

## ANALYSIS OF ARTICLE 6 OF LAW NUMBER 4 YEAR 1996 CONCERNING MORTGAGE RIGHTS AND ARTICLE 1400 OF THE INDONESIAN CIVIL CODE ON SUBROGATION

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### ABSTRACT

*The problem of guaranteeing mortgage rights on the debtor's property will not actually occur if the debtor fulfills the obligations as stated in the principal credit agreement. However, it often happens that debtors cannot fulfill their obligations as agreed. Article 20 paragraph 1 of the Law Number 4 Year 1996 on Mortgage Rights has stipulated the protection for creditors by giving the authority to execute the collateral provided by the debtor once a state of default is established. The research results show that in the event where the debtor is in default, subrogation can be carried out, namely the reimbursement of the creditors' rights to repayment by a third party. Subrogation occurs either by agreement or by law, and is different from debt relief in that it involves a third party who pays the recurring debts to the creditors, not with the aim of releasing the debtor from his obligation to pay the debt but replacing the position of the former creditor. With regards to mortgages as collateral in debt and loan agreements, if the debtor does not change the object of collateral as agreed in the initial agreement, then the same provisions on mortgage will be applicable to the new creditor. This paper features a juridical normative legal research with statutory and conceptual approaches.*

**Keywords:** Mortgage, subrogation

### 1. PREFACE

Every collateral arrangement that is executed between the creditor and the debtor is an *accessoir* of and therefore begins with a credit/debt agreement. The latter is a principal agreement setting out the terms and conditions of certain borrowing arrangement between a creditor and a debtor. This is sometimes followed by *accessoir* agreement(s) to secure certain collateral(s) as guarantee of repayment against default, therefore protecting the creditors by ensuring that their security is more securely guaranteed. The formation and general existence of these agreements until their expiration is therefore determined by the existence of their respective principal agreements, starting at the time the credit agreement is entered into, followed by the delivery of money from the creditor to the debtor so that a debt is born.

Creditors acknowledge that there are always risks entail in the credit realization process, one of which is the event of default. Loan recipients or debtors who at the beginning of the agreement were deemed worthy of receiving credit/ loans in many cases turned out to be unable to settle their obligations as set forth in the credit agreement e.g., unable to complete payments or to pay the installments before they are due. Anticipating such risk that the loan is not returned in accordance with the agreement, the creditor must apply sound credit principles before approval a credit request, offset by conducting an assessment of the debtor's profile using the 5C prudential principles (character, capacity, capital, collateral, and conditions of economic).

Collateral is the property or assets belonging to the debtor that is promised to the creditor in the event that the debtor is unable to repay the loan. Should the debtor fail to make payments when they are due, the creditor is legally endowed to execute his right for repayment by privately selling the collateral or placing it for sale by means of auction, either action followed by

returning the excess amount of gain to the debtor. Regarding the collateral as requested by the creditor and submitted by the debtor as security, there exist various kinds of material guarantees i.e., for both movable and immovable goods. Credit guarantees most often prefer mortgage rights over land as it is considered to gain value over time, making it the economically viable option for collateral intended as guarantee in paying off due debts. Mortgage rights can be imposed on land parcels with varying titles, namely ownership rights, cultivation rights, and building use rights. Mortgage rights are currently the only recognized legal means to secure plots of land as collateral, in accordance with the third paragraph number 5 of the General Explanation of Law Number 4 Year 1996 concerning Mortgage on Land and Objects Related to Land (hereinafter referred to as "Mortgage Law"), which reads as follows: "Mortgage rights are the only institution of guarantee rights over land, ..." Mortgage Law also outlines the provisions regarding guarantees in the form of mortgages in Article 10 paragraphs (1) and (2) which reads:

1. The granting of mortgage rights is preceded by a promise to provide mortgage rights as collateral for the settlement of certain debts, which are set forth in and are an inseparable part of the relevant debt agreement or other agreements that give rise to the debt.
2. The granting of mortgage rights is carried out by making a deed stipulating the granting of mortgage rights by the Land Deed Making Officer (*Pejabat Pembuat Akta Tanah*/"PPAT") in accordance with the applicable laws and regulations.

