

Analysis of Credit Guarantee Binding with Power of Attorney to Enforce Mortgage Rights

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Abstract: This study aims to determine the legal consequences of binding credit collateral with a Power of Attorney to Enforce Mortgage Rights (SKMHT) and to find out the legal remedies that can be taken by creditors against collateral bound by SKMHT if the debtor defaults. This research was conducted using juridical-normative research with data obtained from legal materials and library materials which were then analyzed using qualitative methods. The results obtained from this research include, among others, the encumbrance of Mortgage Rights through SKMHT must be upgraded to APHT in accordance with the laws and regulations. If it is not done, the SKMHT is declared null and void and the creditor's position is not as a preferred creditor who has the right to execute the collateral object if the debtor defaults, but there are exceptions to the type of micro business credit binding that is classified as productive in Ministerial Regulation Number 22 of 2017, while the legal efforts that can be taken by creditors through litigation and non-litigation channels to obtain a legally enforceable judge's decision to be able to carry out the execution or sale process under the hands of the creditor.

Keywords: Credit Guarantee, SKMHT, Mortgage Rights, Default, Execution

Abstrak: Penelitian ini bertujuan untuk mengetahui akibat hukum dari pengikatan jaminan kredit dengan Surat Kuasa Membebankan Hak Tanggungan (SKMHT) serta mengetahui upaya hukum yang dapat dilakukan oleh kreditur terhadap jaminan yang diikat dengan SKMHT apabila debitur wanprestasi. Penelitian ini dilaksanakan dengan menggunakan jenis penelitian yuridis-normatif dengan data yang diperoleh dari bahan hukum dan bahan pustaka yang kemudian dianalisis dengan menggunakan metode kualitatif. Hasil yang diperoleh dari penelitian ini antara lain yaitu pembebanan Hak Tanggungan melalui SKMHT wajib untuk ditingkatkan menjadi APHT sesuai dengan peraturan perundang-undangan jikalau tidak terlaksana maka SKMHT tersebut dinyatakan batal demi hukum serta posisi kreditur bukan sebagai kreditur preferen yang memiliki hak untuk mengeksekusi objek jaminan apabila debitur wanprestasi namun terdapat pengecualian terhadap jenis pengikatan kredit usaha mikro yang digolongkan produktif dalam Peraturan Menteri Nomor 22 Tahun 2017 sedangkan upaya hukum yang dapat ditempuh kreditur melalui jalur litigasi dan non-litigasi untuk mendapatkan putusan hakim yang berkekuatan hukum untuk dapat dilakukan proses eksekusi atau penjualan dibawah tangan.

Kata Kunci: Jaminan Kredit, SKMHT, Hak Tanggungan, Wanprestasi, Eksekusi

INTRODUCTION

Indonesia is a country with a rapidly growing human population, population growth that increases sharply every year can cause problems.¹ So to survive, people must have the ability in the economic field that can develop a business and require a number of funds and capital through financial institutions that can provide credit loans, namely banks, in order to support increased capital needs.

In accordance with the provisions of Law Number 10 of 1992 concerning Banking which states that banks are financial institutions that play an important role in improving people's lives with the task of collecting and channeling funds to the public in the form of credit loans.² The activity of borrowing money or what is known as credit is not something foreign to the community through banking institutions to provide loans or capital through a credit agreement mechanism.

According to O.P Simorangkir, credit is the provision of achievements (e.g. money, goods) with reciprocation (contraprestasi) will occur in the future.³ The progress and development of the community's economy is characterized by the circulation of money around it with evidence of increased demand for credit, related to money as a means of credit which becomes a cooperative problem between the lender and the recipient of credit or between debtors and creditors, they attract profits and bear mutual risks.⁴

The credit agreement is part of the main agreement (panctum de contrahendo), while the guarantee in the main agreement arises because of an additional agreement or Accesoir Agreement, which cannot stand alone and its termination depends on the main agreement.⁵ One of the elements in granting credit and as a means of protecting the creditor's security for certainty over the repayment of the debtor's debt is a security institution. One of the collateral institutions used by banks in granting credit facilities is Mortgage Rights with the object of collateral in the form of land rights regulated in the Basic Agrarian Law.⁶ In Book III of the Civil Code, an engagement is born and begins with an agreement or contract. In the provisions of Article 1867 of the Civil Code, agreements can be made authentically or under hand.

