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## Reconstruction of debtor's right protection regulation in ship's credit agreement guarantee based on justice value

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### Abstract

This study focuses on what are the weaknesses of the regulation on the protection of debtor's rights in the current ship mortgage guarantee credit agreement and how is the reconstruction of the regulation on the protection of debtor's rights in the ship mortgage guarantee credit agreement based on the value of justice. This study uses a constructivism paradigm with a sociological juridical approach to solve research problems by examining secondary data and primary data by finding the legal reality experienced in the field as well as qualitative descriptive methods, namely where the data obtained are then arranged systematically so that a comprehensive picture will be obtained to then be presented descriptively.

The result shows that the weaknesses are in the substance of the law, legal structure, and legal culture, so it is necessary to reconstruct the law in (a). Article 1162 of the Civil Code and Article 1 number 12 of Law Number 17 of 2008 concerning Shipping. (b). Article 314 paragraph (1) and paragraph (3) of the Commercial Code. (c). Article 60 paragraph (2), paragraph (3), and paragraph (4) of Law no. 17 of 2008 concerning Shipping. (d). Article 224 of the Civil Procedure Code (HIR) (e). Article 1178 paragraph (2) of the Civil Code.

**Keywords:** debtor rights protection, credit agreement, ship mortgage

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### Introduction

Indonesia is the largest archipelagic country in the world which is located between the continents of Asia and the Australian continent and between the Pacific and Indian oceans. Indonesia has more than 17,800 islands, a coastline of more than 81,000 kilometers of which 2/3 (two-thirds) of the entire territory is water. Based on these geographical conditions, the role of sea transportation for Indonesia is very strategic as a trigger for economic development. Sea transportation is very strategic because it plays a role in connecting one island to another so that economic activities can run smoothly.

The Government's policy in 1984 which required all ships that were 20 years old to be destroyed and replaced with new ones did not go well, this happened because the Government did not keep its promise to provide new ships as replacements for ships that had been destroyed, so the Government issued a Law - Law Number 21 of 1992 concerning National Shipping, one of which states that shipping is controlled by the State and its guidance is carried out by the government. With this statement, Indonesian shipping uses the *cabotage principle* or national shipping empowerment, where shipping within the Indonesian customs area must use nationally owned vessels.

In 1994 the Minister of Industry and Trade, who was then held by Rini S Suwandi, said that national shipping did not experience significant development because foreign shipping controlled about 95 percent of the flow of goods movement from Indonesia to abroad (Warta Bea Cukai, 2016). The government re-issued Law Number 17 of 2008 concerning Shipping (hereinafter referred to as the Shipping Law) clearly that the *cabotage principle* was maintained and emphasized from the previous law. *The cabotage principle* is the prerogative of the Republic of Indonesia as a sovereign state. This right is granted to a national sea transportation company, and will not be granted to any foreign transportation company, except for considerations for the national interest of the country concerned (Martono and Budi, 2011) <sup>[2]</sup>.

According to Article 1131 of the Civil Code all property of the debtor, movable or immovable, whether existing or future, is borne by the debt he has made. In addition to general guarantees based on Article 1131 of the Civil Code, in the science of guarantee law, there are also guarantees of a special nature, namely material guarantees that specifically determine/designate certain objects belonging to the debtor or belonging to third parties. Collateral is aimed at securing credit so that the realization of the credit agreement is carried out by the agreement. This guarantee will provide legal certainty to creditors. The guarantee given to the creditor, in this case, is a ship.

The Commercial Code distinguishes ships into two groups, namely ships as movable objects and ships as immovable objects. Ships as moving objects are unregistered ships (Article 314 of the Commercial Code). Ships as immovable objects are ships that have a size of at least twenty cubic meters of gross content and are registered

at the harbormaster of the Directorate General of Sea Transportation of the Ministry of Transportation, and with such registration have the nationality of an Indonesian ship. A ship as an immovable object is a guarantee that can be placed on it only in the form of a mortgage. 8 Mortgages are regulated in Book II of the Civil Code Chapter XXI Articles 1162 to 1232 (Widjaja & Yani, 2007).

This mortgage guarantee must be encumbered and registered. The Shipping Law in Article 60 paragraph (2) is stated as follows: "The mortgage assignment on the ship is carried out by making a mortgage deed by the Registration Officer and the Registrar of Transfer of Names at the place where the ship is registered and recorded in the Master Register of Ships." And this mortgage is registered with the Harbormaster's Office.

