice, it is often found that some parties need funds, thus submitting identity data that does not match the actual data because all methods can be used; the important thing is to get money immediately. Therefore, the PPAT must pay close attention to their KTP and NIK because the NIK could use someone else's NIK, especially those from the same clan. The need for funds sometimes causes these debtors to become emotional because they do not want complicated procedures, when in fact, the PPAT's job is to match their identities so they do not cause problems in the future.

In addition to the promises stated in the Credit Agreement, there are promises included in the Mortgage Deed, including: a) Promises that limit the authority of the Mortgage giver to lease the Mortgage object and/or determine or change the lease term and /or receive rent in advance, except with prior written approval from the Mortgage holder; b) A promise that limits the authority of the Mortgage giver to change the form or structure of the Mortgage object, except with prior written approval from the Mortgage holder; c) The promise that gives authority to the Mortgage holder to manage the Mortgage object based on the decision of the Head of the High Court whose jurisdiction includes the location of the Mortgage object if the debtor is really in default or breach of contract; d) A promise that gives authority to the Mortgage holder to save the Mortgage object, if this is necessary for execution or to prevent it from becoming the Mortgage object because the provisions of the law are not fulfilled or violated; e) Promise that the holder of the first Mortgage Right has the right to sell the Mortgage object under his own authority if the debtor defaults or defaults; f) The promise given by the first Mortgage holder that the object of Mortgage will not be cleared of Mortgage; g) The promise that the Mortgage giver will not relinquish his rights to the Mortgage object without prior written approval from the Mortgage holder; h) The promise that the Mortgage holder will obtain all or part of the compensation received by the Mortgage giver for settlement of his receivables if the Mortgage object is released by the Mortgage giver or his rights are revoked in the public interest; i) A promise that the Mortgage holder will receive all or part of the insurance money received by the Mortgage giver for settlement of the receivables, if the Mortgage object is insured; j) Promise that the Mortgage giver will empty the Mortgage object at the time of execution of the Mortgage; and k) Unless otherwise agreed, Land Rights Certificates that have been affixed with notes on the imposition of Mortgage Rights by the Land Office are exempt to the holders of the land rights in question.

In practice, after the Deed of Granting mortgage is filled out by the PPAT, the deed will be read out in front of the Mortgage Giver and Mortgage Beneficiary, witnessed by two witnesses who are generally employees or staff of the Notary Office and the PPAT. If there is incorrect data in filling out the form, it will be corrected, after which the Deed of Granting the mortgage is signed by the Mortgage Giver, Mortgage Beneficiary, witnesses, and PPAT. After the signing of the APHT before the PPAT by the debtor as the mortgagee and the

creditor as the mortgagee, the following process is to register the mortgage object with the Land Office, which the PPAT carries out.

In the laws and regulations, it is determined that a period of not later than 7 (seven) working days after signing the APHT before the PPAT, within this period, the PPAT is required to send the APHT along with other required documents to the local Land Office. Then the registration of the mortgage on the object of the mortgage in question is carried out by the Land Office by making a Mortgage land book and recording it in the land book of the land title of the object of the mortgage in question, then copying the record on the Mortgage certificate of the land right in question. The mortgage is born on the date of the Mortgage land book, the seventh day after complete receipt of the documents required for registration, and if it falls on a holiday, it is dated on the following date.

The Land Office issues a Mortgage Certificate as proof of the existence of a Mortgage Right. The certificate itself contains irah-irah with the words "For the sake of Justice Based on Belief in the One and Only God," thus it is intended to confirm the existence of executorial power in the Mortgage Certificate so that if the debtor defaults, then it is ready to be executed as with a court decision that has obtained permanent legal force. After the Mortgage Certificate issuance, it is handed over to the Mortgage Holder.

Nevertheless, in practice, some obstacles are often found. The obstacle is the registration process at the old Land Office so. There have been several loans or credits whose terms have been completed, but until the loans or credits whose terms have been completed have not yet been issued a Mortgage Certificate by the Land Office. This is often due to the time-consuming search for land books, which becomes an obstacle to recording the registration of Mortgage Rights in the relevant land book.

The APHT is made by the PPAT, the contents of which have been determined in the APHT form. The APHT form is contained in the Regulation of the Head of the National Land Agency (BPN) of the Republic of Indonesia Number 8 of 2012. Thus, the PPAT, in this case, only fills in the APHT form to the relevant regulations, and adding promises in the APHT is not allowed to conflict with laws and regulations. Invitation.