¹ "Masalah Ledakan Penduduk Dan Penyebabnya," April 4, 2023, <https://dppkbpppa.pontianak.go.id/informasi/berita/masalah-ledakan-penduduk-dan-penyebabnya>.

² Republik Indonesia, "Undang-Undang Republik Indonesia Nomor 7 Tahun 1992 Tentang Perbankan" (1998).

³ O.P. Simorangkir, *Seluk Beluk Bank Komersial*, Cet. 5 (Jakarta: Aksara Persada Indonesia, 1998).

⁴ Zulfah I. S Sukarta, Diva A.E Rombot, and Diana Rondonuwu, "Fungsi Penguasaan Dokumen Dan Pengikatan Agunan Sebagai Jaminan Dalam Pemberian Kredit," *Lex Privatum* IX, no. 13 (2021): 25–32.

⁵ Christianty Divanty Roringpandey, Meiske T. Sondakh, and Roosje Lasut, "Kajian Hukum Tentang Sertifikat Deposito Sebagai Sumber Dana Masyarakat," *Lex Privatum* X, no. 1 (2022): 16–26.

⁶ Amalia Indah Ahasani, Tri Lisiani Prihatinah, and et.al, "The Implementation Of Prudential Banking Principles And The Validity Of Powerof Attorney To Charge Mortgage Rightsmade Based On A Sale And Purchase Preliminary Agreement And Power Deed Of Sale," *International Journal of Advanced Research (IJAR)* 11, no. 01 (2023): 578–86, <https://doi.org/10.21474/IJAR01/16052>.

The official authorized to make authentic deeds is a Notary as stated in Article 1 point (1) of Law Number 2 of 2014 concerning Notary Position. It is also stated in Article 1 point (1) of Government Regulation Number 37 of 1998 concerning the Regulation of the Position of Land Deed Official (PPAT) on the Regulation of the Minister of Agrarian Affairs Number 10 of 1961 that land deeds are the authority of PPAT. Thus, in the service sector Notary and PPAT services are officials who are given partial authority by the State to serve the public in the civil sector, especially the making of authentic deeds.

The stage of encumbering a Mortgage Right consists of two stages, namely the granting stage carried out before a Notary/PPAT and the registration stage carried out by the Head of the Land Office. The parties involved in the encumbrance of a Mortgage Right are the grantor of the Mortgage Right and the holder of the Mortgage Right. The principle that must be adhered to in granting a Mortgage Right is that it must be attended and carried out by the mortgagor himself as the party authorized to carry out legal actions on the object used as collateral.⁷ Only if it is absolutely necessary and unable, his presence to grant the Mortgage and sign the Deed of Granting Mortgage, it can be authorized to another party.

The Power of Attorney to Impose Mortgage Rights (hereinafter SKMHT) and the Deed of Granting Mortgage Rights (hereinafter APHT) have a very important function, as a tool to overcome if the grantor of the Mortgage Rights cannot appear before the PPAT and the power of attorney must be made in the form of an authentic deed and given directly by the grantor of the Mortgage Rights. In relation to SKMHT, ideally the provisions of Article 15 paragraph (3) of Law Number 4 Year 1996 on Mortgage Rights explain that SKMHT regarding registered land rights must be followed by the making of APHT no later than 1 (one) month after it is given.⁸ Article 15 paragraph (4) of the Mortgage Rights Law also explains that SKMHT regarding land rights that have not been registered must be followed by the preparation of APHT no later than 3 (three) months after it is granted.⁹ This is to prevent protracted granting of power of attorney and to create legal certainty, so SKMHT is limited in duration.

