



International Journal of Applied Business and Economic Research

ISSN : 0972-7302

available at <http://www.serialsjournal.com>

© Serials Publications Pvt. Ltd.

Volume 15 • Number 20 • 2017

The Inconsistency of Parate Execution Object Warranty of Rights in Banking Credit Agreement in Indonesia

Anis Mashdurohatun¹, Zaenal Arifin² and Gunarto³

¹ Lecturer at Faculty of Law Universitas Islam Sultan Agung Semarang, E-mail: anism@unissula.ac.id

² Graduate Student of Faculty of Law Universitas Islam Sultan Agung Semarang, E-mail: rezae_dm@ymail.com

³ Lecturer Faculty of Law Unissula, E-mail: gunarto@unissula.ac.id

Abstract: This study aims to examine and analyze the philosophy of mortgages as an object of mortgage guarantee, as well as to analyze inconsistencies of execution object execution in mortgage loan agreement. The method of approach in this research was empirical juridical. The data used were secondary data, sourced from primary, secondary and tertiary legal materials. Analyze the data analytically. The results of the study found that: The philosophy of the dependent right as the object of credit guarantee, ie before the existence of the Insurance Rights Act (UUHT) which has been mandated in the provisions of Article 51 of Basic Agrarian Law, then still use *Hypothek* regulation, which is regulated in Book II title 21 Civil Code Article 1162 to Article 1232 and *Creditveerband*, set forth in Stb.1908 No.542 as amended by Stb.1937 No.190 as collateral for debt or credit Guarantees granted in Mortgage Rights, namely the preference to precede other creditors to the creditor Holders of Insurers' Rights. The inconsistency of the *parate* charge of execution in the provisions of Article 6 with Article 11 Paragraph (2) letter (e), Article 6 with Article 14 Paragraphs (2) and (3), and General Explanation Number 9 of Law Number 4 of 1996 Concerning Mortgage Rights. This inconsistency can be seen from the mixed content of the execution *parate* substance according to the doctrine by execution based on the executorial title (*grosse deed*). As well as Circular Letter of Supreme Court Number 7 of 2012. The execution shall still be based on the determination of the Chairman of the local District Court (court fiat).

Keywords: Inconsistency, Parate Execution, Mortgage Rights, Credit.

A. INTRODUCTION

Credit has a main element of belief, although credit itself is not just a trust. Thus, belief here means that the party who gives credit (creditor) believes that the recipient of credit (debtor) will be able to meet everything that has been agreed¹. Loan activity is a very basic and conventional activity of a bank, even while experts say that the traditional function of banks is to raise funds from the community and channel funds to the public. Fund disbursement is generally done in the form of credit provision.²

The Agreement is a legal act based on an agreement between two or more persons to give rise to legal consequences which may be imposed by law³. O. C. Kaligis also believes that the recognition of the treaty as the law makes both parties bind themselves, which then creates rights and obligations for each party that needs to be realized, this is what is called achievement⁴. Agreement made to cause legal consequences, because in the agreement two people agree to determine the rules, rights and obligations are binding and must be obeyed, if not adhered to be imposed sanctions. If those who violate the agreement are not sanctioned then the immoral people will cause chaos. Therefore, for those who violate the minimum agreement are required to pay compensation to the injured party.⁵

The Agreement is a legal relationship in the field of wealth based on an agreement between the subject of the law, and among them (the other parties/legal subjects) is obliged to perform their performance in accordance with the agreement of the parties and cause legal consequences⁶. A covenant is an event in which a person promises to others or where two persons promise to do something, from this event a legal relationship exists between these events arises a legal relationship between the parties called the bond⁷. Ahmadi Miru also believes that this contract or agreement is a legal event in which a person promises to another person or two promises to do or not to do something.⁸

Through the agreement there is an engagement or legal relationship that creates rights and obligations to each of the contracting parties. In other words, the parties are bound to abide by the agreement they have made. In this case the function of the agreement is the same as the legislation, but it is only applicable to the author only. Legally the treaty may be enforced through the Court. The law provides sanctions against the perpetrator of breach of agreement or broken promise (*wanprestasi*)⁹. For those who fail to implement something that has been agreed upon, the other party may use the judicial authority to execute the agreement and obtain redress or other remedies.¹⁰

Banking credit agreements with mortgage guarantees have spread with the development of property businesses in Indonesia. Risks in running the banking business and other business are the inevitable part. On the other hand, many bad loans are caused by many factors, either because *forcemayor* or bank that ignores the prudential principles of the bank, before giving credit or financing, syari'ah bank should conduct a thorough assessment of the character, capability, capital, collateral, and prospect Business of the Debtor Customer. The five elements are often called 5C¹¹ lending (Character, Capital, Capacity, Collateral and Condition of Economy). On the other hand, it could also be due to the debtor's default or default injury. When the debtor fails to pay (*wansprestasi*), legal measures of creditor do executing the object of guarantee of mortgage rights. It is interesting that it is further studied about the implementation of the execution object parate of mortgage guarantee in the banking credit agreement based on Law No. 4 of 1996 concerning the Rights of Dependence on the burden of land and the objects related to the land.

B. RESEARCH METHODS

The paradigm of this research is the Positivism Paradigm, with the type of doctrinal research. Law is defined as the norm or rule that applies in society and becomes the reference of every person's behavior, and the rules or norms in positive law¹². Peter Mahmud Marzuki, explains that legal science has characteristics as a prescriptive and applied science, where as a prescriptive science, the science of law studies the purpose of law, the values of justice, the validity of the rule of law, the concepts of law, and the legal norms.¹³

With normative juridical research methods, the object of legal juridical-normative research includes (1) research on legal principles, (2) research on legal systematics, (3) research on the level of legal synchronization, (4) legal history research, And (5) comparative law studies.¹⁴

C. RESEARCH AND DEVELOPMENT RESULTS

1. The Philosophy of Mortgage Rights as an Object of Mortgage Rights Guarantee

The mortgage right is a material security institution for land rights and land-related items for certain debt repayment, which gives priority to a particular creditor to a creditor holding the Insurance Rights to other creditors. Guarantees granted in Mortgage Rights, ie, prioritized rights to other creditors to creditors of Holders of Mortgages¹⁵. In the provision of Article 51 of Law Number 60 Year 1960 on the Basic Agrarian Law (UUPA), mandates for the creation of the Mortgage Rights.

