

# Juridical Analysis Of The Binding Strength Of A Power Of Power To Charge Lien Rights In The Payable And Receivable Agreement

*by Dwfse Wrwefs*

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## Juridical Analysis Of The Binding Strength Of A Power Of Power To Charge Lien Rights In The Payable And Receivable Agreement

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**Abstract,** The research entitled *Juridical Analysis of the Sale and Purchase of Plots of Land That Have Not Been Certified in Kampung Tengah Nongsa, Batam City*, the problem is *How is the Legal Regulation of the Sale and Purchase of Land Plots that have not been certified, How is the Implementation of the Sale and Purchase of Plots of Land that have not been certified and What are the factors that become obstacles to the practice of buying and selling land plots that have not been certified in Kampung Tengah Nongsa, Batam City.* This research method uses empirical legal research methods using qualitative techniques and the approach used in this research is a statutory approach and a conceptual approach. To obtain primary data, this was done by means of in-depth interviews (depth interviews). From the research results, it is known that the legal regulations governing the practice of buying and selling land that has not been certified are contained in the Civil Code in articles 1457 and 1458. Apart from that, there are also regulations for buying and selling land according to Customary Law, Government Regulation Number 24 of 1997 concerning Registration Land, Land Management Rights by the Batam Authority as regulated in *Presidential Decree Number 41 of 1973 concerning the Batam Island Industrial Area and Arrangements for Transfer of Land Rights and Permits for Transfer of Land Rights* as regulated in the Regulation of the Head of the Batam Free Trade Zone and Free Port Concession Agency Number 27 of 2017 concerning Implementation of Land Allocation. The factor that is an obstacle in the practice of buying and selling plots of land that have not been certified in Kampung Tengah Nongsa, Batam City is that the community believes that the Plot Certificate and Land Sale and Purchase Agreement in the form of a Grant Letter are proof of legal ownership and are guaranteed by law, so that sometimes buying and selling land just do it under your hands.

**Keywords:** Binding Strength, Mortgage Rights, Debt and Receivable Agreements

### 1. INTRODUCTION

The Law of Guarantee has existed since the reign of the Dutch East Indies, Japan, and the era of independence until now. In the Dutch East Indies era, legal provisions governing Security Law can be studied in Book II of the Civil Code (abbreviated as KUHPdata) and Staatsblad 1908 Number 542 and amended by Staatsblad 1937 Number 190 concerning Credietverband. In Book II of the Civil Code, the legal provisions relating to Security Law are pawn (pand) and mortgage. Pand is regulated in Articles 1150 to 1160 of the Civil Code, while mortgages are regulated in Articles 1162 to 1232 of the Civil Code. Credietverband is a legal provision relating to the imposition of collateral for native Indonesians. Land rights that can be burdened with credietverband are ownership rights, building use rights and business use rights, while for Europeans and those equated with them, the legal provisions relating to Mortgages apply. During the Japanese era, the provisions of the Guarantee Law did not develop, because they were still enforced in the legal provisions contained in the Civil Code and Credietverband.

According to the provisions of Article 1 number 2 of Law Number 10 of 1998 concerning Banking, the definition of a Bank is a business entity that collects funds from the public in the form of savings and distributes them to the public in the form of credit and/or other forms in order to improve the standard of living of the people. The Role of Banking in the Economic Development of a Nation is vital like a Heart in the human body. <sup>5</sup> Banking acts as a channel of funds for developing business activities, which are expected to strengthen the economy of a country and support National Development. This role has the consequence that National banking is required to always be able to provide the greatest possible benefits so that national stability is created leading to increased welfare of the people. Bank changes as stipulated by the provisions of the law above, it can be seen that banks as fund distributors play a role in serving the needs of the community in their business activities in the form of providing loans (credit). As before the bank lends its funds to the debtor, there will be an agreement which is usually called a credit agreement. The credit agreement gives rise to a debt relationship, where the debtor is obliged to repay the loan given by the creditor, based on the terms and conditions agreed upon by the parties.

