

IS IT NECESSARY TO INCLUDE PROMISE IN A DEED OF GRANTING OF MORTGAGE RIGHTS?

by Analisa. Y.

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Mada Apriandi, Annalisa Yahanan, Murzal
Faculty of Law Universitas Sriwijaya, Palembang, Indonesia
Email : madaapriandizuhir@fh.unsri.ac.id; annalisay@fh.unsri.ac.id;
murzal@fh.unsri.ac.id

ABSTRACT

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To secure the funds that have been granted to the debtor in a credit agreement between the creditor and debtor, a guarantee agreement is usually included. One form of collateral that is most in demand is land collateral. This research aims to analyze funds security that has been handed over to debtors in connection with credit agreement and promises (clauses) inclusion in a Deed of Granting of Mortgage Rights. This normative research uses statutory, conceptual and interpretive approaches. This study examines several deeds to search and analyze the promises (clauses) in the guarantee agreement. The result shows that the credit agreement includes a promise to provide collateral for mortgage rights, to secure the credit that has been given to the debtor as security for repayment of the credit loan. Therefore, the credit agreement contains the rights and obligations of parties as a manifestation of prudential principles. Furthermore, a Deed of Granting of Mortgage Rights considerably needs to include promises (clauses) as a form of conditions related to the guarantee provided. In its regulation (Mortgage Rights Law), these promises are optional (not mandatory) being included in a Deed of Granting of Mortgage Rights. However, in practice these promises are always included in a deed at the creditor's request, with the aim being a kind of self-protection to the creditor. However, Mortgage Rights Law also provides a balance of protection to debtors, namely promises that are prohibited from being included that creditors have the mortgage rights' object when the debtor defaults. If such promise is included, then Deed of Granting of Mortgage Rights is null and void.

Keywords: Credit Agreement; Deed of Granting of Mortgage Rights; Promises

1. INTRODUCTION

The bank functions as a distributor of funds to the community in the form of loans.¹ The loan value which has been agreed upon by the credit grantor (bank) and credit receiver (debtor) is stated in a form of the credit agreement.² In applying for credit, a loan agreement is required between the debtor as a customer and the creditor (bank) which can be made before a notary. The notary has exclusive competency to issue an authentic deed including a loan agreement deed between debtor and creditor. The credit agreement deed provides legal protection or legal certainty to both sides (debtor and creditor). The loan agreement functions between creditor and debtor as evidence and guarantees the truth of the deed.

(Bank dalam memberikan kredit dalam bentuk apapun, wajib mempergunakan akad perjanjian kredit. Frasa ini tidak menjelaskan atau mengatur secara spesifik mengenai bentuk dan klausul apa saja yang perlu atau harus dicantumkan dan klausul apa saja yang tidak perlu dicantumkan dalam perjanjian kredit terkait dengan hak dan kewajiban kreditor dan debitor). Banks are obliged to use credit agreements and specifically regulate the form of clauses needed to include in this agreement, particularly in connecting with the rights and obligations of parties.³ Of course, providing funds by banks through credit facilities carries risks.⁴ To reduce this risk, the bank requires the debtor to provide collateral⁵ to secure the repayment of the credit loan.⁶

¹ See Article 3 Law Number 7 Year 1992 about Banking

² Munir Fuady, *Hukum Perkediteran Kontemporer*, (Bandung: PT. Citra Aditya Bakti, 2003): 57.

³ Bank Indonesia Unit I Circular Letter Number 2/539/UPK/Pemb, dated 8 October 1996.

⁴ Badriyah Harun, *Penyelesaian Sengketa Kredit Bermasalah* (Jakarta: Pustaka, 2010).

⁵ Siti Malihatun Badriyah, "Problematika Pesawat Udara Sebagai Jaminan Pada Perjanjian Kredit Dalam Pengembangan Industri Penerbangan," 43, no. 4 (2014): 546–52, <https://doi.org/10.14710/mmh.43.4.2014.546-552>.

⁶ M. Bahsan, *Hukum Jaminan Dan Jaminan Kredit Perbankan Indonesia* (Jakarta: PT. Raja Grafindo Persada, 2007).

Therefore, banks need to apply the principle of prudence⁷ (prudent banking) because banks are trusted by the public to store and manage public funds in the form of deposits, current accounts, savings, etc. However, on the other hand, the public (customers) must also provide good faith so that loans provided by banks do not cause bad credit.⁸ One of the ways in which banks provide credit is to follow it with Deed of Granting Mortgage Rights as a debt repayment guarantee.⁹ (“...sudah merupakan suatu syarat mutlak bagi kreditor yang dalam hal ini adalah bank dalam memberikan kredit kepada debitur dengan jaminan hak tanggungan, maka harus dibuatkan Akta Pemberian Hak Tanggungan sebagai jaminan pelunasan utang debitur kepada kreditor.”) Naturally, there are consequences for the bank as a creditor if the loan is not followed by collateral as repayment of the credit provided. (jaminan dengan pengikatan hak tanggunga yang tujuannya adalah untuk pelunasan kredit yang diberikan)