In the absence of the Mortgage Law that has been mandated by UUPA, then as a transition we still use the *Hypotheek* and *Creditverband* institutions as debt or credit guarantees.¹⁶

The provisions concerning this Mortgage are governed in Book II title 21 Civil Code Section 1162 to Article 1232. The *Creditverband* is used the provisions in Stb.1908 No.542 which changed with Stb.1937 No.190¹⁷. In 1996, it had been released the Law No. 4 of 1996 on the Rights of Land Dependence and Land Related Materials which is commonly known as the Mortgage Rights Act (UUHT).¹⁸

By basing on the definition of mortgage, as mentioned above, it can be seen that the Mortgage Rights embody the main elements such as:

- a) Mortgage Rights is the right of guarantee for the settlement of receivables
- b) Object of the Mortgage Rights is the right to land in accordance with UUPA.
Objects of mortgages consist of land rights in the form of right of ownership, building right, right to cultivate, Right to Use of State Land which by its nature can be transferred and Right to Use of Property related to the land. It can be concluded in Article 4 Paragraph (4) of UUHT (Mortgage Rights Act) that the Liability Rights may also be imposed on the land right and the existing, existing or existing buildings, plants and works which are united with the land and which belongs to the holder of the land rights whose burden expressly stated in the Deed of Granting the Mortgage Rights concerned. Article 4 paragraph (5) of the UUHT stipulates that the objects related to the land are not limited to objects owned by the holder of the land right concerned but may also include objects owned by another party. However, the charger may only be done by signature as well as by the owner or authorized by the owner on the Deed of Granting the Mortgage Rights concerned.
- c) Guaranteed debt should be a certain debt.

According to Article 3 paragraph (1) UUHT, Mortgage Rights may be used as security for:

- i) Existing debt
- ii) The new debt will have but previously agreed with a certain amount.

- iii) The new debts shall be in existence but previously agreed with the amount at which the request for execution of the mortgage is filed shall be determined based on the agreement of the debts of the receivables or other agreements resulting in the related debt relation.
- d) Give priority to a particular creditor above the other creditors¹⁹

The provisions of Article 11 paragraph (2) letters e and h are mentioned in the Deed of Granting Mortgages may include promises that: the promise that the first holder of the Mortgage right shall have the right to sell on his own authority the object of the Mortgage right if the debtor of breach of promise “ letter h which is a promise that the Depository will not relinquish his/her right to the object of Mortgage Rights without prior written consent of the Mortgage Holders.

Furthermore, in Article 20 paragraph (1) mentioned that the debtor has an appointment injury based on:

- i) the right of the first Depository to sell the object of Mortgage Right as referred to in Article 6 or
- ii) the executorial title contained in the certificate of Mortgage Right as referred to in Article 14 paragraph (2) The object of the Mortgage Right shall be sold through a public tender in accordance with the procedure prescribed in the legislation for the repayment of the Debt Holders’ holders with the right of priority over the other creditor.

It is mentioned in Article 6 of the Mortgage Rights Act (UUHT) if the debtor has an injury to an appointment, the first Depository holder has the right to sell the object of the Mortgage Right to his/her own power through a public tender and to take out the receipt of the proceeds from the proceeds.

For the Creditor of the Important Mortgage is the enforcement of the privileges of the Creditor to a third party or other Creditor, to be repaid in advance of the sale of the specially designated object as the object of the Mortgage Right in the event that the Debtor breaches the pledge.²⁰

Prior to the enactment of such provision has been preceded by the provisions of Article 1131 of the Civil Code which regulates all material objects of the indebted and immovable, whether existing or new, there will be a later dependent on all personal engagement.

The Mortgage Rights Act is strongly seen to protect only the creditor, this is according to Salim HS which states that the characteristics of the Mortgage Rights are as follows²¹:

- a) Provide priority or priority to the holder known as *droit de preference*. This privilege is affirmed in Article 1 number 1 and Article 20 paragraph (1) of Law Number 4 Year 1996. If the debtor has an appointment injury, the holder of the Mortgage Rights shall be entitled to sell the object as collateral through a public tender under the applicable rules and take the settlement of the receivables from the proceeds sale, with the right of prior credit to other creditors who are not holders of Insurance Rights or creditors holding Mortgage Rights with lower rank. This privilege is not owned by a creditor not a holder of a Mortgage.
- b) Always follow the secured object in the hands of whoever it is or is called the *Droit de suit*. This privilege is affirmed in Article 7 of Law Number 4 Year 1996. Even though the object of the Guaranteed Right has been transferred to the other party, the creditor of the Depository shall still be entitled to sell it through a public tender if the debtor has an appointment injury.

- c) Fulfill the principle of specialty and publicity so that it can bind third parties and provide legal certainty for interested parties.
- d) Easy and sure in execution.

Thus the Law on Right of Responsibility (UUHT) has provided convenience and certainty to creditors in execution implementation.

2. Parate Inconsistency Execution Object Guarantee of Mortgage Rights in Credit Agreement Banking

Execution is an execution of Court Decisions that have been has a permanent legal force (*in kracht van gewijsde*) which is forcibly executed because the losing party in the case does not obey the execution of the Court Decision. In Article 195 HIR/Article 207 RBG is said: “It shall carry out the Decision of the District Court in a case which is first examined by the District Court on the orders and duties of the Head of the District Court, who firstly examines the case in accordance with the manner prescribed in the Articles HIR”.