Banks as business entities that provide credit to debtors are required to make security efforts so that the credit can be paid off by the debtor, either in whole or in part, will be a loss for the bank. Losses that show a relatively large amount will affect the bank's health level and the sustainability of the bank. Therefore, no matter how small the value of money from the credit that has been given to the debtor must be secured, one way is with a credit guarantee. Regarding credit guarantees, for their security can be found both at the credit analysis stage and the application of legal provisions. Collateral is a guarantee submitted by a debtor customer to the Bank in order to provide credit facilities and is an element of assessment carried out by the Bank before providing credit to the party that needs it. According to the Bank, the safest and most appropriate collateral for the amount of credit issued is land, because within certain limits land is considered a relatively safe collateral, meaning that if the land that is pledged has no problems.

Credit provided by the Bank contains very high risks, so that in every credit provision must pay attention to the principles of healthy credit and based on the principle of prudence. Therefore, before providing credit, the Bank must conduct a thorough assessment of various aspects. Based on the explanation of Article 8 of Law Number 10 of 1998 concerning Banking, what must be assessed by the Bank before providing credit is:

1. Assessment of character
2. Assessment of ability (capacity)

3. Assessment of capital
4. Assessment of collateral
5. Assessment of the debtor's business prospects (condition of economy).

The stage of granting mortgage rights is preceded by a promise to grant mortgage rights. The giver of the mortgage right must appear in person before the Land Deed Official (abbreviated as PPAT), because in principle the release of the mortgage right must be carried out by the giver of the mortgage right as the one acting on the object of the mortgage right. Every credit that has been approved and agreed upon between the creditor and debtor must be stated in a written credit agreement. The credit agreement made by the parties must expressly agree on what they mean. In essence, Mortgage Rights are an accessory to the main agreement, namely an agreement that creates a legal relationship of debt. Thus, the existence, transfer and elimination of Mortgage Rights depend on the debt whose payment is guaranteed. The existence of Mortgage Rights is determined through the fulfillment of the procedures for its imposition which include two stages of activities, namely the stage of granting Mortgage Rights by the PPAT (which contains mandatory substances and promises that are optional) which is preceded by the main agreement, namely the debt agreement, and the stage of registering Mortgage Rights by the Land Office which indicates the birth of Mortgage Rights.

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

- a. How are the legal regulations related to the Binding Power of Attorney to Charge Mortgage Rights in Debt Receivable Agreements (Research Study in Batam City)?
- b. How is the implementation related to the Binding Power of Attorney to Charge Mortgage Rights in Debt Receivable Agreements (Research Study in Batam City)?
- c. What are the factors that become obstacles/constraints and solutions related to the Binding Power of Attorney to Charge Mortgage Rights in Debt Receivable Agreements (Research Study in Batam City)?

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

- a. To find out the legal regulations related to the Binding Power of Attorney to Charge Mortgage Rights in Debt Receivable Agreements (Research Study in Batam City)
- b. To find out the implementation related to the Binding Power of Attorney to Charge Mortgage Rights in Debt Receivable Agreements (Research Study in Batam City)
- c. To find out what factors are obstacles/constraints and solutions related to the Binding Power of Attorney to Charge Mortgage Rights in Debt Receivable Agreements

(Research Study in Batam City)

## **2. LITERATURE REVIEW**

Analysis is the activity of summarizing a large amount of raw data, then grouping or separating the relevant components and parts to then link the collected data to answer the problem.<sup>14</sup> Analysis is an effort to describe patterns consistently in data so that the results of the analysis can be studied and translated and have meaning. According to Komaruddin, the definition of analysis is the activity of thinking to break down a whole into small components so that you can recognize the signs of the components, the relationship of each component, and the function of each component in an integrated whole. Juridical is something that is recognized by law, based on law and something that forms order and has an effect on its violation, juridical is a rule that is considered legal or in the eyes of the law is justified in its validity, both in the form of regulations, customs, ethics, even morals that are the basis for its assessment.