The principal security which mortgagee of a ship looks into, inter alia, are a priority mortgage over the ship or ships concerned, an assignment of all insurances of that ship, an assignment of all earnings of the ship, including of a particular charter party, and any compensation of the ship, a person or parent company guarantee and indemnity, a charge over or pledge of the shares of the borrower<sup>3</sup>, etc (Ajonumah and Pepple, 2019) <sup>[3]</sup>.

Ships that can be used as mortgage objects are limited in nature, namely, in accordance with the provisions in Article 314 WvK, ships with a gross content of at least 20 m<sup>3</sup> (twenty cubic meters) can be registered in the general register and become mortgage objects. The registration of this ship gives the owner a strong property right that can be defended against anyone. In practice, registration provides strong protection to the owner, because the owner can defend his rights to the public (general). The public who wants to know the status of the ship can seek information from the registration agency. If the registration is deleted, the nature of the ship's property rights is subject to the provisions in Article 1977 of the Civil Code (Rizal, 2018) <sup>[4]</sup>.

The procedure for loading of ships as collateral takes precedence with a credit agreement with ships as collateral using a mortgage guarantee institution that is weighing above 7 GT (Grosse Tonnage) so it must be registered in the vessel register and included in the category of immovable objects if it has a weight of 20 m<sup>3</sup> to the top and vessels used as collateral must be imposed on the object which is used as collateral, namely by making a Deed of Loading the Ship as an attempt to bind the object of collateral by the creditor (Bank) (Arnoli, Azheri, dan Mannas, 2019) <sup>[5]</sup>.

Ship mortgages are one way for ship owners to increase their financial capacity, where the shipowner as a mortgagor borrows a certain amount of money from a person or financial institution as a mortgagee with the guarantee of his ship. The ship is still in the control of the owner the ship to be cultivated for profit. Considering that the collateral object remains in the possession of the mortgagor, there is an obligation for him not to cause harm to the mortgagee on his rights to the guarantee. The nature of the ship as an object that can be moved, even to the extent of crossing the country's territorial borders, causes a special mechanism for protection for mortgagees in the ship mortgage registration system.

Ship mortgage in the form of a gross deed, with an executorial title in the form of a transfer "For Justice Based on the One Supreme Godhead", then the mortgage attaches executive power (executorial Kracht) or entitles the holder to enforce because the law itself equates it with a court judge's decision that has permanent legal force (Janah, 2015) <sup>[6]</sup>. Ship mortgage arrangements are currently regulated in Law no. 17 of 2008 concerning Shipping, hereinafter referred to as the Shipping Law. The Shipping Law stipulates that the assignment of a mortgage on a ship is carried out by making a mortgage deed by the Registrar and Registrar of Transfer of Names of Ships at the place where the ship is registered and recorded in the master register of ship registration (in this case the Head of the Section for Registration and Transfer of Names of Ships, Directorate of Shipping and Shipping), Directorate General of Sea Transportation of the Ministry of Transportation for ships registered in the provisions of Article 60 of the Shipping Law) (Haerani and Ulum, 2021) <sup>[7]</sup>.

By the principle of proportionality known in civil agreements, mortgagors and mortgagees should be given equal rights and obligations. In general, the rights of the mortgagor relate to his rights as the owner of the ship until the mortgagee takes over his rights to the ship due to the failure of the mortgagor to pay. As Lord Mansfield stated:

*"In general, till the mortgagee takes possession, the mortgagor is owner to all the world; he bears the expenses and he is to reap the profit".*

With this ownership, Mortgagor also has the right to sell the mortgaged vessel. On the other hand, the *mortgagee* is entitled to payment of the loan from the mortgagor including the promised interest. If it is contained in the mortgage agreement, then the mortgagee can control the mortgage on the ship until a certain time since the mortgagor fails to pay its debts. Mortgage also has the right to intervene and even exercise control over the object of the mortgage if the mortgagor takes actions that cause damage or decrease the value of the object of the mortgage.

Legal protection for the parties to the mortgage agreement is certainly not enough to only concern administrative aspects and rights precedence, as contained in Law no. 17 of 2008 concerning Shipping. rights *Mortgage* to sell ships or rights to redeem mortgage objects when the redemption period ends, for example, also need to be strictly regulated in laws and regulations to achieve legal certainty for the parties and avoid conflicts. Therefore, it can be said that it is still necessary to arrange regulations regarding mortgages on ships that are better able to provide legal protection for related parties.