Furthermore, in the provisions of Article 196 HIR/Article 208 RBG is said: “If the defeated party refuses or fails to satisfy the Decision of the Court in peace, the victor in the case shall file the request of the Chairman of the District Court to carry out the Court Decision”. Then the President of the District Court summoned the defeated party in the law and did the warning (*aanmaning*) to the defeated party in the case to fulfill the decision of the court within a maximum period of 8 (eight) days. And if it has passed 8 (eight) days it turns out that the losing party in the case does not want to implement the Decision of the Court, the Chairman of the District Court can order the Registrar District Court to execute seizure execution on the object of land and then can request the help of state tools / police to assist with the safeguards in the case of evacuation done on the land object litigation. Before discussing the execution of the Mortgage Rights, it should be conveyed that the source of the execution rule which is still effective is Article 195 to 208 and 224 HIR or Articles 206 up to 240 and 258 RBg, and the term of execution.

Retno Wulan mentions that the execution is to execute a judge’s verdict which already has a definite legal force and which decision is *condemnatoir*²². Yahya Harahap, meanwhile, states that in carrying out the court’s verdict, nothing else implies the content of a court decision, namely forcibly imposing a court decision with the help of the general force if the defeated party (executed or the defendant) does not want to volunteer it²³. New executions can be executed if the decision has obtained permanent legal force. This is one of the principles or principles that must be considered at the time of execution. However, against the principle there are exceptions. In certain cases, the law allows the execution of decisions that have not yet obtained the force of law. Or Execution can be executed against a particular product form beyond the verdict. Sometimes execution is not an act of enforcing a judgment of the Court, but exercising the execution of “legalized” forms of products as a decision which has obtained a permanent legal decision.

Law No. 4/1996 concerning Mortgage Rights provides for non-litigation settlement in Chapter V on the Execution of Mortgage Rights. Article 20 formulates:

- (1) If the debtor has an appointment injury, then based on:
 - a) the right of the first Depository to sell the object of Mortgage Right as referred to in Article 6 or

- b) the executorial title contained in the certificate of Mortgage Right as referred to in Article 14 paragraph (2) The object of the Mortgage Right shall be sold through a public tender in accordance with the procedure prescribed in the legislation for the repayment of the Debt Holders' holders with the right of priority over the other creditor.
- (2) Upon the agreement of the giver and the Holders of Mortgage, the sale of the object of Mortgage Right may be exercised under the control of if so it shall be obtained at the highest price favorable to all parties
- (3) The sale as referred to in paragraph (2) can only be done after 1 (one) month since it has been notified in writing by the Giver and / or the holder of the Mortgage Rights to the interested parties and announced at least in 2 (two) newspapers circulating in the relevant area and / or local media, and no party has objected.
- (4) Any promise to execute the Mortgage Rights in a manner contrary to the provisions of paragraphs (1), (2), and (3) shall be null and void
- (5) Up to the time of announcement for the auction issued, the seller as referred to in paragraph (1) may be avoided by the repayment of the debt secured by the Mortgage Rights and the execution expenses incurred.

In the elucidation of Article 20 Paragraph (1) it reads: The provisions of this paragraph represent the embodiment and convenience provided by this Law to the creditors holding the Mortgage Rights in the event of an execution.

In principle every execution must be executed by a public tender, because in this way it is expected to obtain the highest price for the object of Mortgage Rights. The creditor shall be entitled to take the settlement of the secured receivable from the sale of the Mortgage object. In the event that the proceeds of the sale are greater the value of dependents, the rest becomes the right of the Depositors.

Based on the provisions of Article 20 above, it can be drawn some conclusions, they are:

First, the Mortgage Right is aimed at ensuring credit given by a bank or creditor to the debtor; in the event that the credit given is problematic the bank is entitled to execute the collateral by first telling the promised debtor or *wanprestasi*.

Second, the law provides two options for the settlement of non-performing loans, ie, a public tender if there is no agreement between the bank and the debtor or with sales under the hand if both parties intend to settle peacefully.

Third, hand-picking in practice is not entirely viable. The goodwill of the debtor is necessary. Debtors are often unknown when declared negligent to *wanprestasi*.

Fourth, the implementation of the sale under the hand can only be done after the expiration of 1 (one) month since it has been notified in writing by the giver and / or the holder of the Mortgage to the parties in question and announced at least in 2 (two) In the relevant area and / or local mass media, and no party has objected.²⁴

There are several forms of exceptions justified by the law allowed for execution to be executed outside decisions that have obtained permanent legal force²⁵, such as execution of a dependent right.

Execution of Mortgage Rights is regulated in Article 20 through Article 21 of Law Number 4 Year 1996. The execution of Mortgage Rights can be done in 3 ways:

1. The right of the first Depositary to sell the Insurance Rights to his / her own power through a public tender as referred to in Article 6. The right to sell the object of the Mortgage Rights on his / her own power shall constitute an embodiment of the priority position held by the Holders of the Guarantee or the first Depositary in case there are more than holders of the Mortgage Rights. The right is based on the promise given by the Depositary that if the Debtor is injured, the Mortgage Holders are entitled to sell the object of Mortgage Rights through a public tender without requiring the consent of the Depositary and subsequently to take the settlement of the receivables from the proceeds of the sale from the creditor, another creditor. The remainder of the sale remains the right of the Depositary.
2. The execution of the executorial title contained in the Certificate of Mortgage Right, as intended in Article 14 paragraph (2) of the head of the decree mentioned in the Mortgage Certificate is intended to confirm the existence of the execution power on the Insurance Rights Certificate, so that if the Debtor is injured Promise, ready to be executed as well as a court decision that has obtained permanent legal force, through the procedure and using the parate executive agency in accordance with the Civil Procedure Code.
3. Execution under the hands.

