

Mortgage Encumbrance of Ships in Bank Credit Agreements Reviewed From Legal Certainty



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ABSTRACT: The bank when granting or disbursing credit is usually preceded by an agreement called a draft loan agreement. In the credit agreement, collateral is included, as a guarantee when repaying credit if the debtor defaults. In banking practice, especially credit problems, various collateral institutions are known, each of which has different characteristics. Meanwhile, in terms of objects, there are collateral institutions that own movable and inanimate objects. The formulation of the problem in this paper is How is the encumbrance of ship mortgages in bank credit agreements viewed from the perspective of legal justice? The type of research used in this research is normative law. Procedures for encumbering mortgages on ships in bank credit agreements registered holders and registrars review the completeness of administration in less than 5 (five) days from the time the application documents have been summarized. Vessels that have been entered in the shipping list as well as other vessels in process and parts of such vessels can be granted mortgage rights.

KEYWORDS: Mortgage; Sea Ship; Agreement; Bank Credit; Legal Certainty.

I. INTRODUCTION

Indonesia is geographically an archipelago with two-thirds more ocean area than land. This can be seen with the coastline on almost every island in Indonesia (\pm 81,000 km) which makes Indonesia second only to Canada as the country with the longest coastline in the world. This strength is a great potential to advance the Indonesian economy.¹

In order to support and accelerate the Indonesian economy, especially the economy of small islands, the transportation network system needs to be developed seriously, because the integration of the transportation network with land, sea and air transportation modes will become a bridge for economic growth and development in the surrounding area. This is a necessity. Sea transportation/inter-island shipping is the lifeblood of the economy and connects Indonesians with other nations. Therefore, priority should be given to the domestic shipping industry. This is important to improve Indonesia's competitiveness in the world market.²

One form of business activity in Indonesia that cannot be separated from credit activities and the need for guarantees, is activities related to ships, namely shipping activities, of course this is because Indonesia is an archipelago.³ In running a shipping business, it is not far from the construction and development of a fleet and of course requires a lot of capital or funds. The funds or capital can be obtained one of them by way of credit.

Banks as one of the financial institutions that have the most strategic role in society, aim to raise funds from the community in the form of savings, deposits, demand deposits, or others and channel them back in the form of lending to the community, either productive or consumptive credit, therefore banks are said to be agents of trust (agents of trust for the government and community development) and as agents of development (development agents).⁴ To maintain the health of credit business institutions, especially banks, this credit business should also be accompanied by guarantees, this aims to provide security in providing credit and certainty of credit repayment. So it is appropriate that the giver and recipient of credit, as well as other parties

¹ Zulham, 2013, *Hukum Perlindungan Konsumen*, Kencana Prenada MediaGroup, Jakarta, p. 1.

² Ety R. Agoes, 1991, *Konvensi Hukum Laut 1982 dan Masalah Pengaturan Hak Lintas Kapal Asing*, Abardin, Bandung, p. 164.

³ Fani Martiawan Kumara Putra, "Surat Kuasa Memasang Hipotek Dalam Jaminan Hipotek Kapal Laut", *Perspektif*, Vol.17, No.2, 2012, p. 98.

⁴ Yulianto, 2004, *Tanggung Jawab Notaris dalam Membuat Akta Jaminan Kredit PerBankan*, Mitra Usaha Abadi, Surabaya, 2004, p.1.

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involved in it get protection through a guarantee institution that can provide legal certainty for all parties involved in the credit business.⁵

Article 1162 of the Civil Code is "A property right over immovable property that is used as collateral in the repayment of an obligation." The definition of Article 1162 of the Civil Code is a property right over an immovable object to take change from the object for the repayment of a debt. From there, the right of mortgage arises, which is a property right that gives power over an object but not for use or use, but to be used as collateral for debt. This guarantee is one form of the prudential principle that must be applied by banks as the intended credit institution, regulated in Article 2 of Law No. 7 of 1992 concerning Banking, as amended by Law No. 10 of 1998 concerning Banking (hereinafter referred to as the Banking Law) states "Indonesian banking in conducting its business is based on economic democracy using the prudential principle". The prudential principle is further regulated in Article 29 paragraph (2) of the Banking Law which stipulates that banks are obliged to maintain a sound level of bank health in accordance with capital adequacy, asset quality, management quality, liquidity, and profitability, solvency, and other aspects related to the bank's business, and must conduct business activities with this prudential principle.