To realize this credit agreement, there needs to be a credit agreement between the bank as a creditor and the customer as the debtor.¹⁰ One of provision stated in the credit agreement is the credit repayment period. The form of credit agreement made by parties should be in written¹¹ followed by collateral agreement. For example, it is necessary⁵ include a clause so that the debtor complies with the contents of the agreement, namely in case the debtor defaults then the creditor as holder of mortgage right has the rights to sell off its own authority object of mortgage right. However, in practice in Indonesia, agreements between debtors and creditors are not respected even though they have been included in a deed of Granting of Mortgage rights. As a result, this can create difficulties or obstacles for creditors to carry out execution (such as vacating land) where in practice the object of the mortgage right is still occupied by the debtor or third party. The mortgage right object is still occupied by a third party, usually when it is leased by debtor to third party beyond creditor's knowledge. For this reason, in a credit agreement¹⁰ that guarantees the object, clauses are necessary to be included in the encumbrance agreement in the Deed of Granting of Mortgage Rights, including: a clause (promise) not to rent out the mortgage right object; a promise not to alter the shape or format of mortgage right object; any promise that first mortgage rights holder possesses rights to sell off mortgage rights object; mortgage rights holder's promise to obtain whole or in part of insurance money if the object is insured; a promise by the person giving mortgage rights to clear out the object when the right is executed. Debtor's prohibition against renting out the object is to make it easier for the mortgage holder to carry out the execution.¹² This is *ratio legis* why mortgage rights law regulates promises or clauses shall be included in a Deed of Granting of Mortgage Rights. Another clause or promise example which is included in a deed of Granting of Mortgage rights is that means you are entirely not allowed to change any shape or structure of the mortgage right object because this can have an impact on the collateral object's function, value and status.¹³ Prohibition on change can be interpreted as a prohibition on changing the nature and purpose of the object, where this action could harm the holder of the mortgage right in the execution process.¹⁴

Even though the deed of Granting of Mortgage rights includes no promises, it does not affect the validity of the deed.¹⁵ However, if any promise has been made in the deed and registered at the Land Office, then it has binding force on the third party, binding as a matter of law as intended in Article 1338 paragraph (1) Indonesian Civil Code.

⁷ Zainal Asikin, *Pengantar Hukum Perbankan Indonesia* (Jakarta: Rajagrafindo, 2015).

⁸ Luluk Ambarisita, “Analisis Penanganan Kredit Macet,” *Journal Economic, Bussines and Accounting* 3, no. 11 (2013): 14–20.

⁹ Iman Hidayat, “Peranan Notaris Dalam Membuat Perjanjian Kredit Tanpa Diikuti Dengan Akta Pemberian Hak Tanggungan (APHT) Menurut Undang-Undang Nomor 4 Tahun 1996 Tentang Hak Tanggungan,” *Legalitas: Jurnal Hukum* 11, no. 2 (2019): 180, <https://doi.org/10.33087/legalitas.v11i2.175>.

¹⁰ Republik Indonesia, “Law Number 10 Year 1998 about Banking,” Pub. L. No. 8 (1998).

¹¹ D. Pertiwi, “Perlindungan Hukum Pemegang Hak Tanggungan Yang Obyeknya Dikuasai Pihak Ketiga Berdasarkan Perjanjian Sewa Menyewa,” *Calypra : Jurnal Ilmiah Mahasiswa Universitas Surabaya* 2, no. 2 (2013): 1–16, <https://journal.ubaya.ac.id/index.php/jimus/article/view/729>.

¹² Putri Reyvita and Ridha Sabila, “Larangan Menyewakan Atas Objek Hak Tanggungan (Analisis Putusan No.7/Pdt.G/201/Pn.Pwk,” *Jurist-Diction* 2, no. 4 (2019): 1405–23.

¹³ Burhanuddin Susanto Zafiratul Jamilah MZ, “Perubahan Objek Hak Tanggungan Dalam Perjanjian Kredit,” *Journal of Islamic Business Law* 6, no. 3 (2022): 1–14.

¹⁴ Zafiratul Jamilah MZ.

¹⁵ Pertiwi, “Perlindungan Hukum Pemegang Hak Tanggungan Yang Obyeknya Dikuasai Pihak Ketiga Berdasarkan Perjanjian Sewa Menyewa.”

Credit agreement made by parties should be in writing¹⁶ and followed by guarantee agreement¹⁷ where in practice can cause problems because it does not comply with the contents of clauses included in any deed of Granting of Mortgage rights. Generally, the credit agreement binding process with collateral is implemented in two steps. The first step is the credit agreement with a clause Granting of Mortgage rights and the second step is the imposing collateral process which includes clauses in the Deed of Granting of Mortgage Rights made by Land Titles Registrar.

Zafiratul Jamilah MZ's¹⁷ research discusses changes in the object of mortgage rights in credit agreements, where the results of the research formulate changes in the object of collateral for mortgage rights due to the element of intent, which is a breach of contract or an unlawful act. Therefore, creditors can demand compensation in accordance with Articles 1236 and 1365 of the Indonesian Civil Code. To prevent this, the application of Article 11 paragraph 2 of the Mortgage Rights Law must be mandatory and requires regular reviews of the objects of mortgage rights by creditors.