In general, a power of attorney is made when someone needs help to take care of matters relating to legal decisions such as finances, property, health care, and so on. The Big Indonesian Dictionary (KBBI) states that the definition of a power of attorney is "a letter containing the granting of authority to someone to take care of something. According to the law, a power of attorney is a form of agreement in which a person authorizes another person to carry out an affair on his behalf. The legal basis for a general power of attorney is stated in Article 1796 of the Civil Code, while a special power of attorney is stated in Article 1795 of the Civil Code. So, in general, a power of attorney is a document that gives authority to another party to carry out legal actions on behalf of the grantor. This is because the grantor is currently unable to do so themselves. This other party can be a lawyer, family member, or other related individual.

Mortgage Rights are an object of collateral for debt repayment, with priority rights, with the object of the collateral being Land Rights as regulated in **Law Number 5 of 1960 concerning the Basic Principles of Agrarian Law**. Mortgage rights can also be imposed on land rights including buildings, plants and works of art that already exist or will exist which are an integral part of the land, and which are the property of the holder of land rights, the burden of which is expressly stated in the deed granting the mortgage rights in question. Legal Agreement of Receivables there is a term about an Agreement that when someone promises then the Promise must be kept because its Weight is like a Debt that must be paid. It also applies when someone starts a business or makes an agreement in Business where if there is an agreement in the form of a Business Agreement then both parties must keep the Agreement.

### **3. RESEARCH METHOD**

This empirical legal research consists of the word "juridical" which means law is seen as a norm or *das solen*, because it discusses the problems of this research using legal materials. And also comes from the word "empirical" which means law as a social, cultural reality or *das sein*, because in this study primary data obtained from the field is used. So, the empirical legal approach in this study means that in analyzing the problem is done by combining legal materials (which are secondary data) with primary data obtained from Bank Swasta Batam. The approach is taken by examining the laws and regulations that are related to the legal issue being researched to examine and analyze the applicable laws and regulations to find the logical ratio and ontological basis for the birth of the law.

The specification or type of research in this thesis is to combine normative legal research (doctrinal) with empirical legal research (sociological). Where in this research will compare between the regulation of ideal norms (*das Sollen*) of law with the reality that occurs in society (*das Sein*). The population in this study is Private Banks. The determination of the sample in this study uses a purposive sampling method, namely sampling in determining and taking sample members based on considerations of the intent and purpose of the study. So based on the determination of the population above, the sample that will be used as respondents is the Head of Private Banks and Customers.

### **4. RESULTS AND DISCUSSION**

#### **1. Legal regulations related to the Binding Power of Attorney to Charge Mortgage Rights in Debt Agreements (Research Study at Bank OCBC, Batam City)**

According to Article 10 paragraph (2) of the UUHT, after the main agreement is made, the granting of mortgage rights is carried out by making an APHT made by the PPAT in accordance with applicable laws and regulations. The absence of the mortgagee before the PPAT when making the APHT is a reason that allows the mortgagee to make or use the SKMHT, therefore Article 15 paragraph (1) of the UUHT emphasizes that the power of attorney in question must be special and authentic and must be made before a notary or PPAT. Land originating from old rights, namely land ownership rights according to customary law, can be used as an object of SKMHT as referred to in Article 15 paragraph (4) of the UUHT. According to Article 15 paragraph (4) of the UUHT, "SKMHT regarding unregistered land rights must be followed by making an APHT no later than 3 months after being granted." This can happen if the parties agree on the rights and include the promise that has been written in the SKMHT.

The parties through the PPAT can include in one SKMHT or more objects of mortgage rights. Land originating from old rights, namely land ownership rights according to customary law, can be used as an object of SKMHT as referred to in Article 15 paragraph (4) of the UUHT. In the obstacles to registering SKMHT to become APHT, the cost and time factors are one of the obstacles to upgrading SKMHT to APHT. This is not because of the cost of upgrading SKMHT to APHT by PPAT, but because the next process, namely certification of the SKMHT object that has not been registered, requires expensive costs. Meanwhile, for other SKMHTs which do not experience these obstacles, Article 15 paragraph (5) of the UUHT applies, this is based on the amount of each credit, where there is no need to comply with the validity period of the power of attorney, in the case of guaranteeing certain credits which are applied in statutory regulations, such as small credits, home ownership credits, and others (Regulation of the Minister of State for Agrarian Affairs / Decree of the National Land Agency (BPN) No. 4 of 1996 concerning Explanation of the Time Limit for Using SKMHT to Guarantee Repayment of Certain Credits), namely until the end of the validity period of the relevant principal agreement.

