



Authorization Entities (Legal Guarantee Review)

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Abstract

The guarantee agreement for guarantee rights is flexible to be implemented, it does not have to be carried out alone by the party that guarantees it. If represented, it is made in the form of SKMHT that must be made in a notarial deed or PPAT deed. If it follows the provisions in Article 15 of the UUHT, credit is a daily necessity for the community both in the context of meeting consumption needs and in terms of doing business in various business fields, compared also with bank credit contracts as stated by Kevin Kogin¹. Today's business transactions move quickly and increasingly involve all elements of society as a business. The ultimate purpose of the prohibition of the Power of Attorney Imposing Mortgage Rights (SKMHT) as a special power of attorney is to provide legal protection to creditors. SKMHT is a special power of attorney that can only be controlled by the direct power of attorney because it is only related to the power of making APHT with a creditor in the presence of PPAT. If the power of attorney is substituted, it will make creditors difficult if there is a dispute to conduct legal relations because there are too many parties to be able to connect directly with the debtor. In addition, if it is substituted, the creditor will lose his rights and position as the preferred creditor to the receivables that have been given to the debtor.

Keywords: *Guarantee Agreement; Creditor; Contract*

Introduction

1. Background Problems

Land security uses a guarantee model of mortgage rights. The agreement to grant the mortgage is stated in the Deed of Granting Mortgage Rights (APHT) made by PPAT (Land Deed Making Official). It should be noted that the agreement on the granting of mortgage rights made by a person who does not give the mortgage right, it must be done on the basis of the SKMHT based on Article 15 of Constitution Number 4 of 1996 concerning Mortgage Rights and Land Related Objects (hereinafter referred to as with UUHT) which determines the following:

¹ Kevin Kogin, Moch. Isnaeni, Endang Prasetyawati, *Ratio Legis of Using Cross Collateral and Cross Default Clauses in Banking Credit Contract*, Jurnal of Law, Policy and Globalization Vol.78, 2018, p. 82.

Article 15

- (1) The Power of Attorney Imposing Underwriting Rights must be made with a notarial deed or PPAT deed and meets the following requirements :
 - a. does not contain power to carry out other legal actions rather than impose Mortgage Rights.
 - b. does not contain the power of substitution;
 - c. clearly states the object of the Underwriting Right, the amount of debt and the name and identity of the creditor, the name and identity of the debtor if the debtor is not the Underwriter.
- (2) The Power of Attorney to Impose Liability cannot be withdrawn or cannot be terminated by any reason except because the power of attorney has been exercised or because it has expired as referred to in paragraph (3) and paragraph (4).
- (3) The Power of Attorney Imposing Mortgage regarding registered land rights must be followed by the making of the granting of Mortgage Right no later than 1 (one) month after being granted.
- (4) Power of Attorney Imposing Underwriting Rights regarding land rights that have not been registered must be followed by making Deed of Granting Mortgage Right not later than 3 (three) months after being granted.
- (5) The provisions referred to in paragraphs (3) and (4) do not apply in the event that a Power of Attorney Imposing Underwriting Rights is granted to guarantee certain credits stipulated in the applicable laws and regulations.
- (6) The Power of Attorney Imposes Underwriting Rights that are not followed by the making of the Deed of Granting Mortgage Rights in the time specified as referred to in paragraph (3) or paragraph (4), or the time determined according to the provisions referred to in paragraph (5) is null and void by law.

The guarantee agreement for guarantee rights is flexible to be implemented, it does not have to be carried out alone by the party that guarantees it. If represented, it is made in the form of SKMHT that must be made in a notarial deed or PPAT deed. If it follows the provisions in Article 15 of the UUHT, credit is a daily necessity for the community both in the context of meeting consumption needs and in terms of doing business in various business fields², compared also with bank credit contracts as stated by Kevin Kogin³. Today's business transactions move quickly and increasingly involve all elements of society as a business⁴. Observing SKMHT and developments like this, the government must wisely take a stand not only to follow economic globalization⁵, compare with the characteristics of sales and leasing contracts proposed by Rachmat Harjono Tengadi⁶, and also compare with the legal implications and results of land functions proposed by Suryadi⁷.