*The importance of the clause for without prior approval from the Debtor (First Party) in the event of default to sell in public by auction the object of mortgage either in whole or in part by applicable laws and regulations.*

This clause arrangement is intended to put more emphasis on debtors so that they know better that without prior approval from the debtor in the event of a default or lousy credit, the creditor (Bank) can act in terms of execution. This is related to the executorial power in the Mortgage Certificate.

However, when viewed from the credit agreement made by the parties, in this case, the debtor as the Mortgage Giver and the creditor as the Mortgage Beneficiary, the debtor is automatically obliged to carry out achievements to routinely carry out periodic payments according to the debt agreement every month or in accordance with the agreement that has been signed, while the

creditor is entitled to achievement, in this case, receiving payment of installments of his credit debt according to the credit agreement.

Thus the debtor's position here is passive, while the creditor's position here is active in the legal relationship. If the debtor defaults and is no longer able to pay his Debt to the creditor even though he has been given subpoenas three times in a row by the creditor or through his attorney, then in general, the debtor must voluntarily hand over his belongings starting from the movable property and if not enough continue with immovable property to be confiscated and auctioned off in order to settle the Debt. If there are excess funds after deducting the debt from the auction, it will be handed over to the debtor. The legal basis is regulated in Article 1131 of the Civil Code, which states that "all movable and immovable objects belonging to the debtor, both existing and future, serve as collateral for the debtor's commitments." The debtor's property will exist, meaning that the debtor's property did not exist when the debt agreement was made but was there when the debtor defaulted and was confiscated for auction.

The provisions in the Mortgage Law are unique because one of the characteristics of the mortgage is to give priority to the first mortgage holder in paying off debts to default debtors. Creditors, in this case, banks, indeed cannot take the risk of loss; therefore, of course, from the start, the possibility of anticipation has been calculated if the debtor defaults and the credit becomes terrible credit. Therefore, in his position as an active party, he can take action to sell the auction of collateral, in this case, the existing mortgage guarantee from the debtor to pay off his Debt.

The action to secure the capital issued by the creditor, in this case, the Bank to the debtor, is carried out considering that the creditor has taken the initial steps so that the debtor wants to settle his Debt. If efforts to cooperate with the debtor are not successful, then the next step taken is to execute as stipulated in UUHT in article 20, it is stated:

- (1) If the debtor defaults, then based on: a) The right of the first Mortgage Holder to sell the Mortgage object as referred to in Article 6, or b) The executorial title contained in the Mortgage Certificate as referred to in Article 14 paragraph (2). The mortgage object is sold through a public auction according to the procedure specified in the laws and regulations for the settlement of receivables of the mortgage holder with prior rights over other creditors.
- (2) Based on the agreement between the giver and the holder of the Mortgage Right, the sale of the Mortgage object can be carried out under the hand if, in this way, the highest price can be obtained, which benefits all parties;
- (3) The implementation of the sale, as referred to in paragraph (2), can only be carried out after the expiration of 1 (one) month after being notified in writing by the giver and or the holder of the mortgage to interested parties and announced in at least 2 (two) published newspapers. Circulating in the area concerned and the local mass media, no party has expressed any objections;
- (4) Every promise to execute the mortgage in a manner that is contrary to the provisions in paragraph (1), paragraph (2), and paragraph (3) is null and void by law;

- (5) Until the announcement for the auction is issued, the sale, as referred to in paragraph (1), can be avoided by paying off the Debt guaranteed by the mortgage along with the execution costs that have been incurred.

This promise to sell on his power is regulated in Article 6 UUHT, which stipulates that "if the debtor defaults, the holder of the first Mortgage has the right to sell the object of Mortgage on his power through a public auction and collects the settlement of his receivables from the proceeds of the sale." Furthermore, in the Elucidation of Article 6 UUHT, it is stated that: The right to sell the Mortgage object on its power is a manifestation of the priority position held by the Mortgage holder or the first Mortgage holder if there is more than one Mortgage holder. This right is based on the promise given by the Mortgage giver that if the debtor defaults, the Mortgage holder has the right to sell the Mortgage object through a public auction without requiring further approval from the Mortgage giver and then collect the settlement of his receivables from the sale proceeds before the creditor. -other creditors. The remainder of the sale proceeds remains the mortgagee's right.

So there is a type of execution regulated in the UUHT, namely parate execution, which can be interpreted as direct execution and executorial titles that creditors or Banks can choose in auctioning objects of Mortgage guarantees. For the implementation of auctions based on Article 6 UUHT, initially, the Office of State Assets and Auction Services (KPKNL) previously KP2LN had made MOUs with certain banks, which confirmed that the collateral to be auctioned was not in trouble and if after the auction there is a lawsuit, then the Bank that should be sued or held responsible.