The execution under the hands is the sale of the object of the Mortgage Rights carried out by the Depositary, by agreement with the holder of the Mortgage Rights, if in this way the highest price will be obtained.²⁶

Munir Fuady mentioned the execution of the Mortgage right can be done in the following way:

- a) In the case of execution (by court appointment), by utilizing the executorial title of the mortgage certificate. Such a thing does not need to be promised but is valid by law.
- b) Parate executed²⁷, by self-selling (without court intervention) by a public tender if it fulfills the following conditions: 1). Applies only to first holders of Mortgage Rights, and 2). Must be agreed between the parties.
- c) Parate executed, by self-selling (without the intervention of the court) under the hands and without passing a public tender if it satisfies the following conditions: Must be agreed between the parties, if so obtains the highest price, Previously notified in writing to the parties of interest, shall be published in at least 2 (two) newspapers, and No party shall bring any objection.
- d) Execution by lawsuit can pass court.²⁸

Sudikno Mertokusumo discloses 6 (six) ways of expiration or removal of the Mortgage Rights. The six ways are:

1. Debt settlement or voluntary achievement by the Borrower. There is no appointment or dispute injury here.
2. The debtor does not meet on time, which will result in the Debtor being reprimanded by the Creditor to fulfill his/her performance. This reprimand is not uncommonly welcomed by the

fulfillment of his accomplishments by the Borrower voluntarily, so that Debtor's debt is paid off and the debt agreement receivable expires.

3. Debtor an appointment injury. With such a promise of injury, the Creditor may invalidate a parate executive by selling a guaranteed auction without involving the court. Debts are repaid from the auction proceeds. Thus the debt agreement receivable expires.
4. The debtor has an appointment injury, then the Creditor may file a Mortgage Rights certificate to the court for execution under the Article 224 HIR followed by a public tender. With the debt repaid from the auction proceeds, then the debt agreement receivable expires. There is no lawsuit here.
5. Debtor injured promise and still do not want to fulfill the achievement hence debtor sued by Creditor, which then followed by court decision winning creditor (if proven). The verdict may be executed voluntarily as it did in the second way with the fulfillment of achievements by the Borrower without a public tender and thus the debt agreement of the receivable expires.
6. The debtor refuses to enforce a court ruling that defeats him and punishes his debt repayment then the court's decision is forcibly executed by a public auction whose proceeds are used to settle the debtor's debts, and result in the debt agreement ends.²⁹

Auction to the guarantee of Mortgage Rights has been regulated in Law No. 4 of 1996 on the Right of Land and Land Related Responsibility, as defined in Articles 6 and 20.

In addition to the aforementioned provision there is a manual for the implementation of auction as stipulated in Regulation of the Minister of Finance No. 93 / PMK.06 / 2010 dated 23 April 2010, as amended by Regulation of the Minister of Finance No. 106 / PMK.06 / 2013 dated 26 July 2013 and Regulation of Director General of Wealth Country Number 6 / KN / 2013 About the Technical Guidelines for Implementation of Auctions.

Wildan Suyuthi, the auction is the sale of public goods by way of oral or written pricing by means of collecting enthusiasts or bidders and shall be led by the auctioneer. From the auction definition, there are several elements of auction as follows:

1. Auction is a way of selling done at the time and place that has been determined.
2. Conducted in public by means of announce it to collect enthusiasts or bidders.
3. Conducted by way of special price quotes, that is by offering a verbal or written price that is competitive.
4. The participant making the highest bid shall be declared the winner.³⁰

Auction sales have a good, among others:

- a) Fair, that is because the auction is open (general) and objective, led by an independent auctioneer.
- b) Safe, namely that the auction is witnessed, led and executed by the auction official as a public official, appointed by the government.
- c) Fast, that is because the auction is preceded by the announcement of the auction so that participants can be collected on one day of the auction and the payment is in cash.

- d) Achieve a reasonable price, ie the bidding system in the auction is competitive and transparent.
- e) Legal certainty, that is because on the auction of the auction by an auction official created an authentic certificate called auction treaties.

Thus auction sales have some kindness that is fair, safe, fast, realizing a reasonable price and legal certainty. A very important good in auction sales is legal certainty, because with the certainty of law then the rights of the buyer can be guaranteed certainty.

Noting the aforementioned auction should be held in the presence of auction officials. The sale and purchase of an auction must be preceded by an offer to the public (public). Sale and purchase through auction price agreement formed at auction, ie at the time of auction officials for the interests of the seller appoint the highest bidder and reach the limit price as auction buyer.

The characteristics of imposition of this guarantee with this mortgage grant privileges in which the provision of granting preferred position to a particular creditor to other creditors. In this case the mortgagee's creditor is a separatist creditor who has a preference for the Dependence he holds. The characteristics of *droit de preference* are contained in the provisions of Article 1 Figures (1) of the Mortgage Act where it is stated that:

“Mortgage rights to land and other land-related items, hereinafter referred to as Mortgages, are guaranteed rights imposed on the right to land as referred to in Law Number 5 of 1960 concerning Basic Regulations of Agrarian Principles, the following or not Along with other objects constituting a unity with the land, for the repayment of certain debts, which gives priority to a particular creditor to other creditors”

In addition, the characteristics of *droit de preference* are also found in Article 20 Paragraph (1) where it is stated that:

“If the debtor breached an appointment, then based on:

- a) The right of the first Depositary to sell the object of Mortgage Right as referred to in Article 6, or
- b) The executorial title contained in the certificate of Mortgage right as referred to in Article 14 paragraph (2), the object of Mortgage Right shall be sold through public tender according to the procedure specified in the legislation for the repayment of the Debt Holders' holders with prior rights than other creditors. “

In that context, the material guarantee in the Mortgage Rights basically provides a better position, since the creditor is prioritized and facilitated in taking out the settlement of its claim on the proceeds of the sale of a particular item or group of objects belonging to the debtor; And / or there are certain objects owned by the debtor held by the creditor or tied to the creditor's right, which is valuable to the debtor and may provide a psychological pressure on the debtor to fulfill its obligations well to the creditor.³¹

The objectives mentioned in the guarantee of mortgages regarding *droit de preference* are reinforced by the provisions of Article 6 of Law No. 4 of 1996 on the Mortgage Rights which states:

“If the debtor breaches the pledge, the first holder of the Mortgage Rights shall have the right to sell the object of Mortgage right to his / her own power through a public tender and to take his receivable from the proceeds of sale.”