Law No. 17 of 2008 concerning Shipping states that each mortgage deed is issued one Grosse Mortgage Deed which is given to the mortgage recipient. The Grosse Mortgage Deed has the same executorial power as a court decision that has obtained permanent legal force. By granting such executive powers it should not be too difficult

for financial institutions to carry out executions. The mortgage holder only needs to ask the district court for assistance to execute the mortgage object.

What still needs to be regulated is the right to sell on their power for the mortgage holder if the debtor breaks his promise, whether both parties can regulate this on their own or not. The law needs to provide space for the parties to agree on this in the mortgage agreement. However, what needs to be considered is the affirmation that the mortgage holder cannot be domiciled as the owner of the ship with ownership rights attached to it. The ownership of the mortgage holder must be within the limits of protecting the receivables that have been given to the shipowner.

Debtors who do not carry out the credit agreement or default on the credit agreement can be asked for the execution of the ship that is used as collateral. Based on the current regulations, the execution of a ship that is the object of a mortgage can be requested for court assistance because the legal force of the gross deed is the same as a court decision that has permanent legal force. Problems can arise if the ship that is the object of the mortgage to be executed is not within the territory of Indonesia. In the civil procedural law applicable in Indonesia, there is no regulation regarding the confiscation of objects outside the territory of Indonesia, so there is no legal basis for the execution of objects outside Indonesia.

Based on the background of the problem above, this research contains the following 3 (three) problem formulations:

1. What are the weaknesses of the regulation on the protection of debtor's rights in the current ship mortgage guarantee credit agreement?
2. How is the reconstruction of the regulation on the protection of debtor's rights in the ship mortgage guarantee credit agreement based on the value of justice?

### **Method of Research**

This study uses a constructivist legal research paradigm approach. The constructivism paradigm in the social sciences is a critique of the positivist paradigm. According to the constructivist paradigm of social reality that is observed by one person cannot be generalized to everyone, as positivists usually do.

This research uses descriptive-analytical research. Analytical descriptive research is a type of descriptive research that seeks to describe and find answers on a fundamental basis regarding cause and effect by analyzing the factors that cause the occurrence or emergence of a certain phenomenon or event.

The approach method in research uses a method (*socio-legal approach*). The sociological juridical approach (*socio-legal approach*) is intended to study and examine the interrelationships associated in real with other social variables (Soekanto, 1984)<sup>[8]</sup>.

Sources of data used include Primary Data and Secondary Data. Primary data is data obtained from field observations and interviews with informants. While Secondary Data is data consisting of:

1. Primary legal materials are binding legal materials in the form of applicable laws and regulations and have something to do with the issues discussed, among others in the form of Laws and regulations relating to the freedom to express opinions in public.
2. Secondary legal materials are legal materials that explain primary legal materials.
3. Tertiary legal materials are legal materials that provide further information on primary legal materials and secondary legal materials. Research related to the socio-legal approach, namely research that analyzes problems is carried out by combining legal materials (which are secondary data) with primary data obtained in the field. Supported by secondary legal materials, in the form of writings by experts and legal policies.

### **Research Result and Discussion**

#### **1. Weaknesses of Debtor Rights Protection Regulations in the Current Ship Mortgage Credit Agreement.**

##### **a. Weaknesses in Legal Substance**

Ratification *International Convention on Maritime Liens and Mortgages* by the Government of Indonesia through Presidential Regulation no. 44 of 2005 and the high encouragement of the shipping community to improve the lagging national law regarding ship mortgage issues, caused several changes to this issue in Law no. 17 of 2008 concerning Shipping. Through the ratification of the convention and changes to the rules, it is hoped that foreign financial institutions and banks are willing to assist national shipping companies in developing a fleet of Indonesian-flagged vessels.

Provisions regarding receivables that take precedence as regulated in Article 316 of the Commercial Code and are still in effect until the enactment of Law Number 17 of 2008 concerning Shipping, further increase the reluctance of financial institutions to lend capital to shipping companies. Changes to the provisions regarding mortgages made by Law Number 17 of 2008 concerning Shipping are of course intended to adapt to the demands of the current shipping business needs, therefore by using the benchmark of Law Number 17 of 2008 concerning Shipping, restructuring must be carried out significantly to the rules regarding ship mortgages.