Collateral law is closely related to the fields of property law and banking. The field of banking law is linked to collateral lies in the function of banking, namely the collection and distribution of funds for the community, one of its efforts is to provide credit. Credit is a supporting factor for economic development.⁶ As the name implies, namely guarantee, it is necessary to have an object or object that will be pledged to convince and obtain funds from the lender (creditor). The guarantee institution itself has actually been known since the existence of the Burgerlijk Wetboek (hereinafter abbreviated as BW). Based on BW, the division of objects is one of the important things, and the most important division of objects in BW is movable and immovable objects.⁷

Bezwaren (guarantee) distinguishes between movable and immovable objects. For movable objects, the guarantee institution is Gadai (regulated in Articles 1150-1160 BW), or Fiduciary (regulated in Law No. 42 of 1999 concerning Fiduciary (hereinafter referred to as UUJF)), and for immovable objects, the guarantee institution available is Mortgage (regulated in Articles 1161-1232 BW), or Mortgage (regulated in Law No. 4 of 1999 concerning Mortgage Rights (hereinafter referred to as UUHT)).⁸ Currently, due to the birth of the UUHT, mortgage guarantees can only be imposed on non-land immovable objects, such as ships, airplanes.⁹ Another security right that is widely used today to obtain business capital from creditors is to use a security object based on trust, while the security object remains in the hands of the owner of the goods, namely through a mortgage on the ship, as regulated in Article 1162 to Article 1232 of the Civil Code (referred to as KUHPdata), Article 314 to Article 316 of the Commercial Code (referred to as KUHD), Law No. 17 of 2008 concerning Shipping, Government Regulation No. 51 of 2002 concerning Shipping, and Minister of Transportation Regulation No. 13 of 2012. Historically, mortgages were applied as collateral attached to all immovable objects, in its development, land security as one of the immovable objects has been regulated in Law No. 4 of 1996 Mortgage Rights on Land and Objects Related to Land. Movable objects that can still be used as objects of mortgages include ships with a gross content size of at least 20m³. In a legal context, a mortgage as stipulated in Article 1162 of the Civil Code is an important right to property that is used as collateral for the repayment of a contract. Currently in Indonesia, ship mortgages are subject to the Shipping Act of 2008, the Commercial Code and also International Conventions that have been ratified by Indonesia, namely the International Convention on Maritime Receivables and Mortgages 1993. The regulation of mortgages contained in the Civil Code is also partially applicable to marine mortgages. Article 315 d of the Civil Code provides that if a ship is no longer an Indonesian ship. Law No. 17/2008 on Shipping has expressly stipulated that the official authorized to carry out encumbrance, deed-making and registration of marine vessel mortgages is the Registrar and Recorder of Vessels at the place where the vessel is registered, who is an official at the relevant port office. In practice, the Registrar and Recorder of Vessels is often referred to as Syahbandar. So far, the process of encumbering ship mortgages in banking credit agreements has been carried out by Syahbandar. Syahbandar has the authority as an official appointed by the State through the law. While there is a mortgage deed that must be made by a mortgage maker official. How is the authenticity of the deed made by the syahbandar, associated with the obligations and authority of the Notary as an authentic deed official. The law on the office of Notary does regulate the authority of Notary. Notary has skills This notary authority shows that the Notary has the ability and comprehensive knowledge of civil law acts, especially in making a deed that is able to protect the parties involved in it. The notary's authority to make agreements also includes the making of bank credit agreement deeds. The collateral institutions that apply in general are fiduciary security institutions and or mortgages. collateral institutions have the task of launching and securing the provision of credit or

⁵*Ibid.*, p. 89.