Further, Kinaria Afriani's¹⁸ research discusses the legal strength of insurance clauses in deeds Granting of Mortgage rights untuk menyelamatkan objek hak tanggungan. Novelty's research concludes that the insurance clause in the Deed of Granting of Mortgage Rights has binding force on creditors and debtors in accordance with the principle of binding force as stated in Article 1338 of the Indonesian Civil Code. Meanwhile, Wansan's¹⁹ research discusses the cancellation of deeds of granting of mortgage rights where the results of his research state that the loan agreements guaranteed by mortgage rights where the mortgage holder is a foreign citizen are valid, because the requirements regarding mortgage rights holders are not specified in detail in the Mortgage Law and other Laws. The existence of a *beding* property clause and a sentence that makes the agreement a nominee agreement is contrary to the legal terms of the agreement. The legal consequence, if the Deed of Granting of Mortgage Rights is cancelled, is that the Creditor's position changes from being a preferred creditor to a concurrent one. Furthermore, Sofyan Hendrawan's²⁰ research discusses the implementation of the execution of mortgage rights, where his research novelty states that Article 11 paragraph (2) letter e of Mortgage Law does not specifically provide instructions for implementing the execution of mortgage rights, but more generally states "a promise that the holder of the first mortgage right has the right to sell under his/her own power the object of the mortgage right if the debtor defaults. The three studies discussed previously differ from the discussion in this paper, namely regarding the inclusion of promises (clauses) contained in the Deed of Granting of Mortgage Rights, while the inclusion is of a facultative nature regulated in the mortgage rights law.

Minimizing bad credit in order to protect the bank as the lender who hold mortgage rights, so this research aims to analyze the guarantee agreement as an additional agreement to the main agreement (credit agreement) and promises (clause) inclusion as outlined in the deed of Granting of Mortgage rights. This research's novelty is that the inclusion of a clause in the deed of Granting of Mortgage rights which is facultative in nature does not yet provide legal protection for the holder of mortgage rights. Therefore, a clause inclusion should be mandatory in addition to the element of good faith on the part of the person giving the mortgage rights. In this article, the discussion examines the Mortgage-Based Credit Agreement as Preventive Security and the Inclusion of Promises in the Mortgage Deed.²¹

¹⁶ Bank Indonesia Circular Letter Number 03/1093/UPK/KPD dated 29 December 1970

¹⁷ Zafiratul Jamilah MZ, "Perubahan Objek Hak Tanggungan Dalam Perjanjian Kredit."

¹⁸ Kinaria Afriani, "Kekuatan Hukum Klausula Asuransi Dalam Akta Pemberian Hak Tanggungan," *Varia Hukum* 31, no. 40 (2019): 1936–47.

¹⁹ Wansan, "Pembatalan Akta Pembebanan Hak Tanggungan," *Law Review* 18, no. 2 (2018): 165–82, http://www.uib.no/sites/w3.uib.no/files/attachments/1_ahmed-affective_economies_0.pdf%0Ahttp://www.laviedesidees.fr/Vers-une-anthropologie-critique.html%0Ahttp://www.cairn.info.lama.univ-amu.fr/resume.php?ID_ARTICLE=CEA_202_0563%5Cnhttp://www.cairn.info.lama.

²⁰ Saudara Parsaoran Bako; Fitriani Sofyan Hendrawan, "Tinjauan Hukum Pelaksanaan Parate Eksekusi Hak Tanggungan Tanah Dan Bangunan Menurut Undang-Undang No. 4 Tahun 1996," *Jurnalrectum* 4, no. 1 (2022): 254–67.

²¹ Kompas.com - 18/11/2022, "Sertifikat Tanah Bisa Dijadikan Jaminan Utang, Hadi Tjahjanto: Jangan buat Beli Motor", <https://www.kompas.com/properti/read/2022/11/18/130000421/sertifikat-tanah-bisa-dijadikan-jaminan-utang-hadi-tjahjanto-jangan>. Kompascom+ baca berita tanpa iklan: <https://kmp.im/plus6> Download aplikasi: <https://kmp.im/app6>

2. RESEARCH METHOD

This research is a normative study regarding the inclusion of promises (clauses) contained in the Deed of Granting of Mortgage Rights. This study aims to find and formulate legal arguments through juridical analysis of the main problem studied, namely the inclusion of promises (clauses) in the Deed of Granting of Mortgage Rights. For this reason, the approaches used are statutory, conceptual and interpretive.²² In this regard, in this qualitative (descriptive) research, the types of data used are primary legal materials such as legislation relevant to guarantee law and secondary legal materials such as books, journal articles and proceedings which are used as comparisons and to strengthen the researcher's findings. To support the analysis of these two legal materials, interviews with the Land Titles Registrar were also carried out to prove that there was an obligation to include promises (clauses) outlined in the Deed of Granting of Mortgage Rights.

3. DISCUSSION

In the discussion, this paper examines the need for collateral for mortgage rights in fulfilling the requirements of a credit agreement, which is a preventive security required by creditors. This preventive security is necessary, when debtor breaks his/her promise (defaults) then the creditor shall receive repayment of debt payments through the sale of collateral from the debtor. Besides, this article also examines the inclusion of promises (clauses) in mortgage deeds. These promises include, among others, the debtor's promise not to rent out the mortgage right object, not to change the shape or format of the mortgage right object, any promise to give power to the mortgage rights holder to sell the object and others as stated in article 11 paragraph 2 of Law No. 4 of 1996 concerning Mortgage Rights over Land and Objects Related to Land (Mortgage Rights Law). Even though these clauses are not an obligation, creditors always want them to be presented inside a Deed of Granting of Mortgage Rights. This will be discussed in the following sub-headings.

