



## Land Rights Execution as a Pledge Object Based on MoU with PT. Pegadaian at the Office of Agrarian Affairs Ministry and National Land Agency

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### Abstract

*Cooperation Agreement between the Production Director of PT Pegadaian (Persero) and the Secretary General of the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency Number 352/S-00015.02/2018, Number 31/SKB-100/IV/2018. The imposition of a certificate of land rights as collateral for a mortgage is interesting to discuss by discussing the problem of objects as collateral and the imposition and execution of collateral object rights when the debtor defaults, a conclusion is obtained as follows: Objects as collateral and the imposition, that the types of objects are distinguished between movable objects and non-movable objects. If the differentiation of objects is used as collateral, there is also a distinction. A movable object which is charged with a pledge, is required to transfer of ownership right from the giver to the recipient with the threat of cancellation if the delivery is not made. Non-movable objects are burdened with mandatory register of mortgage rights at the Land Office, the Land Office will issue a certificate of mortgage right which has the power of evidence as a court decision which has permanent legal force. Execution of the collateral object rights when the debtor defaults, if the debtor defaults does not carry out his/her obligation to pay off the debt, then at the pledge, the creditor can execute based on the provisions of Article 1150 B.W., while in the mortgage right if the debtor defaults and does not fulfill obligations voluntarily can execute according to the provisions of Article 14 UUHT (Mortgage Rights to Land and Land-Related Objects)*

### Introduction

In people's daily life, people often hear conversations about borrowing money by handing over object as collateral. The collateral according to Herowati Poesoko is a translation from the Dutch language, namely (*zekerheid* or *cautie*, which includes in general the ways creditor's guarantee the fulfillment of bills from borrowers, in addition to the general liability of the debtor for his/her object.

Delivery of objects as collateral for debt, which means there is a legal relationship between two parties, namely the lender is known as the creditor and the borrower is known as the debtor. According to Hesselink, (2004). a legal relationship is known as "*rechtsbetrekkingen*) is a relationship between two or more legal subjects regarding rights and obligations on the one hand against the rights and obligations of the other." According to Myaskov et al. (2015), legal relations are private and legal relations are public. Legal relations created by the parties regarding an object within the scope of the family and assets are a private relationship. Meanwhile, legal relations within the scope of family law can only occur between human law subjects and legal entity, both private and public legal

entity. The legal relationship in the lending and borrowing agreement with the delivery of object as collateral includes a private legal relationship, because it relates to something within the scope of the family and assets.

The legal relationship is based on lending and borrowing as regulated in Article 1754 of Code of Civil law (KUH Perdata), which stipulates: "Lending and borrowing is an agreement whereby one party gives the other a certain amount of objects which are used up due to use, with the provision that the latter party will return the same number of the same kind and circumstances". Borrowing and lending is an agreement, so it is included in the scope of the agreement as regulated in Book III of the Civil Code on Agreement, which adheres to the principle of freedom of contract.

The principle of freedom of contract can be analyzed from the sentence "all contracts which are legally made apply as law to those who make them". Freedom of Contract, until now, remains an important principle in the contract law system in both the civil law system, common law system and in other legal systems. This is because, *First*, the principle of freedom of contract is a universal principle that applies in all countries in the world. *Second*, the principle of freedom of contract has a meaning as a manifestation of the free will of the parties in an agreement, which also means a reflection of the recognition of human rights. The principle of freedom of contract is not absolute, but is relative because there is a limit to the application of the principle of freedom of contract, which is not against law, public order or morals, according to Wilson, (1965) freedom of contract is limited by three things, namely not prohibited by law, not against morals, and not against public order.