Based on Article 15 paragraph (3) and (4) UUHT, the SKMHT must be registered as an APHT, if it is not registered then according to Article 15 paragraph (6) UUHT the SKMHT is null and void by law. The Binding Power of Attorney to Charge Mortgage Rights (SKMHT) in a credit agreement. The imposition of mortgage rights preceded by the granting of SKMHT also has several weaknesses, including the time limit for the SKMHT to be followed up to become an APHT before issuing a Mortgage Certificate. Namely one month for land that has been registered, and three months for land that has not been registered. And the consequence is if the SKMHT time period is violated, the SKMHT is null and void by law. This is very detrimental to creditors considering that the bank in its credit agreement explicitly states the land that will be guaranteed and given SKMHT but cannot be attached to the mortgage because the SKMHT has matured.

The mechanism for granting mortgage rights in the SKMHT is the key to the process of transferring to a third party, because it contains a promise to pay off the debt. This is regulated in Article 10 paragraph (2) of the UUHT which reads: "The granting of mortgage rights is preceded by a promise to provide mortgage rights as a guarantee for certain payments, which is stated in and is an inseparable part of the relevant debt agreement or other agreement that gives rise to the debt. The granting of mortgage rights is carried out by making an APHT by the PPAT in accordance with applicable laws and regulations." Obstacles to making SKMHT, especially by notaries or PPATs who make the SKMHT, are not legally found. This

is because the provisions regarding SKMHT have been clearly regulated in the UUHT, however, these obstacles are found in administrative management, namely in the process of using SKMHT to become APHT.

## **2. Implementation related to the Binding Power of Attorney to Charge Mortgage Rights in**

### **Debt Agreements (Research Study in Batam City)**

The formal definition of bank credit in Indonesia is contained in the provisions of Article 1 number 11 of the 1998 Banking Law, the Law stipulates: A bill that can be equated with that, based on an agreement or loan agreement between the bank and another party that requires the borrower to pay off a certain debt after a certain period of time by providing In the credit agreement, Banking Officers must pay attention to the provisions, especially those stated in Article 6 and Article 7 of Law Number 7 of 1992 as has been refined by Article 6 and Article 7 of Law Number 10 of 1998 as well as in circulars or decrees of the BI Board of Directors, especially regarding credit issues. Collateral Assessment: Banking institutions will assess the collateral submitted, to determine the value and eligibility of the collateral as collateral for a loan through an appraisal team.

Preparation of SHGB/SHM Agreement: If the collateral submitted is accepted, the prospective debtor and banking institution will make an agreement with a Notary/PPAT regarding a credit agreement regarding the loan submitted, collateral pledged, loan amount, interest rate, and other general terms and conditions. Loan Disbursement: After the loan agreement is signed before a Notary and the Bank, the financial institution (Bank) will disburse the loan according to the agreement to the borrower according to the time period submitted to the Bank. Loan Repayment: The borrower is obliged to repay the loan according to the agreed time period and conditions. If the borrower is unable to repay, the financial institution (Bank) has the right to sell or auction to the Batam State Asset and Auction Service Office (KPKNL), namely the collateral pledged or referred to as default. Collateral Repayment: After the loan is paid off, through accelerated repayment or paid off with the term having ended, the debtor will get back the collateral in the form of SHGB/SHM which is pledged to the Bank after carrying out the agreed repayment process.

