

## **International Law Study on the Execution of Mortgage Guarantee Assets Located Outside Indonesia.**

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**Abstrak:** *Mortgage guarantee is a form of material security regulated in Indonesian civil law. Provisions regarding mortgage guarantees can be found in Articles 1162 to 1232 of the Civil Code (Civil Code). These articles include general provisions to special rules related to mortgage guarantees. In addition, the Commercial Code (KUHD) also regulates certain aspects of mortgage collateral, especially in Articles 314 to 316, which highlight objects that can be used as collateral for mortgages in business transactions. In addition to these regulations, Law Number 17 of 2018 concerning Notary Services also has relevance in regulating mortgage guarantees, especially in relation to the process of recording and legal validation of mortgage agreements. This journal article discusses international legal studies related to the execution of mortgage-backed assets located outside the territory of Indonesia. The main focus of this study is to analyze how international legal principles can be applied in the context of cross-border mortgage guarantee dispute resolution. With a legal reconstruction approach, this study aims to provide an in-depth understanding of the relationship between international law and the implementation of the right of guarantee on a global scale.*

**Keywords :** *Guarantees, Mortgages, International Law*

### **INTRODUCTION**

Indonesia is a maritime country where sea transportation plays a dominant role in the flow of goods and people. Given this, the provision of transportation infrastructure and facilities must meet the needs and demands for transportation services effectively and efficiently. Sea transportation has its own characteristics and advantages compared to other modes of transportation, as it involves efforts that require larger capital investments.

Without sufficient capital, a person would not be able to start a business or develop an existing one. Capital, often

referred to as funds, is the financial resource in the form of goods or money owned by an entrepreneur. On the other hand, debt is a source of capital that an entrepreneur can obtain from financial institutions, such as banks, non-bank financial institutions, or other institutions engaged in finance, financing, and the money market. The party providing the funds is referred to as the creditor, while the party borrowing the funds is called the debtor.

In banking practice, it is common to have loan agreements, also known as credit agreements. The process of borrowing and

lending between the creditor and the debtor requires an agreement to ensure the rights and obligations of both parties. In addition to needing an agreement, the creditor also requires collateral from the debtor to ensure that the loan repayment is sufficient and secured. This is because the credit extended by the bank carries risks, and collateral is needed to provide confidence in the debtor's ability and willingness to repay the loan.

In the implementation of credit, whether in banking activities or consumer financing activities, collateral is required. Collateral is needed to guarantee the repayment of the debtor's loan/credit in the event the debtor defaults or fails to repay the debt. In banking activities, credit collateral is generally in the form of land encumbered with a mortgage, while in consumer financing activities, collateral typically takes the form of motor vehicles purchased by the consumer through a fiduciary guarantee.

In practice, credit agreements between creditors and debtors do not always proceed smoothly. Issues can arise in the credit agreement, such as defaults. One way to resolve a default, where the debtor fails to repay the debt, is through the execution of collateral to settle the debtor's outstanding debt.

In general, the execution of collateral often leads to disputes. This is understandable, as the creditor seeks to fulfill the debt repayment rights through the collateral. On the other hand, the debtor is reluctant to have the collateral executed for the repayment of the debt and will attempt to resist in various ways, including through legal action by filing a lawsuit in court. The basis for the lawsuit regarding the legal action is to determine the legality of the execution process, which may result in unlawful actions during the execution. The

legal challenge addresses whether the execution of the collateral is lawful.<sup>1</sup>

A ship mortgage is one of the accessory agreements to a contract, typically a credit agreement, which holds value and functions to safeguard the credit in the event of a default by the debtor. To cover the losses incurred by the creditor, the execution or realization of the creditor's collateral rights can be carried out in accordance with applicable legal provisions.