A very diverse routine of the legal subjects implies the possibility of being unable to attend the signing of the APHT. In these conditions, the law provides a solution by authorizing the imposition of Mortgage Rights in the form of an authentic SKMHT. In the SKMHT, the making of the SKMHT is regulated by a period of time so that it can be followed up as APHT. However, in practice, problems are often found regarding SKMHT

⁷ Hosada Esa and Hartanto Andy, "Legal Protection Of Crediturs In The Implementation Of Subsidy Credit," *RJOAS* 11, no. 71 (2017): 250–56, <https://doi.org/10.18551/rjoas.2017-11.32>.

⁸ Republik Indonesia, "Undang-Undang Republik Indonesia Nomor 4 Tahun 1996 Tentang Hak Tanggungan Atas Tanah Beserta Benda-Benda Yang Berkaitan Dengan Tanah" (1996).

⁹ Indonesia. Pasal 5 Ayat (4)

that are not followed by the making of APHT so that it cannot issue a certificate of Mortgage Rights that has executorial power.

Provisions regarding mortgage rights on pledged land are contained in other regulations, such as Regulation of the Minister of ATR/BPN/Head of BPN Number 22 of 2017 concerning Determination of the Time Limit for the Use of SKMHT, there are exceptions to the SKMHT period on certain credits with a certain limit amount that is sufficient with the provision of SKMHT alone, the validity period of the credit follows the principal agreement or until the credit is declared paid off.¹⁰ Although in normative circumstances this is possible, in practice it can lead to other problems due to these shortcomings.

This research is relevant to analyze the problems and look for common threads in the binding of credit guarantees that are only bound by SKMHT in order to provide protection and legal certainty and to find out the forms of efforts that need to be made when there is an unlawful act by providing solutions, especially to creditors to obtain preferred rights so that they can be implemented in the event of a failure to pay debtor debts by using Litigation and Non-Litigation solutions.

METHOD

This research uses normative juridical research, namely research that provides a systematic explanation of the rules governing a particular legal category, analyzing the relationship between regulations, which has the meaning of legal research that puts the law in a building with a system of norms. The system of norms that is built is everything about principles, norms, rules from laws and regulations, court decisions, studies, and doctrines (teachings).¹¹ Which is then analyzed using the qualitative description method.

DISCUSSION

A. Legal Effects of Credit Guarantee Binding with Power of Attorney to Enforce Mortgage Rights (SKMHT)

Basically, the granting of Mortgage Rights must be carried out and attended by the mortgagor as a party authorized to carry out legal actions in terms of imposing a mortgage on the object used as collateral.¹² However, if the mortgagor is unable to be present to sign the Deed of Granting Mortgage (hereinafter referred to as APHT) for some reason, the law provides a solution for the mortgagor to be authorized to another party who can represent him in granting Mortgage Rights. The granting of

¹⁰ Kepala Badan Pertanahan Nasional, "Menteri Agraria Dan Tata Ruang/ Kepala Badan Pertanahan Nasional Republik Indonesia Nomor 22 Tahun 2017" (2017).

¹¹ Fajar Mukti and Achmad Yulianto, *Dualisme Penelitian Hukum Normatif Dan Empiris*, Cetakan IV (Yogyakarta: Pustaka Pelajar, 2017).

¹² Sri Endah Cahyani, "Pembuatan Surat Kuasa Membebaskan Hak Tanggungan Tanpa Diikuti Akta Pemberian Hak Tanggungan," *Jurnal Hukum Dan Kenotariatan* 3, no. 2 (2019): 29–45.

power of attorney to impose a mortgage is stated in the Power of Attorney to Impose Mortgage Rights (hereinafter referred to as SKMHT).

SKMHT is classified as a form of special power of attorney made before a Notary/PPAT addressed to the holder of the Mortgage Rights or other parties representing. Prior to the enactment of Law No. 4 of 1996 on Mortgage Rights, the use of SKMHT was often used to delay the encumbrance of credit collateral. The making of SKMHT is in the form of an absolute power of attorney, which means that it cannot be substituted for other powers of attorney in a judicial claim and in an absolute power of attorney cannot be terminated for any reason, unless the power of attorney has been exercised or its validity period has ended.¹³ This is regulated in the provisions of Article 15 Paragraph (2) of the Mortgage Rights Law.

