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Legal Analysis of Providing Mortgage Rights Guarantee to Foreign Bank Creditors (A Study at the Land Office of Batam)

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Abstract. This research aims to investigate and analyze legally the granting of mortgage rights guarantee to creditors, especially foreign banks (conducted at the Land Office of Batam). The method used is normative legal research utilizing library references and interviews with academic and practitioner experts as research subjects. This study is descriptive, systematically analyzing primary, secondary, and tertiary legal materials along with relevant facts. The conclusion of this research is that the granting of mortgage rights to foreign banks follows the procedures stipulated in Ministerial Regulation No. 5 of 2020 from the Ministry of ATR/BPN. The registration process for mortgage rights is conducted electronically, but foreign banks such as China Banking Corporation Limited must first register through the financial partner application. The main challenges in implementing electronic mortgage rights guarantee primarily stem from legal uncertainties regarding the registration of foreign creditors through the financial partner application managed by the Ministry. Additionally, there are technical challenges due to IT systems that are not yet fully prepared. Improving the quality of human resources is also necessary, given the constraints faced at the land office due to a shortage of personnel, while demand from the public and service users remains high.

Keywords: Mortgage Rights, Foreign Banks, Creditors

1. INTRODUCTION

The rapidly growing economy, both nationally and internationally, cannot be separated from the influence of the banking sector as a financial institution or fund provider. As a financial institution, banks have an important role in collecting funds from the public in the form of third-party funds and channeling them back to the public in the form of credit. This contribution is very vital for the progress of the business world, both on a micro and macro economic scale.⁷ One of the supporting factors for rapid economic growth is investment from abroad, including investment made by foreign banks. Foreign banks often provide credit to companies or individuals who need capital for various purposes, such as property development or other business projects, as part of the investment. The granting of credit by the bank must be based on confidence in the ability and capability of the credit recipient to pay credit installments.

Article 1 number 11 of Law Number 10 of 1998 Jo. Law Number 7 of 1992 concerning Banking (Banking Law) defines credit as the provision of money or bills equivalent to it, based on a loan agreement between a bank and another party, which requires the borrower to repay the loan after a certain period of time by paying interest. The provision of credit by banks as financial institutions certainly has risks, so banks must manage these risks through risk management. Risk management is a series of methods and procedures used to identify, measure, monitor, and control risks that arise from all bank business activities. Furthermore,

the provision of credit must also meet several elements that refer to the provisions of the Banking Law, namely first, ¹⁸ the provision of funds or securities equivalent to it, second, based on the agreement or loan agreement between the bank and another party, third, the borrower (debtor) has an obligation to repay his debt within a specified period of time, and fourth, the repayment of debt involving interest payments. In addition, prospective debtors must go through several stages to obtain credit facilities, starting from submitting a credit application to receiving credit. After the credit application is accepted, the next stage is to make a loan agreement or credit agreement between the creditor or bank and the debtor.

A private credit agreement is a credit agreement by a bank to its customers made without involving a notary, only between the creditor and the debtor. The form is free and is made by signing by the maker. This private agreement has the power of proof like an authentic deed if the parties acknowledge the contents and signatures listed therein. Meanwhile, an authentic credit agreement deed is a credit agreement deed by a bank to its customers made before a notary. The granting of mortgage rights is carried out in two stages, namely, ⁸ first, the stage of granting mortgage rights by making a Deed of Granting Mortgage Rights by the Land Deed Making Officer or PPAT which was previously preceded by a guaranteed debt agreement, second, the registration stage at the Land Office, which is the time of birth of the mortgage rights that are charged. Both processes are very important and must be fulfilled, because without registration at the land office, mortgage rights will not exist. This is because the new mortgage rights will be ¹ recorded in the land book at the Land Office and a mortgage certificate will be issued as legal evidence. This certificate serves as proof of the existence of mortgage rights and contains the phrase "For the Sake of Justice Based on the Almighty God," providing executorial power equivalent to a court decision that has permanent legal force.