The emergence of property rights must go through an accessory agreement, which is an additional agreement to the original (principal) contract. In other words, the specific property to be pledged must first be agreed upon, as outlined in Article 1132 of the Civil Code (KUHPerdata). A special guarantee refers to a guarantee that arises specifically due to an agreement between the debtor and creditor. Generally, creditors prefer special guarantees, as general guarantees are perceived as insufficient in providing security. A special guarantee is directed only at specific property owned by the debtor (the principle of specialty) and is only applicable to specific creditors.<sup>2</sup>

According to Article 1162 of the Indonesian Civil Code (KUHPerdata), a mortgage is a property right over immovable goods used to secure the fulfillment of an obligation (Sembiring, 2018). A ship mortgage is a property right that provides security to the creditor to ensure that the debtor fulfills their payment obligations. Through a mortgage document, the holder of the mortgage right has a special position, as this document gives legal strength to the lender to take control of the ship pledged as collateral if the borrower fails to repay the debt.

<sup>1</sup> Andika Tanaya, Analisis Upaya Hukum Pihak Ketiga Terhadap Eksekusi Benda Jaminan, Jurnal Notaris Vom 13 No 1 E ISSN 2686-2425 : Universitas Diponegoro

<sup>2</sup> M. Khoidin, Hukum Jaminan, Laksabang Yustitia, Surabaya, 2017, hlm, 12

The execution of a ship mortgage as collateral for debt repayment in banking remains an important and relevant topic for discussion, as legal regulations still have room for improvement in this area. There is no specific legislation governing ship mortgages, which creates uncertainty and does not provide sufficient security for the parties involved. Not only is there no uniform law regulating mortgages, but there are also issues regarding the costs associated with encumbrances and the registration of mortgages. The parties may alter or add provisions to the standard mortgage deed according to their preferences. The procedure for executing a mortgage is also very complex and time-consuming. Additionally, maritime debts are prioritized in execution, and there are no specific regulations for executing a ship mortgage outside of Indonesia's territory.

Based on Article 224 of the Civil Code, if the mortgage deed is made with the intent to uphold divine justice, it possesses an executory force (*executoriale kracht*). This is because the law considers it equivalent to a court judgment or another form of justice that carries permanent legal authority.<sup>3</sup> Banks must be careful when accepting ship mortgages because the collateral usually consists of ships in various stages of construction. In addition, banks need to think about the debtor's potential repayment capacity, including their past and present relationships with the bank<sup>4</sup>

This uncertainty is further exacerbated by the lack of understanding and law enforcement surrounding the execution of ship mortgages in various regions. On one hand, the mortgage document is viewed as a strong and legally valid instrument, but on the other hand, the

execution of rights often requires intervention from authorities or a court decision, even though this is not necessary according to the mortgage document itself, as it is meant to be directly executable. This situation creates confusion and doubt for all parties, especially for creditors, in enforcing their rights over the collateral.

One example of such a case is where Company ABC applied to Bank ANK for a loan of 10 billion with a ship weighing 100m<sup>3</sup> as collateral. The ship was also encumbered by a mortgage institution. At one point, Company ABC defaulted, and the bank sought to seize and auction the mortgage collateral. The problem arose when the ship, as an asset, was located outside Indonesia.

Based on the above description, the author formulates the issue as follows: What are the legal provisions that serve as the basis for the juridical argument related to the execution of mortgage collateral assets located outside Indonesia?

## METHODOLOGI

This research is a normative juridical study with a descriptive-analytical specification, which involves examining and analyzing legal materials and issues related to the problem addressed in the title. The purpose of this research is to provide a juridical analysis of the selected issue. The data analysis employs a qualitative method, with data gathered from various sources of literature, organized systematically, and reported descriptively, presented in a narrative form.

## RESULTS AND DISCUSSION

In accordance with Article 1162 of the Civil Code, a mortgage is a material right to immovable property which is used as collateral in the repayment of an agreement.

<sup>3</sup> Daulay, Z. Y. (2022). Pengaturan Perlindungan Hukum Terhadap Kreditur Dalam Eksekusi Objek Hipotek Kapal Laut Yang Dijaminkan Ke Bank Berdasarkan Perspektif Perundang-Undangan. *Retical Review* 4 (1) 144

<sup>4</sup> Dasinangon, A. D. (2018). Eksekusi Jaminan Hipotik Kapal Laut Akibat Wanprestasi Perjanjian Kredit. *Lex Privatum*, VI(3), 76–82

mortgage elements :

- There must be an object that is pledged as collateral.
- The object is an immovable object. (and also immovable objects due to law)
- Carried out by a person who has the right to transfer collateral.
- There is a certain amount of money in the main agreement and is stipulated in an Authentic deed.