The making of SKMHT is motivated by various interests and experiences obstacles, especially in the process of encumbering, granting, and installing Mortgage Rights which is not easy.¹⁴ In the stages of granting a mortgage right, it begins with a credit agreement process carried out notarially or under the hand between the debtor and the creditor (bank), then proceeds with the signing of APHT as an *accessoir* or accompanying agreement, but the granting of mortgage rights cannot be carried out at the same time as signing a credit agreement, so when signing a credit agreement followed by signing SKMHT between the authorizer, namely the debtor or guarantor with the power of attorney, namely the creditor.

Based on the SKMHT that has been signed, the creditor can sign the APHT, either acting for and on behalf of the pledgor or acting for and on behalf of the pledgee.¹⁵ Subsequently, the process of registering the Mortgage Rights at the local District/City Land Office is carried out to issue a Mortgage Rights Certificate (hereinafter referred to as SHT) as the basis of collateral for the parties.

The use of SKMHT is limited to a period of validity for land rights that have been registered for 1 (one) month and for land rights that have not been registered for 3 (three) months. In accordance with the provisions in Article 15 paragraphs (3) and (4) of the Mortgage Rights Law, this rule is intended to prevent the protracted implementation of the power to impose a mortgage right so that it can be carried out in reality. If the time period is not met, it will be null and void.¹⁶ This means that the

¹³ Indonesia, Undang-Undang Republik Indonesia Nomor 4 Tahun 1996 Tentang Hak Tanggungan Atas Tanah Beserta Benda-Benda Yang Berkaitan Dengan Tanah.

¹⁴ Usman Rachmadi and Tarmizi, *Hukum Kebendaan*, ed. Tarmizi, Ed. 1, Cet (Jakarta: Sinar Grafika, 2013).

¹⁵ Jessica Bintang Victoria Damanik and Siti Malikhatun Badriyah, "Kepastian Hukum Terhadap Perjanjian Pembiayaan Didahului SKMHT Tanpa APHT," *AL-MANHAJ: Jurnal Hukum Dan Pranata Sosial Islam* 5, no. 2 (2023): 1883–98, <https://doi.org/10.37680/almanhaj.v5i2.3697>.

¹⁶ Fikalya Anli, Ahmad Fauzi, and Susanto Limbong, "Tanggung Jawab Notaris Dan PPAT Dalam Pembuatan APHT Berdasarkan SKMHT Pada Bank Mandiri Di Kabupaten Labuhan Batu," *Jurnal Hukum* 14, no. 2 (2022): 285–90, <https://doi.org/10.33087/legalitas.v14i2.330>.

power of attorney cannot be used as the basis for making APHT, then the general guarantee provisions based on Article 1131 of the Civil Code will apply and the creditor is only positioned as a concurrent creditor based on Article 1132 of the Civil Code.

In an effort to protect the law and legal certainty to all parties, especially creditors, the granting of Mortgage Rights is obliged to be registered and copied in the land title certificate.¹⁷ The registration is intended to fulfill the principle of publicity, meaning that the registration and recording of the encumbrance of the object of Mortgage Rights can be open and can be read and known by the public in general.¹⁸ The institution that has the authority to register APHT is the Regency/City Land Office for the issuance of SHT which has legal force and executorial power.

In making SKMHT, it must be based on the requirements determined by the Mortgage Rights Law, so it can be understood that the conditions for making SKMHT do not contain the power to carry out other legal actions such as selling or leasing the object of mortgage rights, or extending land rights, but only as a means of granting power to impose Mortgage Rights.