3.1. Mortgage-Based Credit Agreement as Preventive Security

Article 1313 of Indonesian Civil Code defines that "An agreement is a legal action by which one or more parties bind themselves mutually with one or more others". The formulation of the article emphasizes that agreement results in binding a person himself to another. As a consequence, agreement gives rise to an obligation or performance from one or more people to another party, one or more people who have the right to that performance. This provision also applies to credit agreements between two parties, a creditor and a debtor.

Meanwhile, Article 1754 of Indonesian Civil Code states that a loan agreement is an agreement in which one party gives another a certain number of goods that are consumables, on condition that the borrower shall return a similar number of the same kind and condition to lender. Based on Article 1754 of Indonesian Civil Code, a credit agreement can be interpreted that the consumables are included in the form of money which must be returned to the lending party in the same amount. What about credit agreements, is the structure the same as loan agreements? A credit agreement is a real agreement, an agreement which is determined by money delivery to the customer. However, the repayment of credit agreements at conventional banks is in the form of principal debt and loan interest or by profit sharing at Bank Muamalat Indonesia.²³

Credit agreement formulation has not been explicitly regulated by formal regulation. But, if you pay attention to article 1 (11) of Law No. 10 of 1998 concerning Banking in connection with Law No. 4 of 2023 concerning Omnibus Law, a loan is defined as a "provision of money or bills which is equivalent to both, based on an agreement or loan agreement between a bank and another party which requires a borrower to pay off debt with interest after specified period of time." In fact, the credit agreement is rooted in a credit agreement. However, credit agreement stipulates that the return of the loan must be accompanied by interest, profit sharing or compensation. Meanwhile, in

²² Irwansyah, *Penelitian Hukum Pilihan Metode & Praktik Penulisan Artikel*, ed. 4 (Yogyakarta: Mirra Buana Media, 2021).

²³ Nur Aksin, "Perbandingan Sistem Bagi Hasil dan Bunga Di Bank Muamalat Indonesia dan CIMB Niaga," *JEJAK Journal of Economics and Policy* 6, no. 2 (2013): 112–24, <https://doi.org/10.15294/jejak.v7i1.3596>.

a credit agreement, the return shall be accompanied only with interest and this interest only exists if it is agreed by the parties.

Providing credit from the bank to debtors contains risk (degree of risk). Therefore, banks in providing credit need collateral in accordance with the contents of article 2 paragraph 1 of Decree of the Board of Directors of Bank Indonesia number 23/69/KEP/DIR dated 28 February 1991 concerning Guarantees for Providing Credit. Guarantee means the bank's belief in the debtor's ability to repay credit as agreed. Why does any credit agreement between the creditor and the debtor require supplementary collateral? This is because credit provided by bank provides to debtors contains risks. Therefore, in implementing credit agreements, banks must pay attention to good credit principles. For this reason, banks need to take steps to secure their credit, namely preventive and repressive securities.²⁴ Preventive security is security that is carried out to prevent bad credit by taking into account the 5C principles, including additional guarantee (collateral) agreements.²⁵ Thus, to secure the given credit, the bank needs to ask for collateral from the debtor, whether in the form of a fiduciary warranty, mortgage or mortgage rights. Meanwhile, repressive security is security that is carried out to resolve bad or congestive credits.

Based on upholding the prudential principle, it is impossible for a bank to simply rely on a credit agreement that merely creates personal rights by obtaining general guarantees as stated in Article 1131 of Indonesian Civil Code, thereby positioning itself as a concurrent creditor that could threaten the bank's existence. Therefore, for this purpose, banks need other supports besides general guarantees, namely making special guarantee agreements as additional collateral such as pledges, fiduciary, lien and mortgage rights. Thus, banks have two kinds of rights, namely personal rights arising from credit agreements and property security rights, for example those arising from mortgage rights. In this way, the bank's position will become safer in order to maintain its health level. If a bank wants to obtain a better and stronger position in pursuance of the prudential principles entrusted by Banking Law, then the bank is obliged to deviate from Article 1131 of Indonesian Civil Code, namely by asking for additional collateral. The bank creates a special agreement that aims at certain objects belonging to the debtor to be bound by collateral.

Collateral is not an absolute requirement, therefore the provisions of Article 8 of Law Number 10 of 1998 make it possible to provide credit without collateral. Guarantee in the sense of collateral is one of the conditions that must be fulfilled in addition to other conditions. In the Elucidation to Article 8, it is stated that in providing credit there is no obligation for the bank to ask for additional collateral. Therefore, the material juridical function of a guarantee as a preventive measure can almost be said to be non-existent. So, opportunities arise for debtors who have less good faith to take advantage of these loopholes. Even though according to Article 8, collateral is not an absolute requirement and is only one of the conditions that must be fulfilled, in reality granting bank credit always requires a guarantee in the form of debtor's assets. Practice shows that the debtor's most preferred property required by banks is land.²⁵ In the banking world, the preference characteristic has become the dominant icon for property security rights, so it can be understood why banks are positioned as preferred creditors. When the debtor defaults, bank as a creditor who holds collateral rights (separatist) can take the proceeds from the sale of the collateral.²⁶ This research focuses on collateral in the form of mortgage rights. In the credit agreement between the bank and the debtor, although the contents are strictly followed by providing collateral in the form of mortgage rights, it turns out that providing collateral for mortgage rights is inadequate. To obtain legal certainty for the bank, it is necessary to include promises (clauses) which must be stated in the deed of Granting of Mortgage rights made before the Land Titles Registrar.

