

# EXPANSION OF THE OBJECT OF INDEPENDENT RIGHTS AUCTION THROUGH THE DEED OF ENFORCEMENT OF LIABILITY RIGHTS

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## Abstract

*The deed of imposition of mortgage (APHT) generally cannot be released with a clause that the mortgage is also binding on everything which according to its designation is an integral part of the land and building. The implication is that the clause must be contained in the draft APHT made by the Land Deed Making Officer (PPAT). Failure to include this clause in the APHT will be fatal. This study aims to analyze the position of the mortgage deed in the auction of mortgage rights in the form of land, along with objects related to land. This research is a normative legal research with a statutory and conceptual approach. The results showed that the position of the APHT determines the success or failure of the auction of land and objects related to land. The provisions in Article 4 paragraph (4) of Law Number 4 of 1996 concerning Mortgage Rights, Article 506, Article 507, Article 584 of the Civil Code will not provide benefits to creditors if the clause in the deed of encumbrance of mortgages does not include in detail the granting of mortgage rights covering a plot of land, land and its successors and/or existing or future works that stand on it, which become an integral part of the land, which due to their nature, purpose, or according to the law are considered immovable objects.*

**Keywords:** *Auction object, mortgage, APHT.*

## PRELIMINARY

The object of the mortgage right auction includes all land rights that can be encumbered with mortgage rights, namely property rights, cultivation rights, building use rights, use rights over state land on condition that according to applicable provisions it must be registered and according to its nature can be transferred. The land right becomes the object of the auction if it is encumbered with mortgage rights to guarantee the settlement of the debtor's debt and the debtor cannot fulfill his achievements so that to pay off the debt, an auction is carried out. Auction is the sale of goods that are open to the public with a written and/or verbal price offer that is increasing or decreasing to reach the highest price, which is preceded by the announcement of the auction. Auction as a mechanism for selling goods openly means that everyone is aware of the existence of an auction plan for the collateral and can buy it (Hery Shietra, 2016; 11). Prior to the start of the auction, it will be preceded by an announcement of the auction in the form of notification to the public about the existence of an auction. Through this notification, it is intended to gather auction enthusiasts as well as to notify interested parties.

The author is of the opinion that by referring to the Regulation of the Minister of Finance of the Republic of Indonesia Number 27/PMK.06/2016 concerning Auction Implementation Guidelines which are included in the category of auction enthusiasts are auction participants, and in which there is a buyer, namely a person or legal entity or business entity that submits the highest bid and is ratified. as the winner of the auction by the Auction Officer. Meanwhile, the categories of interested parties in the auction are the seller and the owner of the goods to be auctioned. The definition of an auction participant is a person or legal entity or business entity that has met the requirements to participate in the auction. Seller is a person, legal entity or business entity or agency which based on statutory regulations or an agreement is authorized to sell goods by auction. Goods Owner is a person or legal entity or business entity that has

ownership rights to an auctioned item.

Auctions are broadly divided into three, namely execution auctions, mandatory non-execution auctions, and voluntary non-execution auctions. Execution auction is an auction to carry out court decisions or decisions, other documents equivalent to it, and/or implement provisions in laws and regulations. Mandatory non-execution auctions are auctions to carry out the sale of goods which are required by legislation to be sold by auction. Voluntary non-execution auctions are auctions of private property, individuals or legal entities/business entities that are auctioned voluntarily. Observing the definition of the execution auction, it is obtained that there are three legal bases for carrying out the first execution auction, court decision or decision. Second, other documents that are equated with court decisions or decisions. Third, the provisions in the legislation. The second legal basis is manifested in the form of transfers in guarantee certificates that have executive power. While the third legal basis is realized in the form of a power to sell which is regulated in the deed of encumbrance/granting of mortgage rights (APHT).

The deed of encumbrance/granting of mortgages (APHT) in its theoretical study regulates the terms and conditions for granting mortgages from debtors to creditors. This happens because of the debt that is guaranteed by mortgage. The purpose of granting this mortgage is to give preferred creditors a priority position compared to concurrent creditors for the settlement of certain debts. In other words, the granting of a mortgage is a guarantee for the repayment of the debtor's debt to the creditor due to a credit loan agreement. This agreement as referred to by the provisions of Article 1338 of the Civil Code binds debtors and creditors as law for the parties. In order for a credit loan agreement to act as law for those who make it (debtors and creditors), the credit loan agreement must be made legally. For this reason, in order to make a valid credit loan agreement, it must follow the provisions regarding the legal terms of the agreement, namely Article 1320 of the Civil Code. The condition for the validity of the agreement is the agreement of those who bind themselves; the ability to enter into an engagement; a certain thing; a lawful reason. The terms of the validity of the agreement will be explained in the next paragraph.