Borrowing and lending is an agreement as referred to in Article 1313 of the Civil Code, defined by Barnett, (1986) an agreement is "an event in which a person promises to another person or where the two people promise each other to do something". In the lending and borrowing agreement, the borrower is required to repay the loan within the promised time, known as the achievement obligations that must be fulfilled by the debtor in each agreement". Achievement according to Article 1234 of the Civil Code, that "each agreement is to give something, to do something, or not to do something." This means that the form of achievement in an agreement is to give or deliver something or not to do something. The achievement in the lending and borrowing agreement includes the scope of giving something, the lender submits the lending and borrowing object and the borrower's achievements returns the same amount of the same kind and circumstances. The borrower's obligation to repay the loan has a time limit as agreed, making the lending party the risk of the possibility of the borrower being unable to repay the loan or what is known as default, meaning "not fulfilling the obligations that is stipulated in the agreement".

The lender, in securing the amount of money lent, encourages the borrowers to direct their belongings as collateral. Balkenhol, & Schütte (2001) classifies as follows: General Collateral and Specific Collateral, general collateral is a collateral from the debtor that occurs by the operation of law and is a mandatory rule that every movable object is either tangible or intangible. or non-movable existing one or, the debtor's property will be borne by the creditor, as a property guarantee right. Loannidou, et al (2016) as collateral in the form of movable property and non-movable property (plot of land).

Movable property is loaded to a pledge as regulated in Article 1150 of the Civil Code, specifies:

*Pledge is a right obtained by a creditor for a movable property submitted to him/her by the creditor, or by his/her proxies, as collateral for his/her debt, and who gives the creditor the authority to take the payment of the debt and the objects by means of other creditors; with the exception of the cost of selling as the implementation of a decision on a claim*

*regarding ownership or control, and the cost of saving the objects, which is incurred after the item becomes a pledge and which must take precedence.*

Pledge is a collateral for movable property by handing over the property from the pledge borrower to the lender or the pledge lender with an illegal threat if the pledged property remains with the borrower. If the borrower is unable to repay the loan, then the pledge recipient will take the payment of the loan and the objects through other creditors.

Non-movable property in the form of plots of land as collateral is bound by mortgage rights as regulated in Law Number 4 of 1996 concerning Mortgage Rights to Land and Land-Related Objects (UUHT), defines the mortgage rights as Article 1 point 1 UUHT as following:

*Mortgage rights over land and objects related to land, are guarantee right imposed on land rights as referred to in Law Number 5 of 1960 concerning Basic Agrarian Basic Regulations (UUPA), including or not including objects other creditors which are an integral part of the land, for the settlement of certain debts, which give priority to certain creditors over other creditors.*

The object of the mortgage is lots of land as regulated in the UUPA, the collateral is handed over based on power.

In connection with the mortgage guarantee and guarantees with mortgage right discussed after the existence of a Memorandum of Understanding (MoU) with PT Pegadaian at the office of the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency as outlined in the form of "Cooperation Agreement Between Production Directors of PT Pegadaian (Persero) with the Secretary General of the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency Number 352/S-00015.02/2018, Number 31/SKB-100/IV/2018. The content of the agreement is that the land certificate, especially productive land belonging to agriculture, can be used as collateral for which a mortgage is imposed on PT Pegadaian (Persero) to obtain business capital.

Land certificate, especially productive land belonging to agriculture, can be used as collateral to be burdened with a mortgage. A certificate according to Article 1 number 20 of Government Regulation Number 24 of 1997 concerning Land Registration is a certificate of proof of land rights, ownership rights to apartment units and mortgage right, each of which has been recorded in the relevant land book. Productive land belongs to agriculture according to Article 1 point 4 of Law number. 19 of 2013 concerning the Protection and Empowerment of Farmers is an activity to manage living natural resources with the help of technology, capital, labor and management to produce Agricultural Commodities which include food crops, horticulture, plantations and/or livestock in an agro ecosystem. Certificate of land rights as non-movable property as collateral for land rights, which means that there is a blur of norms where land rights as non-movable property are imposed with mortgages, but are based on Cooperation between the Production Director of PT Pegadaian (Persero) and the Secretary General of the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency Number 352/S-00015.02/2018, Number 31/SKB-100/IV/2018, certificates of land rights are burdened with a pledge.