That SKMHT can be made in a Notary Office or PPAT. However, if it follows the provisions in the Regulation of the Head of the National Land Agency of the Republic of Indonesia Number 8 of 2012 concerning Amendments to the Regulation of the Minister of Agrarian Affairs / Head of the National Land Agency Number 3 of 1997 concerning Provisions for Implementing Government Regulation

² Endang Prasetyowati, *Peraturan Perundang-Undangan Dan Kontrak Pembiayaan Konsumen Dalam Perspektif Keadilan*, DiH Jurnal Ilmu Hukum Volume 13 Nomor 25 Februari 2017, p. 85.

³ Kevin Kogin, Moch. Isnaeni, Endang Prasetyawati, *Ratio Legis of Using Cross Collateral and Cross Default Clauses in Banking Credit Contract*, Jurnal of Law, Policy and Globalization Vol.78, 2018, p. 82.

⁴ Hery Pramono, *Limitasi Pengangguran Oleh Industri Dalam Negeri Terhadap Kehadiran Tenaga Kerja Asing*, UMSurabaya Publishing 2018, p. 98.

⁵ Fajar Sugiyanto, Syofyan Hadi., *Efisiensi, Kedaulatan Negara, Dan Daya Saing Free Flow Of Skilled Labour Dalam Perspektif Economic Analysis Of Law*, UMSurabaya Publishing 2018, p. 56.

⁶ Rachmat Harjono Tengadi, Moch. Isnaeni, Endang Prasetyawati, *Characteristics Of The Contract Of Sale And Lease Back Leasing With Lessee's Land And Building As Object Of The Contract*, International Journal Of Advanced Research (IJAR) Volume:-07, p. 233.

⁷ Suryadi, Made Warka, Endang Prasetyawati, *legal Implications and Result of Agricultural Soil Funtion for Settlement*, Jurnal of Law, Policy and Globalization Vol. 85, 2019, p. 171.

Number 24 of 1997 concerning Land Registration (hereinafter referred to as Perkaban 8 / 2012) in Article 96 paragraph (4), the SKMHT deed may only be made by the PPAT, by regulating that "The preparation and preparation of the deed as referred to in paragraph (1) shall be carried out by each Acting Officer for Land Deed, Acting for Substitute Land Deed, Official Land Deed Maker, or Special Land Deed Maker Officer ". Regulations related to SKMHT are still classified as problematic articles requiring further research. This can be seen in the arrangement related to the party authorized to make SKMHT there are still controversies or conflicting norms. Other things Other things that have not been regulated in full are related to matters that must be contained in the SKMHT.

2. Formulation of the problem

Based on the description on the background of the problem above, then the problem can be formulated as follows what is the ultimate goal of the Prohibition of a Power of Attorney Imposing Mortgage (SKMHT) as a special power of attorney ?

3. Benefits of Research

This research on the development of guarantee law is expected to be useful in contributing to educate the Indonesian people in understanding legal issues, especially relating to the characteristics of the power of imposing mortgage rights and the executive power of the Power of Attorney Imposing Mortgage Rights (SKMHT), so as to provide legal protection in the power of attorney to impose mortgage rights in accordance with the principles of the legislation namely legal certainty, expediency, and justice. This research is also expected to be a guideline for all levels of society, especially those related to the legal world such as Judges, Prosecutors, Lawyers, paralegals, lecturers, law students and other layers who need references related to power of attorney imposing mortgage rights, as well as being beneficial to parties parties conducting similar research.

Final Objectives of the Prohibition of Letters of Authority Loaning the Rights (SKMHT) As a Special Authority.