Under the provisions of Article 6 of the Mortgage Rights Act, the takeover of collateral may be made by the dependent holder without the need for prior approval to the Depository, and there is no need to ask for a local court decision if it will execute the Guaranteed Insured Rights the debtor in the event the debtor breaches the pledge³². The Mortgage Holders may request to the Head of the Auction Office to conduct the auction on the object of the concerned Mortgage Rights³³, so this is a new step where previously the execution of a mortgage deed certificate can only be done through execution at the District Court³⁴. Execution of Mortgage Rights. This concept is known in the Civil Code (hereinafter referred to as Civil Code) known as the Execution Parate as referred to in Article 1178 of the Civil Code. The rules concerning the execution parate of the mortgage rights are expected to provide convenience and legal certainty for the creditor against the legal aspects of material security, as well as the actions of the creditor associated with the execution itself.

However, in practice, the principle of ease and legal certainty of execution parate execution of the mortgage right becomes unclear. In direct, prioritized and prioritized positions for the holders of mortgages (creditor) embodied in the principle of certainty and ease of execution of the execution parate in the Mortgage Act itself contains inconsistencies. This can be seen in Article 14 Paragraphs (2) and (3) where the execution can be carried out on the mortgage certificate in which it contains the words with the words: For Justice based on the One Godhead. Such mortgage certificates have executive powers as a court decision, and act as a substitute for the *gypsbeek grosse acte* as far as the land rights are concerned. In addition, in the general explanation of Point 9 of the Mortality Act it is mentioned that the concept of Parate Execution of Mortgage Rights as referred to in Article 14 Paragraph (3) of the law still refers to Article 224 *Herziene Indonesisch Reglement* (hereinafter abbreviated as HIR).

The provisions of article 224 of HIR mention that:

“The original letter of the letter of mortgage and debt is strengthened in the presence of a notary in Indonesia and whose head uses the words” On behalf of the Law “is equal to the judge’s verdict, if such a letter is not kept in a peaceful manner, then the matter of carrying it on is carried out with the instruction and leadership of the head of the district court in whose jurisdiction the debtor resides or dwells or chooses his place of residence in the manner set forth in the foregoing chapters in this section, but with the understanding that the coercion of the body may be performed only if already authorized by a judge’s decision. If the matter of carrying out the decree shall be executed entirely or partly outside the jurisdiction of the district court, whose chairman has ordered it to run, then the rules of article 195 of the second and subsequent verses shall be obeyed.”

Where Article 14 Paragraphs (2) and (3) and General Explanation of the Mortality Rights Act in Number 9 are related with Article 224 HIR, it can be interpreted that the Mortgage Act does not specifically regulate the execution procedure of the mortgage object, in the Civil Procedure Code as a condition of execution. This is reinforced by the provisions of Article 26 of the Mortgage Rights Act which stipulates that as long as there is no legislation regulating it, the rules concerning *hypothek* execution that existed at the entry into force of this Law shall apply to the execution of the Mortgage Rights.

This thus leads to the interpretable dualism of interpretation that differs from Article 6 jo. Article 20 Paragraph (1) Subparagraph (a) of the Insurance Rights Act and Number 9 of the General Explanation of the Mortgage Rights Act. According to Article 6 of the Mortgage Rights Act whenever a debtor breaches a pledge, the first holder of a Mortgage right shall have the right to sell the object of Mortgage right to his

/ her own power, even though the execution auction may not be conducted solely by the mortgagee's creditor but shall be performed by the auctioneer at State Wealth Service Office and Auction (KPKNL).

The principal feature of execution under Article 6 of the Mortgage Act is based on a promise to sell on its own behalf an execution (execution parate) conducted without the Court's fiat. This Article provides "the right to sell on his own power" or "*beding van eigenmachtig verkoop*". The provision is given by law to the holder of the first mortgage in the form of repayment means which is always ready in hand when he needs it, so that people call it execution that is always ready at hand or parate execution.³⁵

Meanwhile, pursuant to the provisions of Article 14 Paragraph (2) and General Explanation of the Insurance of Right of Insurance Number 9, it can be interpreted that the provisions of Civil Procedure Law regarding execution based on Article 224 HIR / Article 258 RBg by the Mortgage Act are required as long as the execution rules as Referred to in Article 26 of the Mutual Rights Act is not yet available. Thus, as long as there are no rules governing the execution, the execution provisions must rely on the provisions of Article 224 HIR / Article 258 RBg, where the execution shall still be based on the determination of the Chairman of the local District Court (*fiat courts*).³⁶

Besides due to inconsistency of content material in UUHT, the practice of execution parate implementation is further complicated by the Circular Letter of Supreme Court (SEMA) Number 7 Year 2012. In SEMA Number 7 Year 2012 number XIII of Public Private Sub-Division, stated that:

"The auction of the Mortgage Rights carried out by the creditor himself through the auction office, if the auction does not want to empty the object being auctioned, can not be done emptying under Article 200 paragraph (11) HIR but must be filed suit. Since the auction is not an execution auction but a voluntary auction".