Promise's Inclusion in a Deed of Mortgage Rights

Mortgage rights guarantee agreement must be preceded by another agreement such as loan agreements such as (Article 10 paragraph (1) of Mortgage Rights Law). At first, in providing a guarantee or mortgage rights agreement, there must first be a debt or credit agreement as an

²⁴ Bambang Catur, "Pengamanan Pemberian Kredit Bank Dengan Jaminan Hak Guna Bangunan," *Jurnal Cita Hukum* II, no. 9 (2019): 1689-99.

²⁵ Djumhaendah Hasan, *Lembaga Jaminan Kebendaan Bagi Tanah Dan Benda Lain Yang Melekat Pada Tanah Dalam Konsepsi Penerapan Azas Pemisahan Horisontal*, (Bandung: Citra Aditya Bakti, 1996): 14

²⁶ Rahmia Kadir et al., "Pertanggungjawaban Notaris Pada Penerbitan Covernote," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 31, no. 2 (2019): 191, <https://doi.org/10.22146/jmh.35274>.

obligatory agreement. Just as in the Netherlands, the provisions of the mortgage guarantee agreement are preceded by a loan agreement or credit agreement regulated in Article 231 of the Netherlands Civil Code which states: "a right of pledge or mortgage can be established for an existing as well as a future claim. The claim can be personal, payable to any order or bearer. It can be a claim against grantor of pledge or mortgage him/herself, as well as a claim against another person." Furthermore, in Article 233 of the Netherlands Civil Code, the grantor of mortgage right is responsible for value reduction of the collateral to the extent that the collateral grantee is threatened by a reduction in the value of the collateral. Responsibility for reducing the value of collateral objects as regulated in the Netherlands Civil Code is not explicitly regulated in the Mortgage Law. For this reason, the guarantee provided by the debtor is at least worth more than the amount of the credit loan.²⁷ If the debtor defaults, the creditor who holds mortgage security has the rights to sell the object of mortgage right through a public auction where land is used as collateral based on statutory provision with the right to precede other creditors (*droit de preference*).²⁸

In accordance with developments in current Indonesian collateral law (Law No.4 of 1996 concerning Mortgage Rights Law), property guarantee institutions are not limited only to pledge, liens as well as fiduciary but also mortgage rights when offered collateral is land rights. This property guarantee institution can function in business, mainly in the banking world. Concretely, the existence of these four property agreements is classified as additional agreements (*accessoir*). Its meaning as an additional agreement only exists if it is preceded by the main agreement in the form of a credit agreement. Additional agreements depend on a main agreement, when the main agreement ends, the additional agreement also ends. However, on the contrary, if an additional agreement ends, it does not result in the main agreement ending as well.²⁹ Encumbrance agreement as an authentic deed is a separate agreement, apart from the loan agreement or credit agreement as the main agreement. However, this agreement is a continuation and was born from the main agreement. If it is not followed by an encumbrance guarantee agreement, it can create legal uncertainty and be unable to provide legal protection for any parties concerned especially creditors as parties who lend money.

In collateral agreements, creditors usually require the inclusion of clauses or promises (*beding*). *Beding* is a Dutch term, and this term is often used in collateral law literature in Indonesia. In the Dutch-Indonesian Law Dictionary, *beding* means promise, provision or requirement. This means that in the agreement there is a requirement for the debtor to promise not to do or do anything related to the object being pledged as collateral, the aim of which is to protect the interests of the creditor and also the debtor. Thus, *beding* is interpreted as an agreement outlined in a guarantee deed made between the creditor and a public official (Notary, Land Titles Registrar and Vessel Registration and Transfer Name Registrar) who is given the authority to make a guarantee deed with the debtor (third party) who has an object in a form of collateral. These promises or requirements are the creditor's wishes to be fulfilled by the debtor. In fact, these promises (*beding*) have been stated from the beginning in the obligatory agreement, namely the credit agreement.

Property collateral has the most important and strategic position in bank credit distribution. The most frequently requested collateral by banks, as previously mentioned, is land because economically it has profitable prospects.³⁰ In fact, it is said by banking institutions that it is considered the most effective and safest to provide collateral with mortgage rights.

In pursuance of Article 10 of Mortgage Rights Law, a guarantee in the form of mortgage rights is predicated by a promise to offer mortgage rights as guarantee on particular debt reimbursement stated in and is inseparable part of relevant debt agreement or any other agreement which generates debt. Thus, mortgage rights agreement incipience is part of credit agreement that generates debt.

²⁷ Bayu Setiawan Hendri Putra and Arief Suryono, "Kedudukan Sertifikat Hak Atas Tanah Sebagai Jaminan Kebendaan Berdasarkan Undang-Undang Hak Tanggungan Atas Tanah Beserta Benda-Benda Yang Berkaitan Dengan Tanah," *Jurnal Privat Law* 8, no. 1 (2020): 57, <https://doi.org/10.20961/privat.v8i1.40367>.

²⁸ Putri Paramita, "Eksistensi Dan Kekuatan Eksekutorial Sertipikat Hak Tanggungan Terhadap Hak Milik Atas Satuan Rumah Susun Sebagai Jaminan Hutang Dalam Perjanjian Kredit Di Bank," *Jurnal Repertorium* 2, no. 2 (2015): 2355–2646.