1. Book III of the Civil Code (hereinafter referred to as KUHPdt.) Tend to Open.

One of the principles of engagement is the principle of freedom of contract. Freedom of contract has the following explanation:

“agree that those who commit themselves "are an essential principle of contract law. This principle is also called the principle of "consensualism" autonomy which determines the "existence" of an agreement.

In English law; this principle is also known. Anson argues as follows : “A promise more than a mere statement of intention for it imports awillingness on the part of the promise to be bound to the person to whom it is made”.

Thus it can be seen that this principle of freedom does not only belong to the Indonesian Civil Law, but is universal. This principle in contract law in countries with the Anglo Saxon system is known as the freedom of contract. This means that the parties are free to make contracts and arrange their own contents of the contract, as long as they meet the following conditions:

- (1) Eligible as a contract,
- (2) Not prohibited by law
- (3) In accordance with applicable customs
- (4) God Will

The principle of freedom of contract is a reflection of the open system of the contract law. The principle of consensualism contained in Article 1320 of the Indonesian Civil Law implies the "will" of the parties to participate in each other, there is a willingness to bind themselves to one another. This will inspires confidence that the agreement was fulfilled. This principle of trust is an ethical value derived from morals. This principle of freedom of contract is one of the most important principles in contract law. This freedom is the embodiment of free will, the transmission of human rights⁸.

Dominance of Regelend Recht in the Law of Engagement

The engagement law has its own legal provisions (regelend recht). So that the provisions govern all aspects of the law that must be applied, namely how and who has the right to enforce the law and the authorities if a violation occurs. However, the reality in the regend recht is a concrete law, it can even be ruled out because of the agreement made by certain parties. Because the relegend recht is to provide guidelines and instructions for the best ways to do and not force. So "although in practice it can be ruled out but it must not go outside or violate the provisions contained in the provisions of that law. In other words, deviations made in the law of the engagement are still in the corridor or boundary justified by applicable law".⁹

It is as regulated in Article 1320 of the Indonesian Civil Law. which shows the standard conditions that must be fulfilled in an agreement. In addition, the provisions of the law can be said to be the dominance in every contractual practice involving the law and whether or not it is legal. The article can indicate the dominance of legal arrangements in each engagement or agreement that must be made can be explained as follows:

- a. There is an agreement (consensus).
- b. The ability to make an engagement
- c. Object or a certain thing
- d. Authorized, legal or legal power

2. Power of Attorney Agreement as Obligatory Agreement

There are two types of agreements, they are mandatory or demanding and non-demanding. This demanding agreement is called an obligatory agreement as a power of attorney from the power of attorney to the recipient of a binding authority and must be implemented. Obligatory agreement is an agreement that requires someone to pay or surrender something, such as the debtor's obligation to pay debts to the creditor, the obligation to pay rent, work wages and others.

The term obligatory is also called an agreement / contract / commitment which in English is defined as an agreement (agreement) that is binding. The existence of a power of attorney as an obligatory agreement includes the sale and sale which has been regulated in Indonesian Civil Law Article 1458, namely "the sale and purchase are considered to occur between the two parties, immediately after these

⁸ Sukarmi, *Cyber Law: Kontrak Elektronik dalam Bayang-Bayang Pelaku Usaha*, Op.Cit., p. 28-32

⁹ M. Bakri, *Pengantar Hukum Indonesia: Pembidangan dan Asas-Asas Hukum*, Unviersitas Brawijaya Press, Malang, 2015, p.5-6.

people reach an agreement on the material and the price, even though the object has not been submitted, nor has the price been paid ". Furthermore, the provisions are explicitly stated in KUHPdt Article 1459, namely "the right of ownership of goods sold does not transfer to the buyer, as long as the surrender has not been carried out based on articles 612, 613 and 616".¹⁰

This power agreement becomes a formal power that causes legal consequences in the form of obligations and rights that must be implemented, and even creates new regulations based on the agreement in the power agreement to be implemented as an obligatory agreement. "Thus this can require certain actions or other parties to take certain actions which can be in the form of performing certain obligations or not taking certain actions".¹¹