Execution of the object of Mortgage Rights is expected to provide legal certainty, protect the interests of the credit, simple and not complicated. The focal point is the execution by selling the object of the Mortgage Right through a public tender of its own power and taking the settlement of its receivables from the proceeds as determined by article 6 and article 11 paragraph (2) letter e UUHT. The contents governed by the two articles are not of the same meaning, whereas according to Article 6, the authority of the first Depositary to sell the object of Mortgage is granted by the law itself (*ex lege*), whereas according to Article 11 paragraph (2) letter e UUHT, the first Depositary holder is determined by the clause of the agreement. There is confusion about the right of the creditor rights holder, because on the one hand the right is born because the law on the other hand the right is born in agreement, so that the definition of parate executie raises the meaning of double / blurred³⁷.

Conditions that are very difficult to execute parate execution make the value of legal certainty parate execution to be lost. The impact, the value of justice, and the value of legal certainty for creditors and debtors becomes difficult to realize, it is only a pull of interest on the basis of procedural.

D. CONCLUSIONS AND RECOMMENDATIONS

Conclusions

1. The philosophy of mortgages as the object of guarantee of the mortgage, namely the Mortgage Rights is a security institution of property rights to land along with objects related to the land for

certain debt repayment, which gives priority to a certain creditor to the creditor holder of the Mortgage to the creditor - other creditors. Guarantees granted in Mortgage Rights, which are prioritized rights to other creditors to creditors of Holders of Insurers

2. Parate inconsistency of execution of mortgage guarantee object in credit agreement of banking, that execution implementation according to Article 6 of the Guidance Rights Act is based on promise to sell on its own power constitutes execution (execution parate) done without fiat Chairman of Court. This Article gives “the right to sell on its own power”. Article 11 paragraph (2) letter e, the provisions of Article 14 Paragraph (2) and General Explanation of the Guidance Law Number 9 can be interpreted that the provisions of the Civil Procedure Code regarding execution under Article 224 HIR / Article 258 RBg by the Mortgage Act are required as long as the execution rules as referred to in Article 26 of the Mutual Rights Act are not yet available. Thus, as long as there are no rules governing the execution, the execution provisions must rely on the provisions of Article 224 HIR / Article 258 RBg, where the execution shall still be based on the determination of the Chairman of the local District Court (fiat courts). Besides due to inconsistency of content material in UUHT, the practice of execution parate implementation is further complicated by the Circular Letter of Supreme Court (SEMA) Number 7 of 2012.

Recommendations

Based on the principle of “Lex posteriori derogat legi priori”, meaning that the new law overrides the old law, the jurisprudence of Supreme Court Decision Number 3021 / K / Pdt / 1984 dated January 30, 1986 can not be used as the legal basis for the cancellation of the execution parate. Furthermore, in accordance with the order of law of law No. 12 of 2011, a Circular Letter (Supreme Court) in this Circular Letter of Supreme Court (SEMA) Number 7 of 2012 is not included in the order of law, so it should not be used as an excuse or legal basis to refuse execution of mortgages based on the execution parate in UUHT.

NOTES

1. Munir Fuady dalam Neni Sri Imaniyati, *Hukum Perbankan Teori Dan Praktek Perbankan dan Perbankan Syari'ah*, Pusat Penerbitan Universitas (P2U- Unisba) Bandung, 2000, h. 19.
2. *Ibid*, h. 19.
3. KRMT Tirtodiningrat, *Hukum Perjanjian Asas Proposionalitas Dalam Kontrak Komersial*, Yogyakarta, 2008 h. 14.
4. O. C. Kaligis, *Kontrak Bisnis : Teori dan Praktek Jilid 1*, Alumni, Bandung, 2013.h. 3.
5. Muhammad Abdul Kadir, *Hukum Perjanjian*, Alumni, Bandung, 1985. h. 105
6. Hendri Raharjo, *Hukum Perjanjian di Indonesia*, Pustaka Yustisia, Yogyakarta, 2009, h. 42
7. Sutarno, *Aspek-Aspek Hukum Perkreditan Pada Bank*, Bandung Alumni, h. 74.
8. Ahmadi Miru, *Hukum Kontrak Bernuansa Islam*, Raja Grafindo Persada, 2013. h.7
9. Burhanudin Ali & Nathaniela, *60 Contoh Perjanjian (Kontrak)*, Hi-Fest Publishing, Jakarta, 2009, h. 9.
10. Soedjono Dirdjosisworo, *Kontrak Bisnis*, Mandar Maju, Bandung, 2003 h. 28.
11. Bank perlu mengkaji permohonan kredit dengan mengkaji, antara lain *character* (kepribadian), *capacity* (kemampuan), *capital* (modal), *collateral* (agunan), dan kondisi ekonomi (*condition of economy*). Adrian Sutedi, *Implikasi Hak Tanggungan Terhadap Pemberian Kredit Oleh Bank dan Penyelesaian Kredit Bermasalah*, Cipta Jaya, Jakarta, 2006, h.12-13.