The juridical chaos of ship mortgage regulations occurred after the 1992 Shipping Law derogated and revoked colonial product shipping laws that had been in effect until the issuance of the Act. The revocation was followed by a desire to make a replacement by containing provisions for implementing regulations in the related articles, but unfortunately, until the Shipping Law no. 21 of 1992 concerning Shipping was replaced by Law no. 17 of

2008 concerning Shipping, only one implementing regulation has been successfully drafted, namely Government Regulation no. 51 of 2002 concerning Shipping. By the principle of derogation, the provisions regarding mortgages contained in Law no. 21 of 1992 concerning Shipping can be said to undermine the provisions on mortgages both in the Commercial Code and in the Civil Code.

The derogation of regulations that were not followed by the formation of a replacement regulation eventually created a legal vacuum, therefore Government Regulation no. 51 of 2002 concerning Shipping, reinstated the rules regarding mortgages in the Commercial Code and the Civil Code which are considered more comprehensive than the regulations in Law no. 21 of 1992 concerning Shipping and Government Regulation no. 51 of 2002 concerning Shipping itself. Realizing these shortcomings, in Article 33 Paragraph 5 of Government Regulation no. 51 of 2002 concerning Shipping, it is stated that the mortgage provisions regulated in the Civil Code and the Commercial Code still apply to the imposition of mortgages on ships. These regulations indicate a juridical logic confusion in which the rules with a lower position (Government Regulation No. 51 of 2002 concerning Shipping) re-enact the provisions of a higher position (the Civil Code) after it is stated that they will be replaced as stated. in Article 49 Paragraph 2 of Law no. 21 of 1992 concerning Shipping (Umar, 2001) <sup>[10]</sup>. Another problem related to shipping mortgages is the difficulty of executing ship mortgage guarantees. HIR does not specifically regulate the procedure for execution of ship mortgages, but *mutatis mutandis* the provisions regarding the execution of land mortgages can be applied to ship mortgages. The lack of clarity on the rights of the holders of mortgage rights on ships to quickly obtain their rights to ships has caused banks to be increasingly reluctant to accept mortgages on ships as collateral.

## **b. Weaknesses in Legal Structure**

### **1. Banking Institution**

The implementation of mortgage loading on ships at PT. Bank Muamalat has complied with the laws and regulations, in particular the Regulation of the Minister of Transportation No. 13 of 2012 concerning Vessel Registration and Nationality. Therefore, it can be said that the implementation of mortgage loading on ships at PT. Bank Muamalat does not have significant obstacles.

The obstacles that arise are usually related to the time and cost of managing the registration of mortgage charges on ships at the registration office and the port authority. Regarding the management time, Article 29 paragraph (4) of the Regulation of the Minister of Transportation No. 13 of 2012 it is regulated that the completeness of the requirements research is carried out by the Registration Office no later than 5 (five) working days after the complete application is received. However, in practice, the 5 (five) day period is often not kept by the Registration Office and the Port Authority. For notaries, the timeliness of management is quite important to increase trust in notaries. This is because usually, the bank will ask a notary to immediately complete the process of handling the mortgage on the ship so that the bank immediately has legal certainty as a mortgage holder.

In addition, there are obstacles related to the classification status of ships. In the implementation of the mortgage assignment, there are still many cargo ships that have not taken care of their ship classification status at the Indonesian Classification Bureau so these cargo ships do not have classification status in the form of certificates and survey reports. However, in the absence of ship classification status, PT. Bank Muamalat will cover the insurance value at the estimated value of the guarantee. This will be detrimental to the debtor because the ship should have a higher value than its estimated value if it already has a ship classification status.

### **2. Auction Board**

Before conducting an auction or in other words execution, usually, the creditor will make a withdrawal of the ship first. The towing of the vessel is carried out to ensure that the physical vessel to be auctioned has been controlled by the creditor, namely the bank or leasing. During the execution or auction, many obstacles hampered the auction process. Constraints in the auction process are; that it is difficult for creditors to take over the ship because the ships are moving, the cost to carry out the execution is too high and a lawsuit from the debtor because they do not accept the execution to be carried out by the creditor.