Based on the description above, the problem of this article is formulated as follows: Objects as collateral and its burden, and Execution of the collateral object rights when the debtor defaults

## Methods

This research is normative-empirical legal research method. This study examines the implementation of factual legal provisions on any particular legal events that occur in society in order to achieve a predetermined goal. Normative-empirical legal research stems from positive legal provisions imposed on legal events in concreto of the community. This study uses the approach of the law (statute approach) and the conceptual approach, the law approach is carried out for the purpose of examining laws and regulations relating to legal issues faced, while the conceptual approach is carried out from the viewpoint of theory and concept and doctrine that develops in law.

## Results and Discussion

### Objects as collateral and the burden

Objects as stipulated in Book II B.W., adhere to closed, meaning that the parties are not allowed to determine the types of objects themselves which then qualify as moving objects even though they agree on the basis of the arrangement of the properties of the object, it is declared to be closed. This pattern is supported by the provisions of the law which is positioned as *dwingend recht*, statutory provisions which are compelling without permission to deviate from them and must apply.

Regarding objects, the types are distinguished as follows: Tangible objects and intangible objects; Moveable objects and non-movable objects; Objects that can be used up and Objects that cannot be used up; Existing objects and objects that will still be there. Objects that will still exist are then further divided into: Objects that will exist are absolute, that is, objects that do not exist at that time, for example the harvest of the next harvest season; Objects that will exist are relative, namely objects that already exist at that time but for certain people do not exist yet, for example objects that have been purchased but have not been delivered. Objects in trading and Objects outside of trade; Objects that can be divided and objects that cannot be divided. Although objects consist of several kinds of objects, the point that matters is moveable objects and non-movable objects. Moveable objects can be divided into two, namely: Movable objects due to their nature, with reference to the provisions of Article 509 of the Civil Code, are objects that can move or can be moved, and Objects that move due to statutory provisions, referring to Article 511 of the Civil Code, are rights over objects that move. For example, the right to collect proceeds on moveable objects, the right to use moveable objects and others.

Objects that can move or can be moved types of non-movable objects can be divided into 3 (three), namely: An non-movable object because of its nature, namely the ground and everything attached to it, for example a tree; Objects do not move because of their purpose, for example a factory machine; Non-movable objects according to the provisions of law, namely the right to non-movable objects, for example the right to collect the products of non-movable objects, the right to use the non-movable objects and the mortgage.

Objects due to their moveable or non-movable nature can be used as collateral. The right to guarantee property can also be referred to as the object right with a guarantee pattern, explaining the meaning that the guarantee right is attached to or on top of an object, and the object is of course belonging to debtor, and also the guarantee right is not attached to all objects belonging to the debtor, given the inherent guarantee right. All assets of the debtor are controlled by Article 1131 of the Civil Code. the guarantee is attached to certain objects belonging to the debtor, and the right to the guarantee is limited to the one that is burdened. The right to material guarantee is called general guarantee, by law it already exists without the need for an agreement for the parties to realize the existence of the guarantee in question. In connection with the provisions of Article 1132 of the Civil Code, that the general guarantee provided by the legislators can still pose a risk as a result of the auction results of the debtor's

assets if it is insufficient for all purposes according to all debts, then it must be divided proportionally. This suggests that the auction results are contested with each other, the owners of the invoices are mutually concurrent, so that they are then called concurrent creditors. It is different with material guarantee, which is absolute means that these rights can be enforced against anyone, where the rights can not only be enforced on the party of the agreement partner, but also to third parties who are not agreed development partners. The legal basis for the material guarantee is regulated in Article 1132 B.W., which “The right to precedence among creditors derives from the privilege, the pledge and the mortgage/mortgage rights (UUHT)”.