12. Johny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif*, Bayumedia Publishing, Malang 2007.h. 295.
13. Peter Mahmud Marzuki, *Penelitian Hukum*,; Edisi Revisi-Cetakan ke-8,Kencana Prenada Media Group Jakarta, 2013. h. 59.
14. Soerjono Soekanto, *Pengantar Penelitian Hukum*, , UI-Press, Jakarta ,1981. h. 50.
15. Rachmadi Usman, *Hukum Kebendaan*, Sinar Grafika, Jakarta, 2011, h. 306.
16. A.P. Parlindungan, *Komentar Undang-Undang Tentang Hak Tanggungan Atas Tanah Beserta Benda-Benda Yang Berkaitan Dengan Tanah & Sejarah Terbentuknya*, Mandar Maju, Bandung, 1996, h. 1.
17. Adrian Sutedi, *Hukum Hak Tanggungan*, Sinar Grafika, Jakarta, 2012. h.15.
18. JS McIennan, *Parate Executie*, The South Africa Law Journal, 88, Africa,1971,P.310. Januar Agung, Saputra,etc, Parate Execution Secured Assets of Bad Kredit in Indonesia Banking System, The Southest Law Asia Journal, Vol i No.1, Juli_Desember 2015, P. 11.
19. Sutan Remy Sjahdeni, *Hak Tanggungan, Asas-asas, Ketentuan-ketentuan Pokok dan Masalah Yang Dihadapi oleh Perbankan, Suatu Kajian Mengenai Undang-Undang Hak Tanggungan*, Alumni, Bandung, 1999, h. 11.
20. Yanly Gandawidjaja, *Penerapan Pasal 13 Undang-Undang Hak Tanggungan Dalam Pendaftaran Hak Tanggungan*, Fakultas Hukum Universitas Katolik Parahyangan Bandung, Jurnal Pro Justitia, 2005, h. 45
21. Salim HS, *Pengantar Hukum Perdata Tertulis (BW)*, Sinar Grafika, Jakarta, 2003 h. 115.
22. Retno Wulan Sutantio, Iskandar Uripkartawinata, *Hukum Acara Perdata Dalam Teori Dan Praktek*, Alumni, Bandung, 1983, h. 111.
23. Yahya Harahap, *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata*, Edisi kedua, sinar Grafika, Jakarta, 2006, h. 6.
24. Johannes Ibrahim, *Polemik penerapan asas Lex Specialis Derogat Lege Generalis Dalam Penyelesaian Kredit antara Bank dan Debitor* Jurnal Ilmah Hukum Bisnis ISSN 0852/4912, Akreditasi Jurnal Ilmiah SK No. 52/DIKTI/Kep/2002 Volume 23 No. 1, 2004, h. 69.
25. *Ibid*, h. 9.
26. Salim HS, *Perkembangan Hukum Jaminan Di Indonesia*, cetakan ke 7, Graja Grafindo Persada, Jakarta, 2014, h. 191.
27. in this note we consider the impact of the recent suprema court of appeal decision in bock and others v Duboronon invesments (p ltd 2004 (2) SA 242 (SCA) on the debate concerning the constitutionality of parate executie clauses in pledges of movables. Samantha Cook, *Parate Executie Clouses: Is Debate Dead*, The South Africa Law Journal 2004, P. 719.
28. Munir Fuady, *Pengantar Hukum Bisnis Menata Bisnis Modern Di Era Global*, PT. Citra Aditya Bakti, Bandung, 2002, h. 149.
29. *Ibid*, h. 188.
30. Wildan Suyuthi, *Sita dan Eksekusi Praktik Kejurusitaan Pengadilan*, Tatanusa, Jakarta, 2004. h. 43-45.
31. J. Satrio, *Hukum Jaminan Hak Jaminan Kebendaan*, (Bandung: PT Citra Aditya Bakti, 2007). Hlm. 12.
32. Remy Sjahdeini, *Hak Tanggungan, Asas-asas, Ketentuan-ketentuan Pokok dan Masalah Yang Dihadapi Oleh Perbankan*, Alumni, Bandung 1999. h. 46.
33. *Ibid*
34. *Ibid*
35. J Satrio, *Hukum Jaminan Hak Jaminan Kebendaan Hak Tanggungan*, , Buku I, Citra Aditya Bakti, Bandung 1997. h. 224.
36. A. Wahab Daud, *H.I.R. Hukum Acara Perdata*, Cetakan ke-3,Pusbakum, 2002 Jakarta. h. 64.
37. Riris Aswinardani, (2010) *Eksistensi Parate Eksekusi Dalam Undang-Undang Nomor 4 Tahun 1996 Tentang Hak Tanggungan Atas Tanah Beserta Benda-Benda Yang Berkaitan Dengan Tanah*. thesis, UNIVERSITAS AIRLANGGA.