⁶ Dwi Tatak Subagiyo, 2018, *Hukum Jaminan Dalam Perspektif Undang-Undang Jaminan Fidusia*, UWKS, Surabaya, p. 80.

⁷ Fani Martiawan Kumara Putra, "Benturan Antara Kreditor Privilege Dengan Kreditor Preferen Pemegang Hipotek Kapal Laut Terkait Adanya Force Majeure", *Jurnal Perspektif*, Vol. 18, No.1, 2013, p. 32.

⁸*Ibid.*

⁹*Ibid.*

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financing, so good (ideal) collateral is: which can easily help obtain financing / credit by those who need it.¹⁰ The execution of a marine ship mortgage usually involves several stages: The shipowner and the lender (bank or financial institution) reach an agreement on the loan amount, interest rate, and other terms, the execution of a marine ship mortgage must comply with the applicable maritime regulations and laws in Indonesia. In this case, the involvement of experienced maritime law experts and financial consultants is highly recommended to ensure that all procedures are carried out correctly and fulfill a sense of justice. From the aforementioned background, the author is interested in compiling a paper on the enforcement of marine ship mortgages in bank agreements from the perspective of legal justice.

II. RESEARCH METHOD

Based on the identification of the problem as described earlier, this research is a normative legal research, therefore this research will use normative research methods. The subject matter will be studied juridically normative and juridically philosophical with a systemic and comparative juridical approach. The nature of this research is descriptive, namely describing the overall object that is explored and collected systematically. The approaches used in this research are statute approach and conceptual approach. In this research, library materials in the form of secondary data are used as the main source. Secondary data includes: a. Primary legal materials: the binding legal basis derived from the state constitution, both written and unwritten, as well as other norms governing the lawmaking system. b. Secondary legal materials: materials that explain primary legal materials, such as draft laws, theses, dissertations, and other research. c. Tertiary legal materials, which are materials that help interpret and explain primary and secondary legal materials, such as dictionaries and encyclopedias. This variety of data can be obtained through desk research or online data searches. Data collection provides verification, correction, supplementation, and itemization of each other. It will be analyzed qualitatively once collected.

III. RESULT AND DISCUSSION

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The word "guarantee" in the Legislation can be found in Article 1131 of the Civil Code and its explanation in Article 8 of Law No. 7 of 1992 as amended by Law No. 10 of 1998 concerning Banking, but these two regulations do not explain what is meant by guarantee. However, it can be seen that a guarantee is related to debt problems, where in a money lending agreement the creditor asks the debtor to provide collateral in the form of a number of assets for debt repayment, which if the debtor does not pay off the debt within the agreed time. In the understanding so far, it has become common knowledge that credit guarantee (granting) is the last alternative source of credit repayment in the event that the credit cannot be repaid by the debtor customer from his business activities because his business activities have difficulty making money. By giving the meaning of "credit guarantee" as "the bank's confidence in the debtor's ability to repay the credit in accordance with the agreement", the meaning of "credit guarantee" has shifted, so that it is no longer in accordance with its commonly recognized meaning so far.¹¹ The value of a guarantee given to the creditor usually exceeds the value of the credit, this is done by the creditor so that he is protected from losses. So, when a credit jam occurs, the bank can use or sell the credit guarantee to pay or cover the bad credit. The purpose of the credit guarantee here is to protect the bank from bad customers, because only a few customers are capable but do not pay their credit. The point is that the credit guarantee here is the binding of the debtor to the creditor with the debt owned by the debtor's property guarantee, so that the debtor does not run away from his debt. From the description above, it can be concluded that collateral is a debt repayment by the debtor to the creditor if in the future there is a congestion in the payment of the debtor's debt with a number of assets owned by the debtor in accordance with the agreement that has been made according to the applicable laws and regulations. In order for the encumbrance of this mortgage to fulfill justice, the encumbrance of the mortgage guarantee is made with a ship mortgage deed by the registrar and Recorder of Ship Names in the place where the ship is registered and recorded in the Ship Master Register. A ship can be used as a mortgage object must meet the criteria of the definition of a ship contained in Article 1 number 36 of Law No.17 of 2008 concerning Shipping. A ship can be used as mortgage collateral or charged with a mortgage must be registered in the ship register. The documents that must be completed for ship registration are:¹²