¹⁷ The granting of mortgage rights begins with the making of an authentic Deed of Granting of Mortgage Rights by the Land Deed Making Officer (PPAT). A deed can be said to be authentic if it meets the requirements of Article 1868 of the Civil Code, namely a Deed made in accordance with the provisions of the law, either by or before a public official authorized for the purpose, at the place where the deed is drawn up. This requirement has been met by the Deed of Granting of Mortgage Rights, namely the deed is made by and/or before the Land Deed Making Officer and with the form and content of the deed as stipulated by ² the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 3 of 1997 concerning Provisions for the Implementation of Government Regulation Number 24 of 1997 concerning Land Registration.

This Deed of Granting of Mortgage Rights is made in two original or duplicate copies, each signed by the grantor of Mortgage Rights or debtor or guarantor, the holder of Mortgage Rights or creditor, two witnesses, and the Land Deed Making Officer. The first copy will be kept in the office of the Land Deed Making Officer, while the second copy will be submitted to the Head of the Land Office for the purpose of registering Mortgage Rights. The parties will only be given a copy of the Deed of Granting of Mortgage Rights.⁴ From the description above, the PPAT is responsible for making the Deed of Granting of Mortgage Rights and registering the mortgage rights with the local land office, which in this case does not exclude creditors in the form of foreign banks, with collateral owned by PT. Asia Cocoa Indonesia, a legal entity established under Indonesian law.

Based on the background description above, the author raises several problems that will be discussed further. The problems are as follows:

1. How are the Legal Arrangements and Implementation of the Granting of Mortgage Guarantees to Creditors in the Form of Foreign Banks (Research Study at the Batam Land Office)?⁹
2. How are the Obstacles to the Granting of Mortgage Guarantees to Creditors in the Form of Foreign Banks (Research Study at the Batam Land Office)?³
3. How are the Solutions to the Obstacles to the Granting of Mortgage Guarantees to Creditors in the Form of Foreign Banks (Research Study at the Batam Land Office)?³

Based on the formulation of the problem stated above, it can be seen that the objectives of this research are:

1. To find out the Legal Arrangements and Implementation of the Provision of Mortgage Guarantees to Creditors in the Form of Foreign Banks (Research Study at the Batam Land Office)³
2. To find out the Constraints in the Provision of Mortgage Guarantees to Creditors in the Form of Foreign Banks (Research Study at the Batam Land Office)³
3. To find out the Solutions to the Constraints in the Provision of Mortgage Guarantees to Creditors in the Form of Foreign Banks (Research Study at the Batam Land Office).

2. LITERATURE REVIEW

¹⁰The definition of Land Deed Making Officer (PPAT) is stated in several laws and regulations. Based on Article 1 number 4 of Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects related to Land (UUHT),¹¹ PPAT is a public official who has the authority to make deeds of transfer of land rights, deeds of encumbrance of Mortgage Rights, and deeds of granting power of attorney to encumber Mortgage Rights in accordance with the

provisions of applicable laws and regulations. Article 1 paragraph 1 of Government Regulation Number 37 of 1998 which has been amended by Government Regulation Number 24 of 2016, states that "Land Deed Making Officials, hereinafter referred to as PPAT, are public officials who are given the authority to make authentic deeds regarding certain legal acts related to land rights or Ownership Rights for Apartment Units." Article 26 paragraph (1) of the UUPA states that sales and purchase transactions, exchanges, and other legal acts aimed at transferring ownership rights and their supervision are regulated by Government Regulation. Article 19 of the UUPA also mandates the government to organize land registration throughout the territory of the Republic of Indonesia, which is regulated by Government Regulation Number 10 of 1961 concerning Land Registration, which was later replaced by Government Regulation Number 24 of 1997.

Article 39 paragraph (1) letter c of Government Regulation Number 24 of 1997 concerning Land Registration confirms that in carrying out its duties, PPAT has administrative responsibility. PPAT is required to refuse to make a deed if one of the parties or parties involved in the legal act, or one of the witnesses, does not have the authority or does not meet the requirements to carry out the legal act in question. Violation by PPAT of this provision can result in sanctions such as written warnings, temporary dismissal, honorable dismissal, or dishonorable dismissal. Banking plays a vital role in the economy, including in channeling funds through credit. As a creditor, the bank provides credit to customers as debtors, which begins with a credit agreement. Related regulations can be found in Law Number 10 of 1998 concerning Banking as a special regulation and Book III Chapter Three of the Civil Code which regulates lending and borrowing as its general regulation.