REFERENCES

A. Books

- A. Wahab Daud, H.I.R. *Hukum Acara Perdata*, Cetakan ke-3, Pusbakum, Jakarta, 2002.
- A.P. Parlindungan, *Komentar Undang-Undang Tentang Hak Tanggungan Atas Tanah Beserta Benda-Benda Yang Berkaitan Dengan Tanah & Sejarah Terbentuknya*, Mandar Maju, Bandung, 1996.
- Adrian Sutedi, *Hukum Hak Tanggungan*, Sinar Grafika, Jakarta, 2012.
- Ahmadi Miru, *Hukum Kontrak Bernuansa Islam*, Raja Grafindo Persada, 2013.
- Adrian Sutedi, *Implikasi Hak Tanggungan Terhadap Pemberian Kredit Oleh Bank dan Penyelesaian Kredit Bermasalah*, Cipta Jaya, Jakarta, 2006.
- Burhanudin Ali & Nathaniela, *60 Contoh Perjanjian (Kontrak)*, Hi-Fest Publishing, Jakarta, 2009.
- Hendri Raharjo, *Hukum Perjanjian di Indonesia*, Pustaka Yustisia, Yogyakarta, 2009.
- J Satrio, *Hukum Jaminan Hak Jaminan Kebendaan Hak Tanggungan*, , Buku I, Citra Aditya Bakti, Bandung 1997.
- Januar Agung, Saputra, etc, Parate Execution Secured Assets Of Bad Kredit in Indonesia Banking System, The Southeast Law Asia Journal, Vol 1 No.1, Juli_Desember 2015.
- Johannes Ibrahim, *Polemik penerapan asas Lex Specialis Derogat Lege Generalis Dalam Penyelesaian Kredit antara Bank dan Debitor* Jurnal Ilmiah Hukum Bisnis ISSN 0852/4912, Akreditasi Jurnal Ilmiah SK No. 52/DIKTI/Kep/2002 Volume 23 No. 1, 2004.
- Johny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif*, Bayumedia Publishing, Malang 2007.
- JS McLennan, *Parate Executie*, The South Africa Law Journal, 88, Africa, 1971.
- KRMT Tirtodiningrat, *Hukum Perjanjian Asas Proposionalitas Dalam Kontrak Komersial*, Yogyakarta, 2008.
- Muhammad Abdul Kadir, *Hukum Perjanjian*, Alumni, Bandung, 1985.
- Munir Fuady dalam Neni Sri Imaniyati, *Hukum Perbankan Teori Dan Praktek Perbankan dan Perbankan Syari'ah*, Pusat Penerbitan Universitas (P2U- Unisba) Bandung, 2000.
- Munir Fuady, *Pengantar Hukum Bisnis Menata Bisnis Modern Di Era Global*, PT. Citra Aditya Bakti, Bandung, 2002.
- O. C. Kaligis, *Kontrak Bisnis : Teori dan Praktek Jilid 1*, Alumni, Bandung, 2013.
- Peter Mahmud Marzuki, *Penelitian Hukum*; Edisi Revisi-Cetakan ke-8, Kencana Prenada Media Group Jakarta, 2013.
- Rachmadi Usman, *Hukum Kebendaan*, Sinar Grafika, Jakarta, 2011.
- Remy Sjahdeini, *Hak Tanggungan, Asas-asas, Ketentuan-ketentuan Pokok dan Masalah Yang Dihadapi Oleh Perbankan*, Alumni, Bandung 1999.
- Retno Wulan Sutantio, Iskandar Uripkartawinata, *Hukum Acara Perdata Dalam Teori Dan Praktek*, Alumni, Bandung, 1983.
- Riris Aswinardani, (2010) *Eksistensi Parate Eksekusi Dalam Undang-Undang Nomor 4 Tahun 1996 Tentang Hak Tanggungan Atas Tanah Beserta Benda-Benda Yang Berkaitan Dengan Tanah*. thesis, UNIVERSITAS AIRLANGGA.
- Salim HS, *Pengantar Hukum Perdata Tertulis (BW)*, Sinar Grafika, Jakarta, 2003 h. 115.
- Salim HS, *Perkembangan Hukum Jaminan Di Indonesia*, cetakan ke 7, Graja Grafindo Persada, Jakarta, 2014.
- Samantha Cook, *Parate Executie Clouses: Is Debate Dead*, The South Africa Law Journal 2004.
- Soedjono Dirdjosisworo, *Kontrak Bisnis*, Mandar Maju, Bandung, 2003.
- Soerjono Soekanto, *Pengantar Penelitian Hukum*, , UI-Press, Jakarta ,1981.
- Sutan Remy Sjahdeni, *Hak Tanggungan, Asas-asas, Ketentuan-ketentuan Pokok dan Masalah Yang Dihadapi oleh Perbankan, Suatu Kajian Mengenai Undang-Undang Hak Tanggungan*, Alumni, Bandung, 1999.

Sutarno, *Aspek-Aspek Hukum Perkreditan Pada Bank*, Bandung Alumni

Wildan Suyuthi, *Sita dan Eksekusi Praktik Kejurusitaan Pengadilan*, Tatanusa, Jakarta, 2004.

Yahya Harahap, *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata*, Edisi kedua, sinar Grafika, Jakarta, 2006.

Yanly Gandawidjaja, *Penerapan Pasal 13 Undang-Undang Hak Tanggungan Dalam Pendaftaran Hak Tanggungan*, Fakultas Hukum Universitas Katolik Parahyangan Bandung, Jurnal Pro Justitia, 2005.

B. Law and Regulations

Regulation of the Minister of Finance No. 93 / PMK.06 / 2010 dated 23 April 2010, as amended by Regulation of the Minister of Finance No. 106 / PMK.06 / 2013 dated 26 July 2013 and Regulation of Director General of Wealth Country Number 6 / KN / 2013 About the Technical Guidelines for Implementation of Auctions.

Civil Code Article 1162 to Article 1232.

Creditveerband, set forth in Stb.1908 No.542 as amended by Stb.1937 No. 190.

Law No. 4 of 1996 on the Rights of Land Dependence and Land Related.

Law No. 4 of 1996 on the Mortgage Rights.

Letter of Supreme Court (SEMA) Number 7 of 2012.

C. Journals/Articles/Mass Media

Anis Mashdurohatun, *Tantangan Ekonomi Syariah dalam Menghadapi Masa Depan Indonesia di Era Globalisasi*, Artikel dalam Jurnal Dinamika Hukum, Fakultas Hukum Unsoed, Purwokerto, Vol.11, Februari Tahun 2011.

Anis Mashdurohatun, *The Reflection Of Islamic Banking In Theory And Practic*, Artikel dalam Prossiding seminar Internasional, Fakultas Hukum Unissula, Semarang. 2017.

Bakti Trisnawati, Gunarto, Anis Mashdurohatun, *the Legal Protection to the Owner of Registered Mark Based on the Value of Justice*, International Journal of Business, Economics and Law, Vol. 11, Issue 4 (Dec.) ISSN 2289-1552, 2016.

Januar Agung, Saputra, etc, *Parate Execution Secured Assets Of Bad Kredit in Indonesia Banking System*, The Southeast Law Asia Journal, Vol 1 No.1, Juli_Desember 2015.

Johannes Ibrahim, *Polemik penerapan asas Lex Specialis Derogat Lege Generalis Dalam Penyelesaian Kredit antara Bank dan Debitor* Jurnal Ilmah Hukum Bisnis ISSN 0852/4912, Akreditasi Jurnal Ilmiah SK No. 52/DIKTI/Kep/2002 Volume 23 No. 1, 2004.

JS McLennan, *Parate Executie*, The South Africa Law Journal, 88, Africa, 1971.