A valid agreement will occur if the agreement is given not by mistake, or obtained not by coercion or fraud. In other words, the agreement will be declared invalid if it is given by mistake, or obtained by coercion or fraud. Mistakes will result in the cancellation of the agreement if there is an error regarding or regarding the nature of the goods that are the subject of the agreement. Coercion applied to the person who made an agreement will result in the cancellation of the agreement. Likewise, the agreement will be canceled if there is coercion by a third party who is not actually a party to the agreement, because the agreement was not made by involving the third party. Coercion will also result in the cancellation of the agreement if there is coercion on the husband or wife or relatives in an upward or downward line. The point of common concern is why fraud is the reason for the cancellation of the agreement, because if it was known from the start before the agreement was made there was a ruse used by one of the parties then the agreement would not be made. Therefore, it is only natural that the agreement was canceled because the ruse of one of the parties was only discovered after the agreement was made. However, it is necessary to prove the presence or absence of fraud.

Proficiency is a condition for the validity of the agreement, this means that if the agreement is made by an incompetent person, it results in the cancellation of the agreement. However, it should be stated that everyone is capable of making agreements as long as the law does not state that he is incompetent. The Civil Code has determined several people who are declared incompetent to make an agreement, namely people who are not yet mature, those who are placed under guardianship, women who are stipulated by law, all people who are prohibited by law from making agreements. In response to this provision, the law gives power to people who are declared incompetent to make agreements, may demand the cancellation of the engagements they have made, provided that these incompetent persons are not excluded by law. This provision applies otherwise to people who are capable of making agreements, it is stated

that these people are not allowed to declare the incompetence of minors, people who are placed under guardianship and people who have husbands with whom they make a contract. an agreement.

A certain thing which is a condition for the validity of agreement number three focuses more on goods that can be traded, including goods that will exist in the future can be the subject of an agreement. However, it may not be limited to inheritance that has not been opened or to ask for an agreement on something regarding the inheritance, even though there is an agreement from the testator. While the conditions for the validity of the next agreement, namely a lawful cause, have been determined by the Civil Code that an agreement has no force if an agreement is without cause, or has been made for a false or forbidden cause. On the other hand, an agreement will be declared valid if an agreement is not stated for a reason, but there is a lawful cause, or if there is a reason other than what is stated. However, it must still be noted that a cause is prohibited, if it is prohibited by law or contrary to decency or contrary to public order.

The description above leads the author to link the Deed of Granting Mortgage to the provisions of Article 1 point 1 of Law Number 4 of 1996 concerning Mortgage on Land and Objects Related to Land. It is stated that mortgage is a guarantee imposed on land rights as referred to in Law Number 5 of 1960 concerning Basic Regulations of Agrarian Principles, including or not including other objects which are an integral part of the land, for the settlement of certain debts. , which gives priority to certain creditors over other creditors. There is a phrase in the stipulation that is ...along with or not following other objects which are an integral part of the land, for the settlement of certain debts...This phrase raises the thought that in order to guarantee the repayment of debtor's debts, other objects are not always is an integral part of the land as well as collateral in the provision of credit or in other words it is not always the object of the auction. The problems raised in this paper relate to legal protection for creditors holding guarantees. First, is it possible to carry out the simultaneous execution of other objects that are an integral part of the land as debt repayment? How is the creditor's effort to avoid the debtor's actions with bad intentions in the material guarantee agreement?

## RESEARCH METHODS

This research is a normative legal research because what is being studied is one of the principles of guarantee law, namely the horizontal principle (horizontale scheidings) associated with philosophical principles, constitutional principles, political principles, operational principles (Zaeni Asyhadie and Rahma Kusumawati, 2018: 25). The horizontal principle states that buildings and land are not a single unit, this can be seen in the use of use rights, building use rights. The approach used is a philosophical, conceptual approach. For this reason, in solving existing problems with the scientific method (systematic interrelation of existing facts) in solving problems, especially through research (Raihan, 2017; 59). Legal materials were collected through literature study. While the research analysis was carried out descriptively qualitatively, in the sense that legal materials were described in the form of narratives that were arranged systematically, logically, and were the result of the author's interpretation process of the legal materials produced (Mahrus Ali, 2016: 126).

The data used is secondary data, namely data obtained from official documents, books related to the writing of this paper, research reports contained in legal journals. Secondary data is divided into primary legal materials and secondary legal materials. Primary legal materials are legal materials that have authority (authoritative) in this paper the primary legal materials used are statutory regulations, namely the Civil Code, Law Number 5 of 1960 concerning Basic Agrarian Regulations, Law No. Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land, Regulation of the Minister of Finance of the Republic of Indonesia Number 27/PMK.06/2016 concerning Instructions for Implementation of Auctions. Secondary legal materials are all publications on law which consist of books related

to the writing of this paper such as legal journals.