The power to impose a Mortgage cannot end for any reason, except because the power has been exercised or the period has expired. This provision is intended to ensure that the granting of the Mortgage Right is actually carried out so as to provide legal certainty for the holder and grantor of the Mortgage Right. In its provisions, SKMHT is a form of protection and legal certainty for both the recipient and the grantor.¹⁹

The provisions regarding the validity period of SKMHT stipulated in the provisions of Article 15 paragraphs (3) and (4) of the Mortgage Rights Law do not apply in the case of SKMHT given to guarantee certain credits or Micro Business Loans as stipulated in the Regulation of the Minister of Agrarian Affairs/Head of BPN Number 22 of 2017 concerning the Time Limit for the Use of Power of Attorney to Impose Mortgage Rights to Guarantee the Repayment of Certain Credits. One type of credit that is excluded in the regulation is credit classified as productive credit provided by Commercial Banks and Rural Banks with a credit ceiling that does not exceed Rp.50,000,000.00 (fifty million rupiah). For this type of credit, the validity

¹⁷ Siti Malikhatun Badriyah et al., "Implikasi Hukum Penggunaan Surat Kuasa Membebaskan Hak Tanggungan Sebagai Jaminan Dalam Perjanjian Kredit Pemilikan Rumah Pesatnya Perkembangan Masyarakat Terutama Dalam Bidang Perekonomian Mengakibatkan Perkembangan Kebutuhan Masyarakat Juga Makin Berkem," *Law, Develoment & Justice Review* 2 (2019): 58–71.

¹⁸ Alfiah Dwi Ayu Wirandari, "Solusi Dalam Penyelesaian Pelaksanaan Pendaftaran Akta Pemberian Hak Tanggungan Yang Melebihi Batas Waktu Di Kota Semarang" (Universitas Islam Sultan Agung, 2023).

¹⁹ Indonesia, Undang-Undang Republik Indonesia Nomor 4 Tahun 1996 Tentang Hak Tanggungan Atas Tanah Beserta Benda-Benda Yang Berkaitan Dengan Tanah.

period of SKMHT is based on the relevant principal agreement or until the credit is declared paid off.²⁰ In increasing SKMHT into APHT, time and cost factors become obstacles, this is because the increase in SKMHT to APHT must go through the process of certifying the SKMHT object which requires considerable costs.

Based on the explanation related to the author's research above, it can be concluded that the encumbrance of Mortgage Rights through SKMHT must be immediately upgraded to APHT in accordance with applicable statutory provisions, but if these elements are not fulfilled, the SKMHT is null and void and this can harm creditors in the event of default because they will not be able to execute the object of Mortgage Rights because they are not positioned as preferred creditors which results in creditors not having the right to execute the security object.

B. Creditors' Legal Remedies against Collateral bound by a Power of Attorney to Enforce Mortgage Rights (SKMHT) if the Debtor Defaults

According to Indonesian Civil Law, if the debtor is classified as a default, it can cause problems with the repayment of creditors' debts. The position of creditors is divided into several types depending on the privileges possessed by the creditor and has priority in obtaining repayment of the debtor's debt in the event of default.

Mortgage is a security over land for the repayment of certain debts, which gives priority to certain creditors over other creditors.²¹ Based on the provisions of the Mortgage Rights Law regarding the status and position of SKMHT, it should be upgraded to APHT and issue SHT which has executorial power and is a sign of the birth of Mortgage Rights.

If the process of binding a mortgage right is only until the SKMHT is made, the mortgage right has not been born and the creditor's position is only as a concurrent creditor, namely a creditor who does not have the right to repayment in advance of other creditors and the receivables of concurrent creditors are not secured by property rights.²² With such a position, concurrent creditors cannot execute the security object if the debtor defaults.

The form of legal remedies that can be taken and pursued by creditors if the debtor is declared in default, namely through litigation and non-litigation legal

²⁰ Fuad Rifai, Lucky Endrawati, and Abdul Madjid, "Analisis Yuridis Terhadap Ketentuan Surat Kuasa Membebaskan Hak Tanggungan (Skmht) Kredit Tertentu Sebagai Upaya Mewujudkan Keseimbangan Perlindungan Hukum Bagi Kreditur (Bank)" (Universitas Brawijaya, 2015).