²⁹ Moch Isnaeni, *Pengantar Hukum Jaminan Kebendaan* (Surabaya: PT. Revka Pertra Media, 2016): 115.

³⁰ Hayuning Widiasari, "Perlindungan Hukum Bagi Para Pihak Dalam Perjanjian Kredit Dengan Jaminan Hak Tanggungan," *Res Judicata* 1, no. 2 (2018): 86, <https://doi.org/10.29406/rj.v1i2.1233.wwsadd>

In loan agreements, collateral is required. If an object of collateral is land, then mortgage rights are used and a Deed of Granting of Mortgage Rights is then prepared. In Article 11 paragraph 1 of the Law of Mortgage Rights, the Deed of Granting of Mortgage Rights must include: names and identities of the grantee and grantor of Mortgage Rights, domiciles of parties, clear designation of debt or debts being guaranteed, value of collateral and clear description of Mortgage Rights object. However, to include promise in a Deed of Granting of Mortgage Rights is not mandatory, because law does not require the same. This is known from content of Article 11 paragraph 2 of Mortgage Rights Law which states that some promises may be included inside a Deed of Granting of Mortgage Rights, namely:

1. promise to limit the Mortgagor's authority in renting out the object of Mortgage Rights and/or determine or change the rental period and/or receives money in advance unless under prior written approval from the Mortgagee;
2. promises that limit the authority of the Mortgagee in changing the form or arrangement of the Mortgage Rights object, except with prior written approval from the Mortgagee;
3. promise to give authority to the Mortgagee on an object of Mortgage Rights in pursuance of the Decree of District Court Chairman whose jurisdiction covers the Mortgage Rights object's location when the debtor defaults seriously;
4. promise that authorizes the Mortgagee to save the Mortgage Rights object, when it is necessary in case of execution or preventing the deletion or cancellation of the right of the Mortgage Rights object due to non-fulfillment or violation of statutory provisions;
5. promise that first Mortgagee has the right to sell the Mortgage Rights entity on his/her authority when the debtor defaults;
6. promise which is given by the first Mortgagee that the Mortgage Rights object shall not be cleared from Mortgage Rights;
7. promise that the Mortgagor will not relinquish his/her rights from the Mortgage Rights object without any prior written approval from the Mortgagee;
8. promise that the Mortgagee shall receive the whole or half of any indemnity received by the Mortgagor to its receivables repayment if the Mortgage Rights object is given up by the Mortgagor or has its rights revoked in the public interest;
9. promise that the Mortgagee shall accept whole or half of the insurance money received by the Mortgagor to pay off his/her claims, if the Mortgage Rights object be insured;
10. promise that Mortgagor shall vacate the Mortgage Rights object by time of the Mortgage Rights execution;
11. promise refers to article 14 paragraph (4).

Therefore, based on Article 11 paragraph (2) of the Mortgage Rights Law it can be said that Mortgage Rights can be accompanied by certain promises which are included in the Deed of Granting of Mortgage Rights. This means that mortgage rights can be given with or without certain promises, if accompanied by a promise, so this is included in the Deed of Granting of Mortgage Rights. Based upon the provision of Article 11 paragraph (2), it is not an obligation to include a promise (clause) in Deed of Granting of Mortgage Rights since it is only a facultative option (not mandatory) to the parties. Therefore, in the sentence you find the word "can" which means it contains "permission". The word "can" is interpreted that something is permissible to do or not to include promises stated in Article 11 paragraph 2 of Law of Mortgage Rights. In its content classification, this norm includes exemption (*vrijstelling*, dispensation), which is special permission (*verlof*) not to do something that is generally required. However, in practice, in a Deed of Granting of Mortgage Rights made by the Land Titles Registrar, promises or *bedingen* are always found to be included. In fact, the creditor wants to include these in the Deed of Granting of Mortgage Rights.

Eleven promises (clauses), as mentioned above, may be included inside a Deed of Granting of Mortgage Rights. If being analyzed, the 11 (eleven) promises can be classified into 3 (three) categories, namely: first, promise that limit the authority of the Mortgagor; second, promise that give authority to the Mortgagee; and third, other promises.

There are 2 (two) types of promises that limit authority in Article 11 paragraph (2) points 1 and 2, namely limiting the authority to rent out objects of mortgage rights and limiting the authority to change the form or arrangement of mortgage rights object. Both limitations are directed at the mortgagor. However, both types of promises are still tolerated by the use of the word "except" in this norm. This means that the Mortgagor is still allowed to exercise limited

authority as long as written approval is obtained from the Mortgagee. The word "except" in this norm means exemption from an order, namely being freed to rent and change the form and structure of the mortgage right object if there is any written approval from the Mortgagee. However, both types of promises are still tolerated by the use of the word "except" in this norm. This means that Mortgagor is still allowed to exercise limited authority as long as written approval is obtained from the Mortgagee. The word "except" in this norm means exemption from an order, namely being freed to rent and substitute the shape and structure of mortgage rights object when written approval from the holder of mortgage rights is present. However, if the Deed of Granting of Mortgage Rights prohibits the debtor from renting out the object of mortgage right, and if in reality he/she is still renting it out, then the lease will not affect mortgage right object execution, because the creditor shall not be bound by lease agreement. In this case, holder of mortgage right as the holder of property rights to the mortgage right object is more privileged when compared to the lessee who has personal rights over the object of the lease to the lessor. The prohibition on renting out and changing the mortgage right object is also regulated in the Civil Code of the Netherlands, namely a promise that contains a prohibition on the Mortgagor (debtor) from changing the building or condition of the item being pledged as collateral, which must not be done without the permission of the Mortgagee. The promise not to change the building or property guaranteed by mortgagor is expressly regulated in Article 3:265 non-alteration clause Book 3 Property Law in General (the Netherlands Civil Code) Title 3.9 Real Security Rights: Pledge and Mortgage, Section 3.9.4 Mortgage states that:

“If the mortgage deed encloses an explicit clause according to which the mortgagor may not alter the shape or format of the mortgaged property or he may not do so without the permission of the mortgagee, then it is impossible to file this clause when the Subdistrict Court or the Farm Lease Court has given authority to the lessee to do certain alteration on the basis of the rules of law for lease agreements or, successively, farm lease agreements.”

Furthermore, promises to provide authority also come in 2 types as those are regulated in Article 11 paragraph (2) points 3 and 4, namely promises to give authority to the mortgagee to manage mortgage rights and to save the mortgage right object, including to ensure that mortgage right object value is not reduced. In the Netherlands Civil Code, regarding the reduction in the value of the object of the mortgage, it is expressly stated that the mortgagor is responsible for the reduction in the value of the collateral, based on Article 233 (1) which states that:

“The grantor of a pledgor or mortgagor, who is not himself the obligator, is liable for the reduction in value of the property to the extent that the security of the oblige is jeopardized by such reduction in value and he or a person for whom he is liable is at fault in respect thereof”.

Table.1 Inclusion of Promises (Clauses) in the Deed

Clause	Netherlands Civil Code	Law No. 4 of 1996	Annotation
The initial provision of a guarantee or mortgage agreement is preceded by a debt or credit agreement as an obligatory agreement	Article 233 (1)	Article 10 [1]	The granting of collateral rights begins with a credit agreement
The mortgagee shall not change the collateral	Article 265	Article 11 [2] No.2	The clause is addressed to the mortgagor
The mortgagee is responsible for any reduction in the value of the collateral	Article 233	Unregulate	The clause is addressed to the mortgagor
Promise that cannot be included namely:	Article 235	Article 12	The clause is addressed to the mortgagee

<p>6 a promise that gives authority to the recipient of the Mortgage Rights to own the object of the Mortgage Rights if the debtor breaks his/her promise</p>			
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Source: Netherlands Civil Code and Indonesian Law Number 4 Year 1996

Based on Table 1, the inclusion of facultative promises is aimed at both the mortgagor and the mortgage rights holder. However, some promise cannot be included which are addressed specifically to the mortgage right holder, namely that the mortgage right holder cannot immediately own the object of the mortgage right if when the debtor defaults. Mortgage rights in the Netherlands are regulated in Book 3 of the Netherlands Civil Code Title 3.9 Real security rights: pledge and mortgage, Section 3.9.4 Mortgage. This is different from Indonesia, which is specifically regulated in Law No. 4 of 1996.

Apart from promises that limit and grant authority, other promises are also mentioned in Article 11 paragraph (2) points 5-11, including those related to debtors who break their promises, then these promises are intended for the interests of creditors such as having rights in selling on their authority the Mortgage Right object through public auction to collect receivables; Mortgagor shall not relinquish his/her rights from Mortgage Rights object without any written approval from Mortgagee; Mortgagee shall accept whole or half of compensation received by Mortgagor for repayment of his/her claims; promise that Mortgagor shall vacate Mortgage Rights object by the time of execution of Mortgage Rights; this is important in order to obtain a high price in the Mortgage Rights object sale; land rights certificate affixes with note of Mortgage Rights encumbrance shall be returned in 7) grantee of land rights.

The promises included in the Deed of Granting of Mortgage Rights are all for the benefit of creditors (mortgagee as fund grantors).³¹ What is legal protection for debtors as mortgagor? Are there any promises that may or may not be included in a Deed of Granting of Mortgage Rights? Article 12 of Mortgage Rights Law states "any promise giving authority to the Mortgagee to own Mortgage Rights object when debtor defaults, is null and void by law". This article provides protection for debtors regarding matters that are prohibited from being agreed upon and included in the deed. This provision is prepared by the legislator in every effort to protect any interests of debtors as well as other the Mortgagor, particularly when Mortgage Rights object value exceeds the number of secured debts. For this reason, the Mortgagee is prohibited immediately from becoming the owner of the Mortgage Rights object when the debtor defaults. However, the Mortgagee is not prohibited from becoming a buyer of the Mortgage Rights object as long as they go through procedures as regulated in Article 20. This prohibition is also regulated in the Civil Code of the Netherlands, namely in Article 235 which states "Any provision whereby pledgee or mortgagee is authorized to proper secured property is null and void".³² Even granting authority to the mortgagee over the object of the mortgage right is null and void by law, even less having the object of the mortgage right. The statement mentioned in Article 235 of the Netherlands Civil Code has a similar meaning as in Article 12 of the Mortgage Rights Law.