Every private banking institution or state-owned banking institution can have the same procedure as other banks through the mortgage rights that have been regulated by Law No. 40 of 1996 (implementation of mortgage management), therefore, it is important to clarify the procedures and conditions that apply before applying for a loan with a certificate guarantee to the banking institution. Implementation of debtor default settlement with SHGB/SHM

guarantee involves quite concrete steps in accordance with applicable legal provisions in Indonesia and agreements between creditors and debtors. The following are general steps in implementing debtor default settlement on Bank guarantees:

- a. Legal Compliance Evaluation: Check legal documents related to Building Use Rights Certificate/Ownership Certificate guarantees and the authority to demand repayment if the debtor defaults.
- b. Default Notification: inform the debtor of official rules related to default, by informing the amount and remaining debt that has not been settled and reminding the legal consequences.
- c. Negotiation: Discuss the remaining debt and the remaining principal amount with the debtor first to reach a debt settlement agreement. And offer debt restructuring or gradual payments.
- d. Legal Process: If the discussion is unsuccessful, the creditor can take further legal steps, such as through the auction process of Building Use Rights Certificate/Ownership Certificate guarantees in accordance with applicable legal provisions.
- e. Settlement and Repayment: If an agreement is reached and fulfilled through the legal process, the debtor is expected to make debt repayment in accordance with the agreed provisions.
- f. Monitoring: After the settlement in the repayment procedure is carried out, the creditor re-ensures the payment or the debtor's ability to comply with the agreement that has been reached.

### **3. Obstacles/Constraints and Solutions Related to the Binding Power of Attorney to Charge**

#### **Mortgage Rights in Debt Agreements (Research Study in Batam City)**

Obstacles/Constraints and Solutions Related to the Binding Power of Attorney to Charge Mortgage Rights in Debt Agreements (Research Study in Batam City), namely:

- a. SKMHT Term

Before the UUHT came into effect, what was used was a Power of Attorney to Charge a Mortgage (SKMH), in addition to that, there were also many terms used by notaries that contained the granting of power to charge a mortgage, including: "Power of Attorney to Install a Mortgage". "Power of Attorney to Install a Mortgage". and others. SKMH was made by a Notary based on Article 1178 paragraph (2) of the Civil Code. In practice that has occurred so far (when the SKMHT came into effect) it was very rare for the parties concerned to take the mortgage, almost always what happened

was the making of a power of attorney to charge / install a mortgage and the mortgage was not installed directly. This happened for various reasons, both reasons from the creditor and reasons from the debtor.

b. Mortgage Right Execution

Execution of mortgage rights, namely if the debtor defaults on his promise, the object of the mortgage right is sold through a public auction in accordance with the method determined in the applicable laws and regulations and the holder of the mortgage right has the right to take all or part of the proceeds to pay off the receivables with priority over other creditors.

c. Blocking of Mortgage Right Object Certificate

Blocking of certificates by third parties, both individuals, legal entities and law enforcement is no longer a strange thing in land practices in Indonesia. Related to the issue of blocking certificates, many parties are affected, both the landowner himself, and the bank as a creditor holding the mortgage and other related parties can also be harmed due to the blocking of a certificate. Due to its very broad impact on community life, the regulation of the procedure for blocking certificates needs special attention from the relevant agencies. Therefore, for orderly land administration in recording blocking, the Ministry of Agrarian Affairs and Spatial Planning/Head of the Land Agency of the Republic of Indonesia considers it necessary to issue a special provision that regulates the procedure for blocking land certificates. For this reason, the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the Land Agency of the Republic of Indonesia Number 13 of 2017 concerning the Procedure for Blocking and Confiscation has been issued.

d. Collateral Confiscation by The Court on Mortgage Right Object

In a case, so that the plaintiff's lawsuit is not empty in the future after the decision has permanent legal force, the plaintiff usually requests a security seizure of the defendant's assets. The main purpose of this Security Seizure is so that the defendant does not move or burden his assets to a third party. Maintaining the integrity of the existence of the defendant's assets or the defendant's assets during the case examination process until the case obtains a decision that has permanent legal force. Security Seizure means that in order to guarantee the implementation of a decision in the future, the defendant's assets, both movable and immovable, are first confiscated during the ongoing process or in other words, these assets cannot be transferred, sold or otherwise transferred to another person.