## **Results and Discussion.**

### **Execution of Land Collateral as Debt Repayment and Its Implications.**

Land to have an important meaning for humans, is a basic need to be fulfilled. Cosmologically, land is a place to live, a place to work and live, a place where humans come from, and where humans return (Bernhard Limbong, 2014; 1). Land law experts say that land has a special position in indigenous peoples in Indonesia until now. This can be seen from the respect for the word land as other words for the designation of the state, namely homeland, homeland, heritage land (Bernhard Limbong, 2014; 1). Even land also has high economic value, philosophical, political, social and cultural values. In the legal context, land guarantees can be used as collateral for lending by creditors to debtors. Land as collateral is closely related to the principles of Indonesian agrarian law.

Indonesian agrarian law adheres to the principle of horizontal separation (*horizontale scheidings*), in the sense that the owner of the land and the owner of the building on it are two separate entities (Hery Shietra, 2016; 49). This principle states that land ownership rights do not necessarily include ownership of the buildings on it (Hery Shietra, 2016; 49). So it is possible that two things will happen. First, the land is owned by the same owner. Second, the land is owned by two different parties. The general explanation of item 6 of the Mortgage Law explains that “The Mortgage Rights regulated in this law are basically:

1. Mortgage rights are charged to land rights.
2. But in reality there are often objects in the form of buildings, plants, and works, which are permanently an integral part of the land that is used as collateral.
3. National land law is based on customary law, using the principle of horizontal separation.
4. Objects which are an integral part of the land according to law are not part of the land in question.
5. Every legal act regarding land rights does not automatically include these objects”.

The general explanation of the mortgage law has the potential to make debtors liable to be entangled with the criminal provisions in the Criminal Code. This is possible if at the time of the credit agreement there is no building on the collateral land, but when the object of the collateral will be auctioned off, it turns out that the building is already standing on the collateral land. Due to this situation, the debtor destroys the building, then the debtor’s actions are threatened with property destruction articles (Hery Shietra, 2016; 49). It seems that the application of such a horizontal principle will cause legal disorder in society. Therefore, the general explanation of the mortgage law expands its explanation, which in essence the application of customary law principles is not absolute:

1. Pay attention to and adapt to the development of realities and needs in society.
2. The encumbrance of mortgage rights on land may also include objects on it.
3. As long as the objects are one unit with the land in question.
4. It is expressly stated in the Deed of Granting Mortgage by the parties.
5. The objects on the collateral land are not only limited to those owned by the holder of the land rights in question. But it can also include those owned by other parties.
6. Exceptions for buildings that use underground spaces, which physically have nothing to do with buildings that are above the earth’s surface above them, are not included in this arrangement.

The expansion of the general explanation, one of which states .... is stated explicitly in the deed of granting mortgage rights (APHT) by the parties. This means that these objects are an integral part of the land as collateral. The implication of this general explanation is that a description or explanation of

the sentence in the deed of encumbrance/granting of mortgage is required. Because if it is not written in detail in the deed of granting the mortgage, it will be fatal. The deed of granting mortgages usually includes a clause that the mortgage also binds everything which according to its designation is an integral part of the land and building.

This means that there is no reason for the debtor to do damage, indirectly this is a preventive measure for the debtor from the criminal threat, namely Article 406 of the Criminal Code because the debtor does not intentionally damage the objects on the collateral land. Where these objects did not exist at the time of the credit agreement, but when the collateral object was to be auctioned off, the execution turned out to be a building on the collateral land. The clause in the Deed of Encumbrance of Mortgage is also capable of being an effort to prevent debtors from civil lawsuits, namely acts against the law. The provisions that can be used to prosecute unlawful acts (*onrechtmatige daad*) are Article 1365 of the Civil Code. The purpose of establishing a legal system which later became known as unlawful acts is to achieve the legal motto of living honestly, not harming others, and giving others their rights/*Juris praecepta sunt haec; honeste vivere, alterum non laedere, suum cuique tribuere*. The provisions of this article determine that a person who commits an act against civil law because of his fault which causes harm to another person is obliged to compensate him for the loss

Legal science divides acts against the law into three, namely acts against the law because of intentional; acts against the law without error (without elements of intent or elements of negligence); unlawful act due to negligence. (Munir Fuady, 2016; 248). While the regulatory model of the Civil Code regarding other unlawful acts can be explained as follows: responsibility with elements of error (intentional and negligence) is contained in Article 1365 of the Civil Code; responsibility with an element of error, especially the element of negligence, is contained in Article 1366 of the Civil Code; absolute responsibility (without error) is contained in Article 1367. In essence, the law regarding unlawful acts is a complicated machine that processes the transfer of the burden of risk from the shoulders of the victim to the shoulders of the perpetrator of the act. (Munir Fuady, 2016; 248-249).