The provisions regarding pledge are as stipulated in B.W., book II concerning Material, except for pledge held in a pawnshop. The definition of pledge is found in Article 1150 B.W. is:

*Pledge is a right which is obtained by a debtor for a movable object, which is handed over to him/her by a debtor or by another person on his/her behalf, and which gives the debtor the power to take repayment of the objects take precedence over other indebted persons by with the exception of costs to auction the objects and costs incurred to save them after the objects are pledged, which costs must take precedence.*

Collateral charging in the form of a pledge occurs when a movable object is used as a pledge object and gives creditors the right to prioritize the settlement of their debts.

The delivery of the object of the pledge from the pledge giver to the pledge recipient is an absolute matter in accordance with the provisions of Article 1152 paragraph (2) B.W. determines: "Illegal is a pledge of all objects that are allowed to remain in the power of the debtor or the pawner, or which returns at the will of the debtor". Meanwhile, Article 1152 paragraph (4) BW, stipulates: "This matter of not having the power of the pledge agent to act freely with his/her pledge, is not accountable to the debtor who has received the object in the pledge without prejudice to the right of the person who lost or stolen the object, to sue back".

Regarding Article 1152 paragraph (4) B.W., as above Walch, (2018) Pledge is included in the group of *beschikking* (ownership actions), and *beschikking* acts are legal actions that bring or can have enormous consequences. Therefore, it is not surprising that in order to pledge the person concerned, the authority to act, special authority is required, it is not sufficient to act alone. Words that do not have the authority to act by the pawner cannot be accounted for to the recipient of the pledge. From these words it can be concluded that in principle, the act of pledge requires the authority to act on the person concerned. If there is no provision in Article 1152 paragraph (4), then in principle a pledge agreement made by a person who is not authorized to act will result in a flawed agreement with the possibility of a claim for cancellation.

The description of the pledge as above is clear that the delivery of the object of the pledge is an absolute thing as a form by law as the transfer of ownership rights and at that time there is a pledge bond between the pledge giver and the recipient of the pledge, the absence of delivery is deemed not yet a pledge bond. This delivery is the beginning and the end for the pledge recipient to get the receivables in full when the debtor defaults or breaks their promise.

Types of non-movable objects in the form of land plots with mortgage rights as referred to in Article 1 point 1 of the UUHT, have the characteristics of being inseparable (the words of one inseparable unit), as settlement of accounts receivable and placing the creditor's position prioritized among other creditors. Apart from being inseparable, the mortgage right has the nature of being indivisible, so it is a complete unit. However, this is not absolute, because the UUHT still allows for the distribution of mortgage rights, as long as it is made in an agreement in the deed of granting mortgage rights. (Article 2 UUHT).

The object which is used as a mortgage right still follows the object in the hands of whomever the object is located (*droit de suite*), that is, even though the object of the mortgage has changed hands and becomes the property of another party, the meaning is an absolute right that can be defended against anyone, Creditors can still use the right to execute if the debtor is in default (Article 7 UUHT).

Regarding the party who has the right and authority to burden the land mortgage, Article 8 of the UUHT stipulates that the giver of the mortgage right is an individual or legal entity that has the authority to take legal actions against the object of the mortgage right concerned. The authority to take legal action against the object of the mortgage right must rest with the guarantor of the mortgage right at the time of registration of the mortgage. Because the birth of the mortgage right is when the mortgage right is registered, then the authority to take legal action against the object of the mortgage right must rest with the guarantor of the mortgage right. For this reason, it must be proven the validity of the said authority at the time the mortgage rights are registered. There is an obligation for the land owner as a party that can burden or another person based on a power of attorney, shows that the party burdening the right dependents are the owners themselves.