Generally, credit agreements are in standard or standard form. This agreement is prepared by the bank as a creditor, and the debtor only needs to study and understand its contents without a negotiation process. Credit agreements have a very important role in the provision, management, and administration of credit, such as as the main document that regulates the relationship between creditors and debtors, as a tool to determine the limits of rights and obligations, and as a means to monitor the implementation of credit. In practice, banks provide credit based on trust, time, risk level, and credit worthiness or objects in the form of money or goods. This trust is based on an in-depth analysis of the debtor's ability to pay his debts. Therefore, credit agreements always involve collateral, either in the form of movable or immovable goods. Banks conduct a thorough analysis before providing credit with an approach based on the principle of prudence.

The economic condition of the prospective debtor must also be considered by the bank because it can have a good or bad impact on the prospective debtor's business in a certain period of time. Collateral can be taken over and sold or auctioned by the bank with the approval of the court to settle the debtor's debt if the debtor is unable to pay his credit. Usually, this is the last step taken by the bank. In banks, credit guarantees generally consist of two types, namely personal guarantees and material guarantees. Personal guarantees are agreements between creditors and third parties to guarantee that the debtor will fulfill his obligations in paying his debts. Mortgage is a strong guarantee and allows for the burden of land rights. Mortgage Regulation is regulated in Law Number 4 of 1996 which is a continuation of the provisions in Article 51 of Law Number 5 of 1960 concerning Agrarian Principles.

The binding of credit collateral with Mortgage Rights occurs when a customer or debtor uses land (land rights) along with other immovable objects (such as buildings, plants, statues, and so on) as collateral to obtain credit from the bank. In this process, the debtor does not need to physically hand over the collateral to the creditor (bank). This means that the collateral remains in the physical and legal ownership of its original owner. However, by being used as collateral for debt through a Mortgage Rights agreement, the authority of the original owner to carry out legal actions related to the goods, such as transactions with third parties or other actions that can reduce the value of the collateral, is limited by the mortgage rights held by the bank as the holder of the Mortgage Rights. PPAT has the authority to make authentic deeds, including Deeds of Granting Mortgage Rights. This Deed of Granting Mortgage Rights is an accessory because it is related to the main agreement such as a debt agreement or other agreement that results in debts, such as a credit agreement. The making of a Deed of Granting Mortgage Rights is carried out according to the needs of the creditor who is the party in debt. If the creditor requires the making of a Deed of Granting Mortgage Rights, then the PPAT can make it; however, if it is not required, then the Deed of Granting Mortgage Rights does not need to be made.

In the General Explanation number 7 and Article 15 paragraph (1) of the UUHT it is stated that the granting of Mortgage Rights must be carried out directly by the Mortgage Grantor by being present before the PPAT. If the Mortgage Grantor cannot be present before the PPAT for certain reasons, he must appoint another party as his attorney by using a Power of Attorney to Encumber Mortgage Rights (SKMHT) made in the form of an authentic deed.

3. RESEARCH METHOD

This research is a normative legal type, namely research using library materials or secondary data and supported by interviews with sources on the legal issues of the imposition of Mortgage Rights on joint property and the responsibilities of PPAT. The legality is based on applicable legal regulations, legal theory, principles, and legal doctrines. The approach used by the author is a statutory approach or statute approach which in this case will examine all problem formulations using existing laws and regulations. Then the author also uses a historical approach or historical approach, namely examining the background of the emergence of existing problem formulations.

4. RESULTS AND DISCUSSION

Legal Regulations on the Granting of Mortgage Guarantees to Creditors in the Form of Foreign Banks (Research Study at the Batam Land Office)

Specifically regarding land-related guarantees, since 1996 there have been efforts to unify the law in the Law on Guarantees for Land and Related Objects, better known as UUHT, which was enacted under Number 4 of 1996. The birth of the UUHT is a mandate from Article 51 of Law Number 5 of 1960 concerning Basic Agrarian Principles, which states: "The Mortgage Rights that can be imposed on Ownership Rights, Cultivation Rights, and Building Rights as referred to in Articles 25, 33 and 39 are regulated by law. The granting of mortgage rights must also be through a deed of the Land Deed Making Officer or PPAT, namely the Deed of Granting of Mortgage Rights. In the Deed of Granting of Mortgage Rights, the names and identities of the holder and grantor of mortgage rights, the domicile of the parties must be stated, if one of the parties is domiciled abroad, then a choice of domicile in Indonesia must be stated or if not stated, then the domicile of the PPAT where the Deed of Granting of Mortgage Rights was made must be selected.