Munir Fuady further stated that the elements of an unlawful act in Article 1365 of the Civil Code are:

1. There is an action.
2. The act is against the law.
3. There is an error on the part of the perpetrator.
4. There is a loss for the victim.
5. There is a causal relationship between the act and the loss.

The existence of an act in relation to the debtor is to destroy objects that are on the land that is used as collateral. This destructive act is included in the category of unlawful acts with the understanding:

1. Acts that violate the law, namely the mortgage law.
2. Violating the rights of other people (creditors) that have been guaranteed by law.
3. Actions that are contrary to the legal obligations of the perpetrator (the debtor).
4. Actions that are contrary to decency.
5. Actions that are contrary to good attitudes in society to pay attention to the interests of others, especially creditors.

### **The Efforts of the Creditor Holding the Property Guarantee to Avoid the Debtor's Bad Intentions in the Credit Agreement.**

A credit/debt/financing agreement is a primary or principal agreement. Meanwhile, the complementary (complementary), derivative (*accessoir*) agreements are material guarantee agreements and

guarantee agreements (personal guarantee and corporate guarantee) (Hery Shietra, 2016; 20). The material guarantee agreement will give birth to material rights with material characteristics (material security rights). So if the debtor's object that is used as collateral is a movable object and then it is bound by a material guarantee agreement, then the concrete form of the agreement is a pledge guarantee agreement. If land rights such as property rights, HGB are used as collateral, the institution used is mortgage rights. (H. Moch. Isnaeni, 2016; 82-83). With regard to collateral, legally when the debtor defaults on the credit agreement, the creditor can execute the collateral as referred to by the provisions of Article 20 of the Mortgage Law (Robiatul Adawiyah and A. Tulus Sartono, 2020; 371).

Mortgage rights by referring to Article 1 point 1 of Law Number 4 of 1996 consist of elements (H. Salim HS, 2017; 96):

1. Guarantee rights imposed on land rights.
2. Land rights including or not including other objects which are an integral part of the land.
3. To pay off certain debts.
4. Giving priority to certain creditors over other creditors.

Mortgage rights will be granted through a mortgage granting deed (APHT). The deed of granting mortgage has a function as a regulator and provisions related to granting mortgage rights from debtors to creditors. The granting of mortgage rights from the debtor to the creditor serves as a guarantee for the repayment of the debtor's debt. The object of mortgage is land and other objects that are an integral part of the land. The thing that needs attention is the need for clauses such as the following:

“This contract is an important and inseparable part of the credit agreement. Likewise, the power of attorney granted in this deed is the most important and inseparable part of this deed. Without this deed and these powers, the credit agreement as well as this deed will not be made and enforced between the parties concerned, therefore this deed cannot be withdrawn or canceled during the validity of the credit agreement and the power of attorney will not be canceled or terminated for reasons that can terminate the granting of a power of attorney, including the reasons mentioned in Article 1813, Article 1814, and Article 1815 of the Civil Code.

The clause of the guarantee contract mentioned above which states.... this deed cannot be withdrawn or canceled during the validity of the credit agreement and the power of attorney.... has the potential to be misused by the debtor by revoking all powers previously granted, on the grounds that the debt contract has expired. Even though the creditor holding the material guarantee has not parate the execution of the land collateral, the debtor states that the power and promises in the deed of granting mortgage rights (APHT) are withdrawn on the grounds that the validity period of the main agreement between them has expired. (Hery Shietra, 2016; 21). The phrase ...during the validity of the agreement... implies that if the validity period of the main agreement has expired, even though the creditor has not carried out the execution parate, the creditor who holds the guarantee right will suffer losses.

The things mentioned above lead to the idea that in entering into a credit agreement there needs to be restrictions, so that the creditor and the debtor do not commit acts that harm the interests of both parties. Guidelines that can be used for restrictions are Pancasila and several provisions in the Civil Code, namely Article 1337, Article 1338 paragraph (3), Article 1339 (Robiatul Adawiyah and A. Tulus Sartono, 2020; 375).

Pancasila as the basis of the state philosophy and the philosophy of life of the Indonesian people, are essentially values that are systematic, fundamental and comprehensive. Thus the precepts of Pancasila are a unified whole, hierarchical and systematic (Ujang Charada S, 2020; 126).

## CONCLUSION

1. The deed of granting mortgage rights (APHT) has an important role for the creditor. For this reason, the clause written in the deed should not harm the creditor. The clause that must be in the deed of granting mortgage is that the mortgage also binds everything which according to its designation is an integral part of the land and building.
2. Clauses in the deed of granting mortgages that have the potential to harm creditors holding material guarantees (KPJK) should be avoided. The disadvantage clause states: this deed cannot be withdrawn or canceled during the validity of the credit agreement and the power of attorney. Good ethics are needed from both parties, namely creditors and debtors so that the interests of debtors and creditors are not harmed.

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