The imposition of mortgage rights must be registered in accordance with Article 10 paragraph (1) of the UUHT. One of the principles of mortgage rights is the principle of publicity, therefore registering the giving of the Mortgage Right is an absolute condition for the birth of the mortgage right and binding the mortgage right to a third party as explained in Article 13 paragraph (1) of the UUHT. According to Article 10 paragraph (2) of the UUHT, it is stated that the granting of mortgage rights is carried out by making a deed to grant mortgage rights by PPAT in accordance with the applicable laws and regulations. The making of the deed of granting mortgage rights (APHT) is that the granting of a mortgage must be preceded by an agreement as a guarantee for repayment of debts, the APHT agreement is made separately from other debt agreements. In the APHT, it is mandatory to include the name, identity and domicile of the holder and the giver of the Mortgage, and promises that are mutually beneficial to the parties, as can be seen in Article 11 paragraph (1) and (2) UUHT. The making of APHT is regulated by the Regulation of the State Minister for Agrarian Affairs/Head of the National Land Agency Number 3 of 1996 concerning the Form of Power of Attorney to Impose Mortgage Rights, Deed of Granting Mortgage Rights, Land Mortgage Book, and Certificate of Mortgage Rights, it means that the form of APHT has been determined by the National Land Agency which is already available at the local Land Office.

Certificate of mortgage rights as referred to in Article 14 of the UUHT as proof of the existence of mortgage rights, the Land Office issues a certificate of mortgage rights in accordance with the prevailing laws and regulations. A certificate of mortgage contains the words "For Justice Based on the Almighty Godhead". A certificate of mortgage has the same executorial power as a court decision which has permanent legal force".

Movable objects are used as collateral to be burdened with a pledge, arising from the time the movable object is handed over from the giver to the recipient of the pledge and the delivery is absolutely necessary with the threat of its cancellation. The pledge gives the right to the recipient of the pledge to execute the object of the pledge by placing the position of the pawner to take precedence in the fulfillment of his/her debt among other creditors. For non-movable objects in the form of land plots, the mortgage is imposed by registering the mortgage with the Land Office, which issues a certificate of mortgage. A certificate of mortgage with the sentence "For the sake of Justice based on the Almighty Godhead has the power as a court decision which has permanent legal force.

## **Execution of the collateral object rights when the debtor defaults**

Achievement is an obligation, which means the obligations that must be fulfilled by the parties making the agreement as an implementation of the agreement. The obligations arising from an agreement according to Article 1234 of the Civil Code, which stipulates that "each agreement is to give something, to do something, or not to do something." This means that the form of achievement in an agreement is to give or deliver something or not to do something.

Default according to DeMott (1988) is defined as "not fulfilling the obligations stipulated in the agreement. It is said to have committed default, if in its implementation one of the parties cannot fulfill the obligations arising from the agreement made, then if it causes losses to the other party, then it can be said that it has broken the promise or default.

According to Stein & Book (2011), a person is said to have default if: Not doing what he/she was supposed to do; carry out what he/she promised, but not as promised; carry out what he/she promised but was too late; carry out something that the agreement is not allowed to do.

There are 3 (three) types of not fulfill the agreement, namely: the debtor does not fulfill the agreement at all, the debtor is late in fulfilling the agreement, the debtor erroneously or does not deserve to fulfill the agreement.

It is said to have committed default, if in its implementation one of the parties cannot fulfill the obligations arising from the agreement made, then if it causes losses to the other party, then it can be said that it has broken the promise or default. If the debtor who gives the pledge or the guarantor of the mortgage rights does not fulfill his/her obligations to the creditor who receives the pledge or the recipient of the mortgage to pay the loan, either not fulfilling at all, fulfills but is late or fulfills but is not in accordance with what was promised as the obligation, then it can be said to break a promise or default.

Debtors who do not fulfill their obligations voluntarily, then creditors are in the path of execution. The term execution is defined as implementing a decision or it can also be interpreted as carrying out a court decision, which enforces a court decision with the help of legal force if the losing party does not want to carry it out voluntarily, the execution can be carried out if it has permanent legal force.

The implementation of court decisions or execution can be divided into 2 (two) forms, namely: real execution is what is only possible based on a court decision to take a real action; the execution of the payment of an amount of money is not only based on a deed which is used to make the payment of an amount of money which by law is equal in value to a decision that has permanent legal force.