e. Dispute of Ownership Over Land Mortgage Right Object

Ownership disputes are disputes that aim to determine the rights or owner of a disputed item. Every dispute regarding the determination of rights or ownership of an item has a definite object. Although the amount disputed consists of several items, the disputed item is certain regarding the object. In a dispute over ownership of a particular item, for example, the plaintiff files a lawsuit against the defendant regarding a plot of land. The grounds for the lawsuit are based on the reason that a sale and purchase has occurred, namely that the disputed land has been purchased by the plaintiff from the defendant. Ownership disputes can also be based on the argument that the disputed item was obtained from an inheritance, gift or exchange.

f. Dispute of Debt-Receivables Between Mortgage Right Object Owner with Third Parties

Debt disputes between the owner of the mortgage object and a third party are a problem that often arises in the implementation of the mortgage execution auction. This debt dispute is often used as an excuse by the third party to postpone the implementation of the mortgage execution auction that is being carried out by the KPKNL at the request of the creditor as the holder of the mortgage. Usually the third-party files a lawsuit through the Court against the owner of the mortgage object as the debtor. The grounds for the lawsuit are based on the reason that the debtor as the defendant, in addition to having debts to the bank as a creditor, also has debts to third parties, which are usually very large in amount.

g. Execution of Mortgage Right Object Vacation

If the debtor has defaulted on his promise to pay off his debt, namely his credit facility is in arrears. The bank will then write to the debtor 3 (three) times in the form of a Warning Letter so that the debtor pays off his debt. However, because the debtor has not paid off his debt, finally as a last resort the bank requests an auction for the execution of the mortgage right, as mandated by Article 6 of the UUHT by requesting assistance from the KPKNL to auction the object of the mortgage right. If the provisions and conditions of the auction have been met, the collateral which is the object of the mortgage right is finally auctioned and the auction winner is determined.

## **5. CONCLUSION AND SUGGESTION**

### **1. CONCLUSION**

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

drawn:

- a. Banks as business entities that provide credit to debtors are required to make security efforts so that the credit can be paid off by the debtor, either in whole or in part, will be a loss for the bank. Losses that show a relatively large amount will affect the bank's health level and the sustainability of the bank. Therefore, no matter how small the value of the money from the credit that has been given to the debtor must be secured, one way is with a credit guarantee. Regarding credit guarantees, security can be found both at the credit analysis stage and the application of legal provisions.
- b. Implementation of the settlement of defaulting debtors with SHGB/SHM guarantees involves quite concrete steps in accordance with the legal provisions in force in Indonesia and the agreement between the creditor and the debtor.
- c. Difficulty in communicating between creditors and debtors, The debtor's inability to pay the debt according to the agreed schedule, In a complex legal process in resolving the default problem that arises.

## **2. SUGGESTION**

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

- a. Deep Understanding of the Mortgage Law: Make sure to understand in detail the provisions contained in Law No. 4 of 1996 concerning Mortgage. Focus on how the procedure for making, validity, and legal force of a power of attorney to impose a mortgage are regulated in this law. Influence of Batam City Regional Regulations (Perda): Regional Regulations in Batam City may have specific provisions that affect the practice of debt agreements and land guarantees, including the registration of mortgages. Examine whether there are different or additional provisions that must be considered in the context of your research. Land Registration Regulations in Batam City: Understand the procedures for registering mortgages at the Batam City Land Office, including the technical and administrative requirements needed to validate a power of attorney to impose a mortgage. Field Practice and Implementation: In addition to the theoretical aspects of law, it is also important to identify how actual field practices in Batam City relate to the legal force of a power of attorney to impose a mortgage.
- b. Start with primary data collection, such as a power of attorney to impose mortgage rights used in debt agreement practices in Batam City. You can collect examples of power of attorney from notaries, banking companies, or other financial institutions involved in this transaction.

- c. Collaboration with Stakeholders: Build collaboration with notaries, lawyers, and financial institutions in Batam City to gain better access to the required documents. Explain the purpose of your research clearly to gain their support. Utilization of Alternative Data Sources: Utilize alternative data sources such as published case studies or secondary data from financial institutions or land offices that are publicly available. In-depth Interviews and Discussions: Conduct in-depth interviews and discussions with legal practitioners and other stakeholders to understand their perspectives on the implementation of the power of attorney to impose mortgage rights in Batam City. This will help address differences in legal interpretations

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