### **3. Execution Agency Under Guarantee Confiscation**

Law Number 17 of 2008 concerning Shipping states that each mortgage deed is issued one Grosse Mortgage Deed which is given to the mortgage recipient. The Grosse Mortgage Deed has the same executorial power as a court decision that has obtained permanent legal force. By granting such executive powers it should not be too difficult for financial institutions to carry out executions. The mortgage holder only needs to ask the district court for assistance to execute the mortgage object. What still needs to be regulated is the right to sell on their power for the mortgage holder if the debtor breaks his promise, whether both parties can regulate this on their own or not. The law needs to provide space for the parties to agree on this in the mortgage agreement. However, what needs to be considered is the affirmation that the mortgage holder cannot be domiciled as the owner of the ship with ownership rights attached to it. The ownership of the mortgage holder must be within the limits of protecting the receivables that have been given to the shipowner.

Two principles can hinder the execution of confiscation, namely:

- a. The principle of *Rijdende Beslag*, in this principle confiscation of executions placed on ships must not hinder or hinder the operational activities of ships to sail within the territory of Indonesia or abroad. So even though it has been confiscated, the ship is still free to sail anywhere according to the wishes of the debtor.
- b. The principle of the freedom to control and operate the ship, in this principle confiscation must not reduce the right to control, exploit and use the confiscated goods.

### c. Weaknesses in Legal Culture

#### 1. Weaknesses in Repayment With Ship Mortgage Guarantees

Loan repayments using ship mortgage guarantees experienced many obstacles in their fulfillment. One of the obstacles for creditors in returning repayments from debtors for the execution of mortgages on ships (Anis Idham, 1995)<sup>[11]</sup>, is the execution of ship mortgages which are regulated in the provisions of articles 195 to 200 HIR and 224 HIR because the gross mortgage deed article 224 HIR is equal in strength with a court decision that has definite legal force. Thus, the gross of the ship's mortgage deed automatically attaches the value of the executive power. The execution of the mortgage on the ship must be carried out by selling the auction, and the proceeds of the auction are to pay the debt guaranteed by the mortgage.

#### 2. The Range of Execution of Ship Mortgages That Changed Nationality

Another thing related to the execution of ship mortgages is the execution of ship mortgages that change nationality. In this case, the mortgage holder will not be harmed by the provisions in Article 315d of the Commercial Code, which states, among other things: a). Changes in the Nationality of Ships; b). Mortgage holder privileges; c). Property rights and privileges of Mortgage holders.

#### 3. Sale of Ships That Have Been Mortgaged

In this case, the new owner must be aware, that as a result of the purchase of the vessel, a mortgage has been charged. The new owner must be willing to pay off his debts with a mortgage guarantee against the ship, while the execution of the ship's mortgage can still be requested by the creditor.

#### 4. Ship Sales Through Auction Sales

In the auction sale of a ship that does not change the nationality of the ship, material rights remain attached and the privilege is nullified, as long as the auction sale does not change the nationality of the ship. This has been regulated in article 315c of the Commercial Code jo. Article 1210 of the Civil Code.

### 2. Reconstruction of the Debtor's Legal Position in the Ship Mortgage Credit Agreement Based on Fair Value.

The regulation of ship registration in the PRC country is contained in a regulation called *Regulations of the People's Republic of China Governing The Registration of Ships* which was promulgated by Decree No. 155 of the State Council of the People's Republic of China on June 2, 1994, and became effective on January 1, 1995). The provisions of Article 2 of the PRC ship registration regulations stipulate that the ships that must be registered are:

- a. Vessels owned by PRC nationals who reside or whose principal place of business is within the territory.
- b. Ships owned by companies with legal entity status established under the laws of the PRC whose main place of business is within the territory of the PRC, including foreign investment involved with the proportion of registered capital contributed by Chinese investors not less than 50% (fifty percent).
- c. PRC Government service vessels and vessels owned by institutions with legal entity status.
- d. Other vessels deemed to require registration by the competent PRC port supervisory authority.

The provisions for ownership of ships registered in the PRC as mentioned above show that the PRC Ship Registration Regulations adhere to a closed registration system or flow as is also the practice in Indonesia. However, ships owned by the government or legal entities according to ship registration regulations in Indonesia do not include ships that must be registered as is the practice in China.

Arrangements for loading ship mortgages in the PRC are contained in *The Registration of Ships 1994 Chapter IV Registration of Ship Mortgage (Article 20 to Article 24)*. This regulation regarding the imposition of ship mortgages is part of the PRC Ship Registration Regulations which regulates it in a separate chapter, namely Chapter IV on Ship Mortgage Registration. Article 20 stipulates that a ship with a gross tonnage of 20 (twenty) tons or more can be used as a ship's mortgage object. Compared to Indonesia, there is a difference where the object of a ship mortgage is only valid for ships measuring 20 (twenty) cubic meters and above or having a gross tonnage of seven (GT 7) and above.