In this case, the ship mortgage is emphasized in Article 314, paragraph 3 of the Indonesian Commercial Code (KUHD), which states: "A mortgage may be placed on ships registered in the ship registry, ships under registration, and shares in ships, as well as ships under construction."

The legality aspect in case of default is emphasized in Article 60, paragraph 4 of Law No. 17 of 2008 concerning Shipping: "The Grosse Ship Mortgage Deed, as referred to in paragraph (3), has the same executory force as a court judgment that has obtained permanent legal force."

Referring to this article, the Grosse Ship Mortgage Deed of Company ABC is evidence of the ship mortgage guarantee. This means that Company ABC has a debt to Bank ANK, and the Grosse deed has executory power. The question is, what if the ship is located outside the jurisdiction of Indonesia?

The answer can be found in the legal foundations of existing collateral laws, one of which is Presidential Regulation No. 44 of 2005 on the Ratification of the International Convention on Maritime Liens and Mortgages, 1993. If Company ABC defaults and the ship is outside Indonesia, the bank can still file for the execution of the ship if the ship is located in a country that has ratified the Convention.

The imposition of a mortgage on a ship in the context of collateral law in Indonesia must comply with the applicable legal principles, including the basis for ship mortgage law, which includes:<sup>5</sup>

1. **Rights and obligations to sell a ship encumbered with a mortgage** (Article

1178, paragraph (2) of the Civil Code). In the event of debtor default (delinquency), the creditor, as the mortgage holder on the ship, has the right to conduct a public auction sale of the ship(s) that are encumbered with a mortgage. The proceeds from the sale of the ship are used to settle the debtor's obligations to the creditor.

2. **Debtor's obligation to obtain written approval from the creditor when the ship is to be leased to another party** (Article 1185 of the Civil Code). If the ship is leased to another party, the creditor has the right to request that the lessee be informed that the ship is mortgaged, and that the creditor is the mortgage holder. Therefore, the lessee is usually required to sign a statement agreeing to voluntarily vacate the ship and return it to the creditor in good condition if the debtor defaults.
3. **The buyer of a ship sold through auction has the right to request that the mortgage registered on the ship be removed or discharged** (Article 1210 of the Civil Code). When the ship is purchased, the proceeds from the sale are typically used to pay off the debtor's debt to the creditor. In such cases, a discharge (royal) process must be carried out, similar to the discharge process for a mortgage.
4. **The debtor or mortgage giver is required to insure the ship encumbered with a mortgage.** In the event that the ship is destroyed or damaged and an insurance claim is made, the payment from the insurance claim is the creditor's right. This insurance claim will then be used to settle the debtor's debt to the creditor (Article 297 of the Commercial Code).

Hypotheekbank or credit institution with land collateral, a bank that specializes in providing money loans for immovable objects, ships, airplanes and in other ways issues

<sup>5</sup> Sutjipto, Pendaftaran dan Balik Nama Kapal Panduan Bagi Pejabat Pendaftaran Kapal, Seksi

Pendaftaran dan Balik Nama Kapal, Departemen Perhubungan, Jakarta, 1996, hlm. 124.

mortgage letters. Mortgage objects are regulated by Article 1164 of the Civil Code. Mortgage object :<sup>6</sup>

1. Immovable property that can be transferred along with all its accessories.
2. The right to use the proceeds from such property along with all its accessories.
3. The right to occupy coral reefs and the right to operate.
4. The interest in land, whether paid in money or payable from the proceeds of the land.
5. Interest as originally stated.
6. Markets recognized by the government, along with the inherent rights attached to them.

As stated in Article 6: "Each Participating State, under its national laws, may guarantee other maritime claims against ships to secure claims, apart from those specified in Article 4, against the owner, charterer, manager, or operator of the ship, provided that the claim:

- a) must comply with the provisions of Articles 8, 10, and 12.
- b) must be concluded:
  - (i) after a period of 6 months from the time the secured claim is filed unless, before the expiration of this period, the ship has been detained or secured, with such detention or security carried out for a forced sale, or
  - (ii) at the end of the period of 60 days after the sale to a bona fide buyer, which is the period during which the sale date is registered according to the laws of the ship's registration country, with whichever period expires first; and

- c) must be arranged in accordance with the provisions of Article 4 and after the pledge, mortgage, or claims registered as per Article 1."