The SKMHT agreement is included in the obligatory agreement where the power of attorney must submit the APHT to the authority as proof that the power of attorney has done the obligation as the authority is authorized. In accordance with the mandate of Article 15 of the UUHT, the SKMHT is given by the power of attorney to the power of attorney so that the power of attorney performs the APHT preparation in the presence of a Notary or PPAT. SKMHT can only contain these provisions and no other information can be given. This means that after the power of attorney receives the power of attorney, the power of attorney must represent the power of attorney before the Notary or PPAT to make the APHT then the APHT is given to the power of attorney as a legal consequence of the receipt of the power of attorney.

The Nature of Special Power of Attorney

The power of attorney is a document that shows and authorizes other parties to carry out legal actions for and on behalf of the grantor. "This is enforced because of the mutual trust between the authorizer and the recipient".¹²

Based on this understanding shows that the nature of special powers lies in the trust of both parties, even though the power of attorney is limited by power of attorney which is divided into special power of attorney and general or broad power of attorney. Especially if the special power of attorney is related to the power of attorney imposing a mortgage right (SKMHT) that cannot be withdrawn for any reason, including the expiration of the power as stipulated in article 1813 of the Indonesian Civil Law.

The specific arrangement of SKMHT compared to other powers is to provide legal protection to creditors, especially when legal disputes occur. If a legal dispute occurs, the debtor will easily be able to identify the following creditor with the authorized person in making APHT so that the automatic dispute resolution can be easily resolved as well. This is because in SKMHT can only be given to one proxy and may not be substituted. The aforementioned provisions as a goal of the existence of Gustav Radbruck's law are to provide justice, expediency, and legal certainty. Justice means that creditors and debtors alike get justice through debtors being able to get credit and be able to authorize APHT arrangements. While justice for creditors is to get ease in dispute resolution because the parties involved can easily be identified.

The benefit is that between the creditor and the debtor both get happiness in the credit process without any one party being harmed. While the legal certainty is that both creditors and debtors are guaranteed legal rights through the provisions in Article 15 of the UUHT. All legal objectives have been created from the existence of Article 15 of the UUHT.

¹⁰ Ismantoro Dwi Yuwono, *Baca Buku Ini Sebelum Tanda Tangan Surat Perjanjian*, Medpress Digital, Yogyakarta, 2013, p. 38.

¹¹ Nurmayani, *Hukum Administrasi Daerah*, Universitas Lampung Bandar Lampung, Lampung, 2009, p. 26.

¹² Liberius Jehani, *Pedoman Praktis Menyusun Surat Perjanjian; Dilengkapi Contoh-Contoh*, Visimedia, Jakarta, 2007, p. 159.

Scope of SKMHT

SKMHT can only be made for encumbering mortgage rights made in the form of APHT in the presence of a Notary or PPAT. The power of attorney must be made specifically and cannot be substituted, as determined in Article 15 paragraph (1) UUHT.

SKMHT has a limited scope compared to other powers. If other powers can be carried out freely in content and can be substituted, then in SKMHT this cannot be done. This shows that SKMHT is a special provision for power of attorney as stipulated in the UUHT. The power to make APHT cannot be made only based on the provisions in the Criminal Code as the mother of civil law in Indonesia. SKMHT must be made based on the provisions in the UUHT.

Article 1792 of the Indonesian Civil Law is normally given to authorized recipients for the interests of the grantor, but in the SKMHT it is regulated in reverse. The provisions of Article 1792 of the Indonesian Criminal Code do not apply. Article 15 of the UUHT actually stipulates that SKMHT is given to recipients because it will provide credit (creditors) to the power of attorney (debtor). Creditors are parties that give credit to debtors (in debt). Creditors are divided into 3 (three) types, namely separatist, preferred, and concurrent creditors. The existence of unsubstituted SKMHT is to provide protection to the main creditor, the preferred creditor so as not to lose his rights and position from other creditors, namely concurrent and separatist creditors. These provisions in the legis ratio provide benefits and legal certainty to creditors in SKMHT. Thus, the legal interests of preferred creditors are guaranteed and protected.