However, in current developments, creditors, in this case, banks, prefer to use direct execution as stipulated in Article 6 UUHT because the procedure is more accessible and more straightforward. This is based on a promise when making and signing the Deed of Granting mortgage in front of the Deed Making Officer (PPAT), where one of the promises mentions the promise that the holder of the first mortgage has the right to sell under his authority the Mortgage object if the debtor defaults or default.

The procedure followed by the creditor (Bank) will submit customer data and collateral objects to the KPKNL. An executorial confiscation will be placed on the object of Mortgage collateral and announced in the local daily as published in the Cenderawasih Pos Daily. Then according to the time for determining the auction, the auction will be carried out by the auction official from the KPKNL.

While the executorial title procedure is based on the Mortgage Certificate, which already contains the orders "For the sake of Justice Based on Belief in the One and Only God." This execution procedure must be submitted to the Head of the local District Court, where the object of collateral for the mortgage is located. Because of his position, the District Court chairman will summon the debtor as the respondent for execution to be reprimanded or given a warning or often called *unique*, so that within eight days, he must pay off his Debt to creditors. The implementation of this *amazing* is carried out in a closed session, and the minutes are made. If the 8-day period has passed, the debtor has not yet carried out his

obligation to pay his Debt to the creditor (Bank), then the follow-up action of the Head of the District Court is to order the Registrar to place an executorial confiscation on the object of Mortgage collateral. Then the collateral object to be confiscated will be announced through the local daily within two times 15 days. After that, an auction will be held with the intermediary of the Auction Officer from the KPKNL.

However, if analyzed more deeply, then part of this clause gives excessive rights to creditors in acting as selling auctions of collateral if the debtor defaults. This can be seen from the sentence in the clause for without prior approval from the Debtor (First Party) in the event of default to sell in public by auction the object of mortgage either in whole or in part according to the applicable laws and regulations.

Such a clause can result in a lawsuit against the creditor, in this case, the Bank that sells the auction publicly and the government agency that handles the auction or the State auction office (KPKNL). Therefore, this part of the clause needs to be proposed to be revised with the prior approval of the debtor so that he knows and accepts it to avoid lawsuits from the debtor. It is possible that when signing the Deed Granting Mortgage or Power of Attorney to Install mortgage, the debtor does not read the contents of the articles, but immediately signs the deed, because those who immediately receive funds are due to urgent economic needs. When signing the deed, it is binding on the parties to carry it out.

Suppose it is related to the first condition of the agreement's validity as stipulated in Article 1320 BW, which states that there is an agreement or agreement between those who agree. In that case, the consequences of not fulfilling this agreement can result in the agreement being canceled. If the agreement is canceled, it will cause losses to the Bank or creditor. With the approval, the creditor will notify the defaulting debtor about the sale of the mortgage collateral in public. If the notification is not heeded, it can be followed by a warning or subpoena through a lawyer or a warning from the court so that the debtor is bound to carry out the warning.

Lawsuits can occur if the land used as the object of this mortgage belongs to a third party who does not know that his land is used as collateral at the Bank by the debtor. With a certain relationship between the debtor and a third party, the land or title certificate belonging to a third party is temporarily controlled by the debtor.

## **CONCLUSIONS AND RECOMMENDATIONS**

In practice, the APHT is made, read, and signed by the giver and the mortgagee before the PPAT in the presence of two witnesses. The APHT form/format already exists, so the PPAT's task is only to fill in the data according to the form.

The importance of the clause without prior approval, regulated in the APHT format, is more to emphasize that the debtor giving the mortgage must complete his obligations according to the credit agreement. If a default occurs, the creditor can take an execution parate or executorial title to return the loaned capital to the debtor. Including the word for without prior approval is not by the

agreed terms for the agreement's validity as stipulated in Article 1320 of the Civil Code.

Therefore, the authors recommend:

1. To the PPAT to ensure that everything runs smoothly in filling in the identity data of the Mortgage Giver, the PPAT must be more careful in tracing the identity in the form of KTP and Family Card from the Mortgage Giver.
2. To the government, in this case, BPN, it is necessary to revise the APHT editorial, especially without the prior approval of the debtor, with approval of the debtor.

### **ADVANCED RESEARCH**

In writing this article the researcher realizes that there are still many shortcomings in terms of language, writing, and form of presentation considering the limited knowledge and abilities of the researchers themselves. Therefore, for the perfection of the article, the researcher expects constructive criticism and suggestions from various parties.

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