The official authorized to register ship mortgages in the PRC is the Ship Registration Administration whose position and function can be equated with the Registrar and Registrar of *Balikhnama* Ships in Indonesia. Ship mortgage registration can only be done at the port where the ship is registered at the request of the creditor with the debtor as the owner of the ship by submitting the related documents.

New Zealand ship registration arrangements are contained in the Ship Registration Act 1992 (Law No. 21 of 1992 concerning Shipping) which comes into force on the 28th (twenty-eight) day after the date this law is approved by the King (The Royal). Article 93 comes into force 6 (six) months after the enactment of this law.

The New Zealand Vessel Registration Act specifies that vessels that need or are entitled to be registered are New Zealand vessels and pleasure vessels. As in Indonesia and the PRC, ship mortgage arrangements in New Zealand are also only part of the law governing ship registration contained in the Ship Registration Act 1992 (Part 3 Transfers, transmissions, and mortgages of ships). The provisions of Article 39 state that a ship or any part of a ship can be used as collateral for a mortgage. This provision allows the object of the ship's mortgage not only to be limited to the ship as a whole but also parts of the ship. This is different from the provisions for the loading of ship mortgages that apply in Indonesia and in China, which do not recognize the loading of ship mortgages for the parts that are on a ship. Likewise, regarding the size of the ship that can be charged with a mortgage, the provisions in New Zealand do not regulate it as in Indonesia and the PRC.

The clerk as the official registering the ship's mortgage assignment after receiving the submission of the ship's mortgage assignment which is accompanied by complete documents, must register the mortgage in the special register of mortgages and ratify the incoming documents along with the date and time of making the document. The application for registration of a mortgage under this provision must be registered in the order/time of submission.

If two or more mortgages are registered against the same ship or part of the ship, then determine the priority creditor based on the order of mortgage registration. This provision is no different from what applies in Indonesia and China. Likewise, if the debtor is bankrupt, it will not affect the creditor's right to obtain fulfillment of the debtor's debt (Article 40).

The New Zealand Mortgage Provisions allow for changes to the contents of the mortgage agreement by making a memorandum or memorandum that has been determined by doing all or one of them. It is also necessary to research and discuss the legal norms of ship mortgage guarantees. As discussed earlier, the legal principle is the basis for the birth of a legal norm which is then manifested in the form of legal regulations. Therefore, examining the legal norms of ship mortgage guarantees, will refer to the laws and regulations governing ship mortgages.

Compared to other forms of material security, namely Mortgage and Fiduciary Rights which already have a legal basis in the form of separate laws (Law No. 4 of 1996 and Law No. 42 of 1999), the legal arrangements for ship mortgages are material and formally still refers to several laws and regulations as previously described.

The absence of legal regulations for ship mortgages in separate legislation creates difficulties in researching and discussing legal norms for ship mortgage guarantees. Therefore, the researcher only suggests some legal norms which according to the researcher are substantial about ship mortgage guarantees as follows:

The absence of legal regulations for ship mortgages in separate legislation creates difficulties in researching and discussing legal norms for ship mortgage guarantees. Therefore, the researcher only suggests some legal norms which according to the researcher are substantial about ship mortgage guarantees as follows:

#### **a. Article 1162 of the Civil Code and Article 1 number 12 of Law No. 17 of 2008 concerning Shipping**

The provisions of Article 1162 of the Civil Code provide the meaning or definition of a mortgage, namely as a material right over immovable objects, to take reimbursement thereof for the settlement of an engagement. The definition of mortgage contained in this article is very important to avoid the emergence of various opinions or understandings that can lead to confusion in understanding and implementing mortgage guarantee institutions. The unclear formulation of mortgage legal norms will have an impact on the ineffectiveness of a legal regulation which will certainly interfere with mortgage law enforcement itself. This problem, according to Fuller, in his legal system theory, must be avoided in the preparation of legal regulation.

The existence of the provisions of this article indicates the recognition or acceptance of a mortgage as a guarantee institution in engagements that require the availability of collateral or collateral in the form of immovable property. However, by developments in the material security law, one of the currently recognized and recognized mortgages is the ship mortgage. The existence of a ship mortgage guarantee institution as a means of obtaining capital for economic actors has a very significant position.