Real execution is only possible based on a court decision to take a real action, which means that the implementation of a court decision is based on a dispute between the parties. In a dispute in court the party that is injured, in this case the plaintiff, so that in his claim if the claim is granted not winning on paper, a request for confiscation of the property of the defendant is also included. The confiscated objects were intended as an implementation of a verdict if the defendant voluntarily failed to implement the court's decision.

Meanwhile, the execution of the payment of an amount of money is not only based on a deed, which is used to make the payment of an amount of money which by law is equal in value to a verdict that has legal force. The deed used as the basis for execution is a signed letter, made to be used as evidence, and to be used by people, for whom the letter was made. Even so, not all deeds can be used as the basis for execution, but deeds that must be made meet certain conditions. The deed that can be used as the basis for execution is the deed in which there is the title "For Justice Based on the Almighty Godhead". The deed that contains the word is

called *grosse*, which is a copy or derivative of a notary deed which on the head contains the title of the executor "For Justice Based on the Almighty Godhead". The *grosse* deed has the same power of execution as a permanent court decision. For that what needs to be questioned is what is the difference between a deed and a *grosse* deed.

Executable matter which is an implementation of a decision which has permanent legal force which is carried out with court assistance or that execution is: Implementing the irreversible verdict, voluntarily obeyed by the disputing parties. So in the meaning of the word execution already implies that the losing party must obey the decision voluntarily, so that the verdict must be forced on him/her with the help of public forces, where this general force means the police".

The execution of the object of the pledge is based on the order in the provisions of Article 1150 B.W., "which authorizes the creditor to take the payment of the loan and the objects through other creditors", which occurs because of the obligation to hand over the object of the pledge from the giver to the recipient of the pledge by threat of cancellation. This is different from the execution of the guarantee of mortgage if the debtor is in default, the execution is based on the order of the provisions of Article 14 of the UUHT on the sentence "For the sake of Justice based on Almighty Godhead", which has the power of execution as a court decision which has permanent legal force, as is a certificate of mortgage rights.

The things as mentioned above are related to land certificates, especially productive land belonging to agriculture, which can be used as collateral for which PT Pegadaian (Persero) is charged with a mortgage to obtain business capital, on the one hand as the implementation of government programs implementing the provisions of Article 19 of the UUPA to provide guarantees for the land plots with the issuance of a certificate as proof of ownership. But on the other hand, the imposition of a certificate of land rights as collateral for pledge as a rule that is contrary to the higher systematic laws and regulations, namely the UUHT, based on the provisions as regulated in Law Number 12 of 2011 concerning Establishment of Prevailing Laws (Articles 7 and 8).

## **Conclusion**

Objects as a guarantee and their imposition, that the types of objects are distinguished between moveable objects and non-movable objects. If the differentiation of objects is used as collateral, there is also a distinction. A movable object which is charged with a pledge, is required to transfer the ownership rights to the recipient with the threat of cancellation if the delivery is not made. Non-movable objects are burdened with mandatory register of mortgage rights at the Land Office, the Land Office will issue a certificate of mortgage which has the power of evidence as a court decision which has permanent legal force. Execution of the collateral object rights when the debtor defaults, if the debtor defaults does not carry out his/her obligation to pay off the debt, then at the pledge, the creditor can execute based on the provisions of Article 1150 B.W., while in the mortgage right if the debtor defaults and does not fulfill obligations voluntarily can execute according to the provisions of Article 14 UUHT. A Memorandum of Understanding (MoU) with PT Pegadaian at the office of the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency as outlined in the form of "Cooperation Agreement between the Production Director of PT Pegadaian (Persero) and the Secretary General of the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency Number 352/S-00015.02/2018, Number 31/SKB-100/IV/2018. The content of the agreement is that the land certificate, especially productive land belonging to agriculture, can be used as collateral, which is charged with a pledge, does not provide protection to the creditors who receive the mortgage or creditors who receive mortgage rights when the debtor defaults, because the certificate of

land right is not registered as a guarantee for the issuance of a certificate of mortgage right, the creditor cannot exercise the mortgage right.

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