In addition, the Deed of Granting Mortgage Rights must also contain the amount of debt that is clearly guaranteed, also written how much the value of the mortgage rights of the object used as collateral, and a description of the collateral object. In addition, the Deed of Granting Mortgage Rights also contains articles that contain promises such as promises to provide limitations for the mortgagee to rent out the mortgage object or determine the rental period or receive rent in advance without the consent of the mortgagee. The Deed of Granting of Mortgage Rights also contains a promise in the form of the holder of the mortgage right has the right to sell the object of the mortgage right under his own authority and to own the object of the mortgage right on the condition that the debtor has defaulted. If the object of the mortgage right is insured, it is also agreed that the holder of the mortgage right is also entitled

to all or part of the insurance money received by the grantor of the mortgage right to pay off his debt. These promises are regulated in Article 11 paragraph (2) and Article 12 of the UUHT.

Thus, it can be concluded that there are differences in the way PPAT submits deeds and deed documents to the land office for mortgage registration. The Mortgage Law (UUHT), Government Regulation on Land Registration, and PPAT Job Regulations require PPAT to send physical documents to the land office and the land office is required to receive and store mortgage registration documents in original (physical) form. However, currently with the regulation on electronic mortgage, deeds and deed documents are only submitted in scan form through the electronic mortgage system. The land office no longer accepts physical documents because the Ministry of ATR/BPN aims to reduce the number of physical documents in the land office and implement the zero deed concept by utilizing the online deed system.

Electronic submission of deeds began to be regulated in 2019 based on Article 102 of the Regulation of the Minister of ATR/KBPN Number 7 of 2019. The article states that deeds made by PPAT must have two original sheets, one of which is stored at the PPAT Office and one sheet is submitted to the Head of the Land Office for the registration process. This article also notes that PPAT deeds submitted to the Head of the Land Office can be in the form of electronic documents. Submission of these electronic documents is carried out through an electronic system. If the PPAT deed is submitted in the form of an electronic document, the original copy will be stored at the PPAT Office as a document.

Obstacles in Providing Collateral for Mortgage Rights to Creditors in the Form of Foreign Banks (Research Study at the Batam Land Office)

In practice, the obstacles faced in implementing the provision of electronic mortgage rights in this study are legal obstacles because the regulations regarding the registration of foreign creditors through the financial services partner application through the ministry have not been clearly regulated. In addition, there are technical obstacles to the system. At the time of the granting of mortgage rights at that time, the regulations and implementation regarding electronic mortgage rights were still relatively new. In addition, the lack of socialization is also an obstacle in the implementation of electronic mortgage services. The control carried out by the land office is also still less than optimal, for example, the Deed of Granting of Mortgage Rights that has been registered can be given time to be corrected within five working days and the PPAT and creditor can make improvements. However, the check and balance carried out by the land office in examining the Deed of Granting of Mortgage Rights is often carried out almost on time, so that in fulfilling the improvements sometimes there are documents that also take time to obtain. Not always immediately available on the same day.

This has an impact on the SPS fee that has been paid being forfeited and registration must be carried out from the beginning, so that this is often detrimental to creditors and PPAT. In addition, there are no regulations for the return of SPS fees. Although ¹⁵ in Technical Instruction Number 2/Juknis-400.HR.02/IV/2020 returns are permitted on the grounds of force majeure, in practice these returns are very difficult to carry out. Electronic mortgage rights have implemented that the form of documents that need to be uploaded is in .pdf format so that the land office does not have physical documents in terms of mortgage registration. This makes PPAT store original documents as archives and the second sheet of the Mortgage Grant Deed is included in the deed minutes. So this adds to the burden of responsibility of the PPAT for the second sheet of the Mortgage Grant Deed. If in the future the second sheet of the Mortgage Grant Deed is lost, the PPAT does not have the authority to make a replacement for the original.