In conclusion, these promises need to be inserted inside a Deed of Granting of Mortgage Rights, moreover these are always requested by the creditor because these promises will provide legal certainty to the parties. Though these promises are facultative, they must be linked to Article 6 of Mortgage Rights Law that Mortgagee is obliged to sell mortgage rights object if the debtor defaults.³³ Despite the inclusion of a promise to sell the mortgage right object by Mortgagee is facultative in nature, Article 6 of Mortgage Rights Law eliminates this nature. Even though it has not been previously agreed, the Mortgagee bears the right to sell the mortgage rights object. According to Boedi Harsono, promises to sell mortgaged goods are facultative promises as listed in Article 11 Paragraph (2) letter (e), these promises do not stand alone, but complement them and

³¹ J. Satrio, *Hukum Jaminan, Hak Jaminan Kebendaan, Hak Tanggungan Buku II* (Bandung: PT. Citra Aditya Bakti, 2004).

³² Decision of the Constitutional Court of the Republic of Indonesia Number 21/PUU-XVIII/2020

³³ Arie Hutagalung, "Praktek Pembebanan Dan Pelaksanaan Eksekusi Hak Tanggungan Di Indonesia," *Jurnal Hukum & Pembangunan* 38, no. 2 (2008): 148, <https://doi.org/10.21143/jhp.vol38.no2.171>.

therefore the **Deed of Granting of Mortgage Rights** must be connected and form an integral part with provisions of Article 6 Mortgage Rights Law. This promise is necessary to fulfill the juridical requirements in exercising the rights of the Mortgagee concerned. But it is necessary to apply the principle of balance of justice,³⁴ for example, in an auction the debtor is given the right to set a limit price of the collateral. In this way, there is a balance of protection for both the Mortgagor and the Mortgagee. The authorized party to make the deed of land rights encumbrance and deed granting authority to put upon Mortgage Rights is the Land Titles Registrar. A Deed of Granting of Mortgage Rights is Land Titles Registrar Deed that contains the granting of Mortgage Rights to particular creditors as collateral for repayment of its debt. Thus, the granting of Mortgage Rights is preceded by a promise to grant it as repayment collateral of particular debts stated in a credit agreement or debt-credit agreement and it is an inseparable part of the involved credit agreement which gives rise to the debt (article 10 Mortgage Rights Law). It can be said that every credit application with land owned by the debtor as collateral must always be bound by a credit agreement before the collateral is burdened with a Mortgage.

The imposing Mortgage Rights process is carried out in two steps, namely step of Granting of Mortgage Rights, with issuing a Deed of Granting of Mortgage Rights by the Land Titles Registrar based on Government Regulation Number 37 of 1998 concerning Land Titles Registrar, which is preceded by loan agreement. The second step is the registration at the Land Office which determines as inception of granted Mortgage Rights. To register mortgage rights encumbrance is necessary to a third party so that it knows that collateral has been or is being granted, and besides that, it makes execution procedure much easier.³⁵ Land Titles Registrar is obliged to refuse a request to issue a Deed of Granting of Mortgage Rights if the intended land is still in dispute.³⁶

Promises need to be include inside the Granting of Mortgage Rights Deed in order that creditors feel safe.³⁷ However, to protect the creditors in the future, promises inclusion contained inside the Granting of Mortgage rights deed should no longer be facultative but is mandatory for the sake of legal certainty, justice, or benefit to the Mortgagee. So, banks or creditors have the authority to sell objects of mortgage rights based on Article 11 paragraph (2) letter e of the Mortgage Rights Law.

4. CONCLUSION

Providing credit from creditors (banks) to debtors contains a degree of risk. Therefore, for security, creditors require collateral, in this case, a mortgage right. Every credit application must always be bound with a credit agreement that is burdened with Mortgage Rights. The deed of Granting of Mortgage Rights, made by the Land Titles Registrar at the request of the creditor (bank) to include promises (clauses), aims to protect the party receiving the mortgage rights. The promises included in the Deed of Granting of Mortgage Rights are facultative as regulated in the Mortgage Law. Thus, the inclusion of these promises is not mandatory. In general, the arrangements for promises mentioned in the Mortgage Rights Law are in the nature of limiting authority, granting authority, and in the form of other promises. In the deed of Granting of Mortgage rights, creditors are required to include these promises. In order not to harm the holder of the mortgage right, creditors should periodically review the validity of the object of the mortgage right to avoid undesirable things such as changes in the object of the mortgage right. In the future, it would be better if the facultative rule to include promises in deeds Granting of Mortgage rights be substituted into a mandatory rule in order to protect collateral holders. Even though the deed of Granting of Mortgage rights does not mention these promises, if the debtor defaults then it is the debtor's obligation to pay his/her debt to the creditor as a manifestation of good faith.

³⁴ Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat Indonesia*, Bina Ilmu, Surabaya, 1987.

³⁵ Guse Prayudi, *Pengetahuan Yuridis Praktis Jaminan Dalam Utang Piutang* (Yogyakarta: : Merkid Press, 2008).

³⁶ Muh. Akbar Ariz Purnomo, "Perlindungan Hukum Bagi Pemberi Hak Tanggungan Yang Bukan Debitur Dalam Perjanjian Kredit," *Unnes Law Journal* 3, no. 1 (2014): 62–68.

³⁷ Zafiratul Jamilah MZ, "Perubahan Objek Hak Tanggungan Dalam Perjanjian Kredit."

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