1. submit an application letter to the registrar;

¹⁰Khanifa, Nurma Khusna. "Jaminan Akad Murabahah di Lembaga Keuangan Syariah Kajian Hukum Perdata" Az-Zarqa': Jurnal Hukum Bisnis Islam, Vol. 7, No. 2, 2015, p. 259.

¹¹*Ibid.*, p. 12.

¹² Republik Indonesia, *Undang-Undang Nomor 17 Tahun 2008 tentang Pelayaran*, Lembaran Negara Republik Indonesia Tahun 2008 Nomor 64, Tambahan Lembaran Negara Republik Indonesia Nomor 4849, Pasal 60 ayat (1).

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2. proof of ownership of the vessel;
3. identity of the owner
4. measurement letter (temporary/permanent);
5. proof of payment of BBN; and
6. deletion certificate, specifically for vessels that have been registered abroad (Directorate General of Sea Transportation).

If the documents contained above have been completed by the applicant, then the registrar's official makes a minuta deed and grosse deed of ship registration. The grosse deed or a copy of the minuta deed, which is only signed by the assistant officer for the registration and transfer of the name of the ship. If this assistant employee is absent, it can be signed by the registrar. This grosse deed is given to the owner after the registrar's sign is installed, as proof that the ship has been registered and also functions as proof of ship ownership rights (BHMK). Mortgage is also a material security that gives rise to property rights, where this property right has an absolute nature that can be enforced with anyone. Another characteristic of this property right is the principle of *droit de preference* where the mortgage holder has the right to take precedence over other creditors, especially in the introduction of the mortgage. Payment of the debt. An object can be used as collateral is must have economic value and can be transferred in accordance with Article 499 of the Civil Code: "Property is every item and right that can be controlled by property rights".¹³ Ship owners must also know in advance about the classification of ships regulated in Law No. 17 of 2008 concerning Shipping in Article 4 of the ship classification, namely; wind-driven ships are sailing ships, ships driven by mechanical power are ships that have movement in the form of engines, and ships that are towed are those that move with the help of other ship propulsion devices. It is stated in Article 2 paragraph (1) of the Regulation of the Government of Transportation of the Republic of Indonesia Number 39 of 2017 concerning ship registration and nationality, that ship registration includes registration of property rights; mortgage encumbrance; and registration of other property rights on ships. Registration of ship rights means registration of ownership rights to the ship. This registration is a legal basis that provides evidence of the certainty of the owner's rights and also evidence for other parties who owns the ship and all rights arising as a result of such ownership. Article 154 of the Shipping Law states that the legal status of the ship can be determined through the process of measuring the ship, registering the ship, and determining the nationality of the ship, where each ship before being operated must be measured by an authorized government official. In Article 162 of the Shipping Law, it is explained that ships registered in Indonesia and sailing at sea are given an Indonesian Ship Nationality Certificate by the Minister. The nationality certificate gives the ship the right to sail under the flag of the country whose nationality is owned by the ship, so that ships holding the Indonesian nationality mark are Indonesian Sea Ships. The letter is given in the form of a Sea Letter for vessels of GT 175 (one hundred seventy-five grosse tonnage) or more; a Large Pass for vessels of GT 7 (seven grosse tonnage) up to less than GT 175 (one hundred seventy-five grosse tonnage); or a Small Pass for vessels of less than GT 7 (seven grosse tonnage).¹⁴ The registration of a ship in a ship register, which serves as a place of announcement, is closely related to the preparation of information about the ship and its ownership in the national registration book because it relates to the nationality of a ship, the jurisdiction of the ship and the issue of encumbrance of the ship. Not being registered will follow the legal provisions regarding movable objects and the guarantee institution is fiduciary. Ship registration as referred to in the Shipping Law includes ships that are still in the process of being built, property rights over ships, internal parts of ships and other property rights. Mortgage security must be encumbered and registered. The Shipping Law in Article 60 paragraph (2) states that: "The encumbrance of a mortgage over a ship is carried out by the drawing up of a mortgage deed by the Registration Officer and the Registrar of Vessel Names at the place where the ship is registered and recorded in the Master Register of Ship Registration". Mortgages are registered at the Syahbandar office. The process of encumbering a vessel involves both parties, the attorney, the notary and the Syahbandar. The process of encumbrance until the ship can be charged with a mortgage is as follows:¹⁵