As for what is meant by a ship mortgage according to Article 1 number 12 of the Shipping Law No. 17 of 2008 concerning Shipping is the right of material collateral on a registered ship to guarantee the repayment of certain debts which gives priority to certain creditors over other creditors. Based on the definition of a ship's mortgage, it is clear that the object of the ship's mortgage is a registered ship so unregistered ships cannot be tied up with a mortgage. This provision has a very important meaning related to the validity of the party entitled to the ship being used as collateral. Registered ships will be able to easily find out the legal status of the ship and the clarity of the ship that is the object of collateral, including who is the legal owner of a ship, because the registration referred to here is the registration of ownership rights to the ship. Another benefit of this provision, which is fundamental, is to provide legal certainty for the parties regarding the binding of the mortgage made.

#### **b. Article 314 paragraph (1) and paragraph (3) of the Commercial Code**

This article regulates the limits on ships that can be registered, namely ships that weigh at least 20 m<sup>3</sup> (twenty cubic meters) of gross content. Regarding the size of the ship that can be registered, Article 158 paragraph (2) of the Shipping Law No.17 of 2008 concerning Shipping is equivalent to a ship measuring gross tonnage 7 (GT.7). Determination of the weight or size of the ship that can be registered in the article is an elaboration of the principle of speciality. This provision does not require ship owners to register their ships, but considering the

meaning behind this provision is related to the interests of ship owners (ship ownership status), ship registration is an obligation that must be fulfilled by shipowners.

As for registered ships, the provisions in Article 314 paragraph (3) of the Commercial Code provide more favorable benefits for ship owners, namely that registered ships can place a mortgage on them. This provision is also regulated in Article 60 paragraph (1) of Law No. 17 of 2008 concerning shipping which states that ships registered in the Indonesian Ship Registry can be used as debt security by imposing a mortgage on the ship. From the two regulations, it appears that the aspect of ship registration is the principal thing in placing mortgages on ships.

Considering that mortgages are intended for immovable objects, even though ships by their nature are movable objects, there are exceptions for registered ships, namely they are no longer movable objects but are included in the class of immovable objects. This teaching has long been accepted among legal experts because by the understanding and purpose of holding a mortgage institution it is nothing but fixed or immovable objects in this case land and buildings, ships, and registered aircraft. In its development, land, and buildings have been specifically regulated in the Mortgage Law.

Compared to the common law system, it does not recognize the distribution of collateral objects in the form of immovable and movable objects. Collateral objects are distinguished or termed in two forms, namely real property and personal property, by the Continental European legal system, real property is equated with immovable objects (land and other objects on it, namely buildings and fixed inventory in the office) and personal property (objects). Other objects outside the real property) equated with moving objects.

#### **c. Article 60 paragraph (2), paragraph (3), and paragraph (4) of the Shipping Law No. 17 of 2008 concerning Shipping**

Mortgage on ships according to this regulation is carried out by making a mortgage deed by the Registrar and Registrar of Transfer of Names of Ships at the ship's place registered and recorded in the Master Register of Ship Registration. The making of a mortgage deed followed by recording in the Master Register of Ships is the fulfillment of two principles in the law of ship mortgage guarantees, namely the principle of specialty and the principle of publicity.

Furthermore, paragraph (3) determines that each mortgage deed is issued one Grosse mortgage deed which is given to the mortgage recipient. For the recipient of the mortgage (the creditor), the Grosse of the mortgage deed he holds gives him the right to obtain guarantees in fulfilling the debt by the mortgage giver (the debtor). The provision in paragraph (3) is the actualization of the principle of preference (priority rights) that exist in the law on ship mortgage guarantees.

In paragraph (4) it is said that the Grosse mortgage deed has the same executorial power as a court decision that has permanent legal force. This provision strengthens the usefulness of ship mortgages in providing guarantees for mortgage recipients to obtain debt fulfillment from debtors. The meaning of executive power is very clear to facilitate creditors in carrying out executions when debtors break their promises. However, what is the desire behind the meaning of the legal principle of mortgage guarantees is that it is easy to carry out the execution contained in this provision, in its implementation, it has not been so.