Article 11 further states:

"Notification of Forced Sale"

Paragraph 1: Before a ship is sold under forced sale in a Participating State, the competent authority in that Participating State must ensure that notifications, as stipulated in this Article, have been sent to:

- a) the authority responsible for registering ships in the registration country;
- b) all holders of mortgages, liens, or valid claims not issued to the holder;
- c) all holders of mortgages, liens, or valid claims issued to the holder, and all holders of maritime claims as set forth in Article 4, with the provision that the competent authority conducting the forced sale has received notice of each of those claims
- d) the owner of the ship who is lawfully registered.

Paragraph 2: The notification must be delivered at least 30 days before the forced sale and must include:

- a) the time and place of the forced sale and detailed information regarding the sale, or the reasons leading to the forced sale, as determined by the authority of the Participating State to ensure that the interests of those entitled to the notification are sufficiently protected; or

<sup>6</sup> Sutjipto, Pendaftaran dan Balik Nama Kapal Panduan Bagi Pejabat Pendaftaran Kapal, Seksi

Pendaftaran dan Balik Nama Kapal, Departemen Perhubungan, Jakarta, 1996, hlm. 124.

- b) if the time and place of the forced sale cannot be precisely determined, an estimated time and anticipated place of the forced sale, along with details and reasons for the forced sale as determined by the authority of the Participating State, to ensure the protection of the interests of those entitled to the notification.  
If the notification is made under subparagraph
- c) additional notification containing the definite time and place of the forced sale must be given when known, but in any case, no less than seven days before the forced sale.
- d. recent, accompanied by the approval from the Minister of Law and Human Rights of the ship owner as the grantor (in the case of a legal entity), or photocopy of the ID card of the ship owner (in the case the ship owner is an individual).
- d. Photocopy of the ID card of the directors/persons responsible (if the ship owner is a legal entity).
- e. Original certificate of ship registration.
- f. Photocopy of the ID card of the notary/attorney.
- g. Photocopy of the credit agreement that has been legalized by the notary.

The procedures and requirements for the imposition of the mortgage are as follows: the procedure followed by the applicant is to submit an application to the registration officer and the officer responsible for transferring the title, indicating the value of the mortgage to be imposed. The documents that need to be submitted to the officer depend on the parties involved. Variations in the parties involved are:

1. Ship owner (debtor) and creditor (bank or other financial institutions).
2. Creditor, as the ship owner (debtor) and as the creditor.
3. Ship owner (guarantor/not a creditor) and creditor.

Paragraph 3: The notification referred to in paragraph 2 of this Article must be in writing and delivered via registered mail, or in electronic form or other suitable means that provide confirmation of receipt, to the persons referred to in paragraph 1, if known. Additionally, the notification must be made through public announcement in the country where the forced sale is to be held and considered sufficient by the enforcing authority through other publications.”

This article explains the technical procedures for the forced sale of mortgage collateral in countries that have ratified the convention. To execute the creation and registration of the Ship Mortgage Deed, the following requirements must be met:

- a. Certified copy of the Power of Attorney for placing the Ship Mortgage
- b. Original power of attorney from the bank that grants the authority to create the Ship Mortgage Deed and register it at the port office where the ship is registered.
- c. Photocopy of the Articles of Association along with any amendments up to the most

## CONSLUSION

The Ship Mortgage Agreement is an accessory agreement that is preceded by a debt agreement between the debtor and the creditor. The imposition of the ship mortgage is carried out by creating a ship mortgage deed by the Registration Officer and the Ship Title Transfer Officer at the location where the ship is registered, and it is recorded in the relevant ship's master register. However, based on the discussion above, it is understood that Bank ANK can execute the ship mortgage guarantee. Even if the ship is located outside Indonesia, as

long as the country is one that has ratified the 1993 Maritime Liens and Mortgages Convention. On the other hand, it would be difficult, or even impossible, to execute the ship mortgage guarantee if the country where the ship is docked has not ratified the convention.

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