Solutions to Obstacles in Providing Collateral for Mortgage Rights to Foreign Bank Creditors (Research Study at the Batam Land Office)

The formation of quality regulations or regulations is required to prevent short-term revisions, long-term validity, synchronization with other regulations, both morally and the law itself.⁸² To create a regulation, normatively based on Article 5 and Article 6 of Law Number 12 of 2011, it is stated that in the preparation of regulations, it must follow the principles of good formation, which include clarity regarding the objectives, appropriate institutions or officials who form them, suitability of type, hierarchy, content material, can be applied, benefits and effectiveness, clarity in formulation and transparency, in addition the content material of the regulation must also reflect the principles of protection, humanity, national spirit, family, unity, Bhinneka Tunggal Ika, justice, equality before the law and government, order and legal certainty, as well as balance, harmony, and alignment.

The establishment of regulations related to the obstacles experienced in the registration of mortgage rights can be a solution to legal or technical obstacles. The solution to legal obstacles such as the absence of further regulations regarding the registration of creditors as recipients of electronic mortgage rights through the financial partner service application can be done by creating a ¹ regulation of the Minister of Agrarian Affairs and Land Affairs or its implementing regulations, so it is not only limited to technical instructions with incomplete regulations. Thus, foreign bank creditors who wish to become financial service partners in the BPN system receive clear direction with open information, because the management is directly directed to the level of the Ministry of Agrarian Affairs and Land Affairs.

Technical constraints are certainly related to the frequent occurrence of electronic rights systems that often experience errors and downtime. Thus, PPAT work is often hampered, especially work that is approaching the deadline is often affected. Thus, improving the mortgage registration system is a solution, and increasing the development of systems, programs, and human resources is also needed, by channeling sufficient budget for system development programs so that the electronic mortgage registration system and other land registration services can be more stable and of higher quality. Solutions to recruit quality human resources also need to be added, regarding the many obstacles that become obstacles in the land office due to lack of human resources, while demand from the community and service users is very high. Thus, the solutions that the author describes in this study can be considered.

5. CONCLUSION AND SUGGESTION

Conclusion

Based on the discussion in the previous chapter, the following conclusions can be drawn:

- a. Granting of mortgage rights to foreign banks follows the procedures stipulated in the Regulation of the Minister of ATR/BPN Number 5 of 2020. The mortgage registration process is carried out electronically, with the difference that creditors who are foreign banks, such as China Banking Corporation Limited, must first register themselves in the financial partner service application. After that, their registration will be verified directly by the Ministry of Agrarian Affairs and Land to ensure the smooth running of the mortgage registration process.
- b. In this study, the obstacles faced in implementing the granting of mortgage rights electronically mainly come from the unclear legal aspects regarding the regulations for registering foreign creditors through the financial partner service application organized by the Ministry. In addition, technical obstacles also occur because the IT system is not yet fully ready. The use of electronic mortgage rights is national in nature, so a strong and reliable IT system is needed to ensure that PPAT and creditors can access the mortgage registration system without experiencing technical problems such as errors in uploading documents. The importance of this good IT system also takes into account that the registration period for the Deed of Granting of Mortgage Rights only lasts for seven working days.

- c. Solutions to overcome legal obstacles such as the lack of clarity regarding the registration of foreign bank creditors as recipients of electronic mortgage rights through financial partner service applications can be achieved by creating a regulation of the Minister of Agrarian Affairs and Land or its implementing regulations. This aims to avoid only having incomplete technical instructions in the regulations. Thus, foreign bank creditors who plan to partner in the BPN system will get clear directions and transparent information, because the regulatory process is directly adjusted to the policies of the Ministry of Agrarian Affairs and Land.

Suggestion

From this conclusion, the author can provide several suggestions, namely:

- a. The solution to overcome legal problems such as the unclear registration of foreign bank creditors as recipients of electronic mortgage rights through financial partner service applications can be achieved by drafting a regulation from the Minister of Agrarian Affairs and Land Affairs or its implementing regulations.
- b. To overcome the challenges in recruiting quality human resources at the land office, which is constrained by the lack of numbers even though demand from the community and service users is very high, the solutions proposed in this study should be considered.
- c. Optimizing the mortgage registration system is one solution, while improving the development of systems, programs, and human resources is also very important. This can be achieved by allocating an adequate budget for system development, so that the electronic mortgage registration system and other land registration services can improve their stability and quality.

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