#### **d. Article 224 HIR**

This article stipulates a Grosse of the mortgage deed and debt securities made before a notary in Indonesia whose head uses the words "For Justice Based on God Almighty" with the same force as the judge's decision. If such a letter is not fulfilled by peaceful means, then the matter of carrying it out is carried out by orders and the leadership of the chairman of the district court in which the debtor remains silent or stays or chooses his position, namely as stated in the articles above in this section., but with the understanding that coercion of the body can only be carried out if it has been permitted by a judge's decision. If the matter of carrying out the judge's decision must be carried out at all or in part outside the jurisdiction of the district court, the chairman of which orders it to be carried out, the regulations in Article 195 paragraph two and the following must be complied with.

The provisions stipulated in Article 224 of this HIR recognize two types of gross deeds, namely gross mortgage and gross debt acknowledgment. Both types of Grosse deed have the same executorial power as court decisions that have permanent legal force. However, the problem here is that in several decisions, the Supreme Court has made erroneous considerations in interpreting this article as the basis for the decision, so what happens is that the Supreme Court has confused the meaning of the executorial title by requiring the need for approval from the court in carrying out the execution.

It is true that in Article 224 there is a sentence that states "if such a letter is not fulfilled by peaceful means, then the matter of carrying it out is carried out by orders and the leadership of the head of the district court". However, it is very clear here that this sentence is not intended for Grosse's mortgage deed but the Grosse deed of debt (recognition of debt). The Supreme Court has expanded the scope of the need for the role of the court and this opinion has also been followed by the courts below it.

#### **e. Article 1178 paragraph (2) of the Civil Code**

In imposing a mortgage according to this article, the mortgage recipient (the creditor) can ask for an agreement that if the mortgage provider (the debtor) does not fulfill his obligations, the mortgage recipient can be

empowered to sell the object as collateral through an auction. in public. This provision is known as *parate execution*, which means to run yourself or take what is your right without court intervention.

Regarding the right to sell on one's power, in legal science, there are two opinions, namely the doctrine of mandate and the teaching of execution. Mandate teachings argue that this promise gives the mortgage holder the power (*volmacht*) to sell the collateral object as a representative of the mortgage giver. Meanwhile, according to the teaching of execution, the right to sell collateral is independent (*zelfstandig*) of the mortgage holder and is not the power of the mortgage giver (Badruzaman, 1986:66).

According to the researcher, the two teachings, namely the mandated teaching and the execution teaching, are related to the provisions of Article 1178 paragraph (2) of the Civil Code and can be accepted. The mandate teaching which emphasizes the granting of power of attorney in this article can be seen in the sentence "the recipient of the mortgage can be empowered to sell the object that is guaranteed". As for the teaching of execution, which focuses on the sale of collateral for the payment of a debtor's debts, it becomes the right of the creditor when the debtor does not fulfill his obligations. So it is an independent right without the need for power of attorney from the debtor.

This provision is very beneficial for creditors because the meaning behind the provisions of this article is intended to provide legal protection to creditors so that there is legal certainty in obtaining their rights. This provision also reflects the application of one of the legal principles of mortgages, namely easy and definite execution. However, in practice, this article was misinterpreted by the court because the court did not recognize and canceled the auction without a court order (MA RI Decision No. 3210/K/Pdt/1984 dated January 30, 1986). Concerning some of these problems, it is indeed rather difficult to reduce or eliminate the involvement of the court in the execution of mortgage collateral objects. Judicial decisions at the highest level (Supreme Court) are usually taken into account in decisions of lower courts. However, according to the researcher, the judge may have a conflicting opinion. This is what must be sought as a consequence of the discovery of essential justice in progressive legal theory.

### Conclusion

1. Based on the discussion described above, it can be concluded as follows: There are weaknesses related to shipping mortgage guarantees, namely: weaknesses in the legal substance, namely Law no. 17 of 2008 concerning Shipping, whether the legal order regarding ship mortgages can increase the confidence of financial and banking institutions to finance the procurement of national ships, weaknesses in the legal structure which include weaknesses in banking institutions, Auction institutions, and Ship Mortgage Execution Institutions, and weaknesses in legal culture.
2. There is a need for legal reconstruction, including (a). Article 1162 of the Civil Code and Article 1 number 12 of Law No. 17 of 2008 concerning Shipping. (b). Article 314 paragraph (1) and paragraph (3) of the KUHd. (c). Article 60 paragraph (2), paragraph (3), and paragraph (4) of Law No.17 of 2008 concerning Shipping. (d). Article 224 HIR (e). Article 1178 paragraph (2) of the Civil Code.

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