1. Check with the port office where the vessel is registered. The notary must check the validity of the original grosse deed, the copy of the measurement letter, the documents of the PT concerned. The check must be made where the ship is registered. For example, if the ship is registered in Tanjung Priok, it must be checked with the Syahbandar Tj. Priok. The check is done so that when the notary will make a deed of power of attorney to install a mortgage, the notary can find out the authenticity of the grosse deed. The check is also carried out to find out whether the ship is not in dispute or is encumbered by a mortgage from another party.
2. After checking, the shipowner authorizes a notary to make a Deed of Power of Attorney to Attach Mortgage and signed by the

¹³ H.Salim HS., 2014, *Perkembangan Hukum Jaminan di Indonesia*, RajawaliPers, Jakarta, p. 205.

¹⁴ Tjitrosudibio, dan Subekti, 2017, *Kitab Undang-Undang Hukum Perdata*, PT Balai Pustaka, Jakarta, p. 499.

¹⁵ *Ibid* . p.33

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parties, usually signing together with the signing of the credit agreement deed.

3. After signing the SKMH, the notary or his proxy is tasked with registering it with the intended Syahbandar and then the syahbandar will issue a Ship Mortgage Deed. To carry out the deed, the following documents are required.
4. The application letter and all documents are given to the Syahbandar and then checked, if there are no conditions or documents missing the application letter will be processed approximately 4 working days after the application letter is received.
5. After the inspection, the Syahbandar will confirm about the vessel that there is no dispute and that it is not under mortgage from another party. The ship's mortgage deed will then be drawn up by the Syahbandar at that location and his proxy. After the deed has been drawn up, it will be signed in the presence of the creditor and debtor.
6. After signing by the shipowner and the creditor, the mortgage deed will be given back to Syahbandar to be installed. The Syahbandar will then issue a grosse of the ship's mortgage deed as evidence that the ship has been mortgaged.

To transfer a ship mortgage from a mortgagee to a new money mortgagee, a deed of transfer of the ship mortgage must be made by the Syahbandar. The transfer of the ship can also be done by starting with an application letter to make a transfer. As evidence of the transfer of the ship's mortgage, a grosse deed of transfer of the ship's mortgage will be issued. For ships that are no longer used as debt collateral, the ship must have the mortgage removed (roya) which is also carried out by the Syahbandar. Syahbandar plays a role in the beginning of mortgage encumbrance until the elimination of the ship.¹⁶

IV. CONCLUSIONS

Mortgage encumbrance on ships in bank credit agreements of registered holders and registrars reviewing the completeness of the administration in less than 5 (five) days from the time the application documents have been summarized. Vessels that have entered the shipping list and other vessels in process and parts of such vessels can be granted mortgages. As the ship has been encumbered by a mortgage, the mortgagee is given a grosse of the ship's mortgage deed which has the same executorial power as the result of a court that fulfills legal certainty. The government of the transportation department needs to tighten the documents regarding the legality of the ship for its mortgage and sanctions as a result of the mortgage rules for ships are more emphasized to prevent arbitrary actions on the part of the Kesyahbandaran Office and Port Authority in managing the mortgage of ships.

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¹⁶ *Ibid* . p.18.