²¹ Ni Made Seri Wahyuni Dewi, I Nyoman Putu Budiarta, and Ni Made Puspasutari Ujianti, "Perjanjian Kredit Bank Dalam Hal Surat Kuasa Membebaskan Hak Tanggungan Tidak Diikuti Dengan Akta Pemberian Hak Tanggungan," *Jurnal Interpretasi Hukum* 3, no. 1 (2022): 188–92, <https://doi.org/10.22225/juinhum.3.1.4742.188-192>.

²² Anisa Kartika Sari, "Perlindungan Hukum Terhadap Kreditur Pemegang Hak Tanggungan Yang Tidak Didaftarkan Di Kantor Pertanahan," *Jurnal Repertorium* 3 (2015): 161–73.

channels, including filing a lawsuit in court, placing a security seizure against a collateral item and must obtain a judge's decision that has permanent legal force with the ruling that the debtor is in default, and the collateral can be executed through an auction or underhand sale process.

The efforts that can be taken by creditors against collateral bound by SKMHT if the debtor defaults, using 2 (two) efforts, namely, settlement through litigation, as follows: a) Submitting a civil lawsuit to the Court, through a Simple Lawsuit (Small Claim Court) which is a type of civil lawsuit with a maximum material claim value of Rp.500,000,000 (five hundred million rupiah) which is resolved by simple procedures and proof.²³ If compromise or peaceful or structuring efforts are submitted but the debtor still does not want to correct his negligence. Then take the litigation process, by suing the debtor to fulfill the performance of his obligations through the Court, or through an arbitration institution if the credit agreement agrees that arbitration disputes arising from the agreement are resolved by an arbitration body (arbitration clause); and b) Requesting a security seizure of the debtor's assets so that the claim is more effective and not empty (*illusoir*), with this the creditor can ask the Court to place a security seizure (*Conservatoir Beslag*) on the debtor's property.

Next, use settlement through the Non-Litigation route, as follows: a) Conducting a Sale Under Hand of the Mortgage Collateral Object, which means not going through the auction process. This is regulated in the provisions of Article 20 Paragraph 2 of the Mortgage Rights Law on the basis of benefiting all parties, efficiency through sales under the hand has several advantages compared to public auctions, such as: 1) The cost required is quite light, because it does not go through the administrative payment process; 2) The process of completing the transaction is faster, because the interested parties can bargain directly; and 3) Potential to get a sizable selling price from the buyer.

Based on the explanation related to the author's research above, it can be concluded that if the debtor is declared in default, while the process of encumbering the Mortgage Rights is only carried out by SKMHT, the Mortgage Rights have not been born and the creditor's position is only as a concurrent creditor, not as a preferred creditor, who cannot carry out execution as well as the method of execution of the Mortgage Rights object regulated in Article 20 of the Mortgage Rights Law. However, efforts that can be made by creditors, namely by taking litigation and non-litigation channels, by filing a simple lawsuit by filing a lawsuit in court, placing a security seizure against a collateral object that must obtain a judge's decision that is

²³ Tri Jata Ayu Pramesti, "Seluk Beluk Gugatan Sederhana," Artikel Hukum Online, 2021, <https://www.hukumonline.com/klinik/a/seluk-beluk-gugatan-sederhana-lt56a9cc2d21ea9/>.

legally binding so that the collateral object can be executed through the sale process under the hand.

CONCLUSION

The encumbrance of Mortgage Rights through SKMHT must be immediately upgraded to APHT in accordance with applicable statutory provisions, but if these elements are not fulfilled and the time period expires, the SKMHT is declared never born or null and void, the creditor is in a weak position and only acts as a concurrent creditor, not as a preferred creditor, If the debtor is declared in default, the efforts that can be made by the creditor are by taking litigation and non-litigation channels by filing a simple lawsuit and submitting the lawsuit to the court, by placing a security seizure against the security object and must obtain a judge's decision that has permanent legal force or inkrah with the ruling that the debtor is in default or cinder promise so that the security object can be executed through the sale process under hand.

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