Closing

The ultimate purpose of the prohibition of the Power of Attorney Imposing Mortgage Rights (SKMHT) as a special power of attorney is to provide legal protection to creditors. SKMHT is a special power of attorney that can only be controlled by the direct power of attorney because it is only related to the power of making APHT with a creditor in the presence of PPAT. If the power of attorney is substituted, it will make creditors difficult if there is a dispute to conduct legal relations because there are too many parties to be able to connect directly with the debtor. In addition, if it is substituted, the creditor will lose his rights and position as the preferred creditor to the receivables that have been given to the debtor. As a result, justice and legal protection of creditors become uncertain. This of course also results in the existence of collateral given by the debtor to the creditor in executing the obligation of the liability, if the credit from the debtor experiences a default.

Prohibition of Power of Attorney Imposing Mortgage Rights (SKMHT) as a special power of attorney must be regulated more firmly in special regulations governing SKMHT. This is so that it can provide protection to creditors and the provisions can be understood and no longer clash between the provisions of the power of attorney in the Criminal Code, Permendagri Number 14 of 1982, with Article 15 of the UUHT.

References

Book

- Aminanto, Kif, *Supremasi Hukum*, Jember Katamedia, Jember, 2017.
- Bakri, M., *Pengantar Hukum Indonesia, Pembidangan dan Asas-Asas Hukum Jilid II*, UB Press, Malang, 2015.
- Curzon, L.B., *Jurisprudence*, M&E Handbook, 1979.
- Dean, Maryll, *Japanese Legal System*, Cavendish Publishing Limited, London-Sydney, 2012.
- Hadjon, Philipus M., *Perlindungan Hukum bagi Rakyat Indonesia*, Bina Ilmu, Surabaya, 1988.
- HLA Hart, *The Concept of Law*, New York, Oxford University Press, 1994.
- Isnaeni, Moh., *Seberkas Diorama Hukum Kontrak*, Revka Petra Media, Surabaya, 2017.
- Jehani, Liberius, *Pedoman Praktis Menyusun Surat Perjanjian; Dilengkapi Contoh-Contoh*, Visimedia, Jakarta, 2007.
- L. Fuller, Lon, *The Morality of Law*, Yale University Press, New Haven, 1971.
- Lyons, David, *Ethical and The Rule of Law*, Cambridge University Press, Cambridge, 1984.
- Nurmayani, *Hukum Administrasi Daerah*, Universitas Lampung Bandarlampung, Lampung, 2009.
- Rawls, John, *A Theory of Justice*, Cambridge, Harvard University Press, 1971.
- Sri Imaniyati, Neni, *Aspek-Aspek Hukum BMT*, Citra Aditya Bakti, Jakarta, 2010.
- Sukarmi, *Cyber Law: Kontrak elektronik dalam Bayang-Bayang Pelaku Usaha (Cyberlaw)*, Pustaka Sutra, Bandung, 2008.
- Wendell Holmes, Oliver, *The Common Law*, The Belknap Press of Harvard University, Cambridge, 2009.
- Yuwono, Ismantoro Dwi, *Baca Buku Ini Sebelum Tanda Tangan Surat Perjanjian*, Medpress Digital, Yogyakarta, 2013.

Journal

- C. Gavit, Bernard, *Under the Lien Theory of Mortgages is the Mortgage Oly a Power of Sale*, Minn. L. Rev, Vol. 15, 1931.
- Edgar N. Durfee, *The Lien or Equitable Theory of the Mortgage-Some Generalizations*, Michigan Law Review, Vol. X June, 1912, No. 8.

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