The problem of guaranteeing mortgage rights on the debtor's property will not actually occur if the debtor meets all the obligations stipulated in the principal credit agreement. However, it often happens that debtors as credit recipients failed to do so. Article 20 paragraph 1 of the Mortgage Law regulates the protection for creditors through the authority given to execute the guarantee provided by the debtor.

Another aspect of the settlement of the agreement is the transfer of receivables, which is known as subrogation. Subrogation can occur due to payments made by certain third party directly or indirectly to creditors. The third party then becomes the new creditor to the debtor, in place of the former creditor. The transfer of receivables or subrogation is an appropriate way out of debt problems, especially in large amounts because the essence of implementing subrogation is basically mutual assistance to the parties involved; debtors are helped by interested third parties who take over their obligation to repay debts, at the same time taking over the former creditor's place as the new creditor.

Article 1400 of the Indonesian Civil Code (ICC) regulates the arrangement of subrogation, defining that it takes place when a third party pays to the creditor, followed by the replacement of rights as determined by law or through an agreement. It is different from debt relief, in that it results in the transfer of the rights to claim settlement from the creditor to the third party as the new creditor, who has the right to execute the collateral given to the former creditor.

#### Our Contribution

This paper elaborate in detail the process involving subrogation and further, the consequence of subrogation, specifically the transfer of creditor's rights, towards the collateral initially provided as guarantee of debt payment.

#### Paper Structure

This paper is organized in the following order: It opens with the introduction to the subject matter of the stated issues, followed by research method as well as elaboration and discussion of the issues. At the end, all the above are briefly summarized and the concluding remarks stated.

#### BACKGROUND

Subrogation is regulated in Book III of the ICC Articles 1400 to 1403, which mentioned of the agreement initiating the transfer of the former creditor's rights against the debtor to the new

creditor arising from the agreement between the creditor and the debtor. Subrogation is affected very much by the *accessoir* nature of the collateral agreement attached to the principal credit/loan agreement.

The term “*accessoir*” implies that collateral agreement is only an additional agreement whose nature and existence depends on the main agreement. Therefore, the *accessoir* nature inherent in collateral agreements has various legal consequences, as follows:

- a. The constitution and termination of the additional agreement is dependent on the main agreement;
- b. If the main agreement is void or cancelled, the additional agreement is also considered void;
- c. If the main agreement changes with regards to its substance, then the additional agreement might also change;
- d. If the main agreement is transferred by means of *cessie* or subrogation, the additional agreement follows suit and is automatically transferred without any special assignment.

In the light of the above, the research featured in this paper attempts to answer the following issues:

1. How is the settlement of credit agreements carried out through subrogation when the debtor is no longer able to fulfill his obligations?
2. How is the mortgage defined in the credit guarantee when finalizing the subrogation arrangement?

## **2. RESEARCH METHOD**

This research is a juridical normative legal research with a statutory and conceptual approach. The sources or legal materials used in this research are primary legal materials, secondary legal materials, and tertiary legal materials, which are then analyzed in several stages in the form of discussions in answering problems and producing conclusion

## **3. RESULT AND DISCUSSIONS**

### **Mortgage Right**

Mortgage Law defined that mortgage rights are collateral/ security in the form of land and objects related to land provided to certain prioritized creditors for repayment of debts as referred to in Law Number 5 Year 1960 concerning Basic Regulations on Agrarian Principles (hereafter referred to as “Basic Agrarian Law”). Mortgage rights that are imposed on land rights becomes an integral part of the land; it is secured for repayment to certain debts. Book II of the ICC previously regulated on *hypotheek*, and other laws and regulations such as Staatsblad 1908-542 as amended by the Staatsblad 1937-190 stipulated on *Credietverband*, but with the development of the Indonesian economic system based on the Basic Agrarian Law especially article 57, they have been deemed no longer in accordance with the needs and developments of credit activities. These provisions led to differing views and interpretations in various issues and the implementation of land security law, such as in matters of execution, executorial title, and others. The implementation of the Basic Agrarian Law which regulates various new matters related to mortgage institutions has been adjusted in scope through the Mortgage Law in accordance with the development of the following circumstances:

1. concerning the object of Mortgage;
2. concerning the giver and holder of Mortgage;
3. concerning procedures for granting, registering, transferring, and canceling Mortgage Rights;
4. concerning the execution of Mortgage Rights;
5. concerning the deletion of Mortgage Rights; and
6. concerning administrative sanctions.

The right to use as an object of mortgage was not initially designated in the Basic Agrarian Law, because at the time of its enactment, land rights that must be registered were not considered as collateral and did not qualify as debt security as the publicity requirements were not met. However in recent development, the right to use is granted to transferable State land, such as those used for apartment buildings; these must be registered yet can be used as collateral. In addition to realizing the unification of national land law, the appointment of rights to use as potential objects of collateral greatly assist the holders who mostly are of economically weak groups without the ability to own land with building rights and rights of ownership by opening up opportunities to obtain credit.

The advantage of mortgage is that it protects the creditor through the right to execute the object of the guarantee if it turns out that the debtor is in breach of contract, therefore the creditor should not ignore the importance of guarantee through mortgage. This does not mean that there is ease in the execution of the object of collateral for the creditor. Article 20 of the Mortgage Law states that:

- (1) If the debtor is found to be in breach of contract:
  - a. the right of the first Mortgage holder to sell the object of the Mortgage as referred to in Article 6, or
  - b. the executorial title contained in the Mortgage certificate as referred to in Article 14 paragraph (2), the object of the Mortgage is sold through a public auction according to the procedures specified in the laws and regulations for the settlement of the Mortgage holder's receivables with priority rights over other creditors.
- (2) Under the agreement of the grantor and the holder of the Mortgage, the sale of the object of Mortgage can be carried out under-handedly if in this way the highest price can be obtained that benefits all parties.

The execution of sale of the mortgaged object can be done within 1 (one) month after the written notification is delivered by the creditor as the holder of the mortgage to the debtor. Notifications to interested parties are delivered through announcement in at least 2 (two) newspapers distributed around the area concerned or in the local media to ensure there will not be any objections from another parties.

#### Subrogation

Subrogation in Article 1400 of the ICC is stated as a replacement of rights by a third party for his own interests who pays off the former creditors whose nature of debt precedes his own. Subrogation occurs either by agreement or because it is regulated by law. It is different from debt relief, in that a third party directly or indirectly known by the debtor pays debts to creditors with the aim of not releasing the debtor from his obligation to pay the debt but replacing the position of the former creditor. In subrogation, debt payments made by third parties to creditors are carried out through the debtor who entered into an agreement with the creditor.

Subrogation that occurs because of an agreement is regulated in Article 1401 of the ICC and the one that occurs because of the law is regulated in Article 1402 of the ICC. According to the law, subrogation occurs without the need for approval/agreement between a third party and the former creditor nor between a third party and the debtor.

Article 1401 of the ICC regulates third party agreements to replace the position of the debtor, with the following approval or agreement:

1. If the creditor receives payment from a third party. It is stipulated that the third party will replace its (special) rights and claims against the debtor. In sub-order the time of payment must be precisely and expressly stated;
2. If the debtor borrows a sum of money to fulfill his obligations to repay due debt, then he declares that the person who helps paying off said debt will replace the rights of the former

creditor. This subrogation is valid as long as it is made in an authentic deed which contains a loan agreement to pay off the debt and an explanation that the debt is repaid by the lender/new creditor in the form of money.

Article 1402 of the ICC stipulates that subrogations occur because of the law:

1. For a person who pays off another creditor who, based on his privileges or a mortgage, has a higher right;
2. To buy an immovable object, which has used the money of the price to pay off the debtors, to whom the object is tied up in a mortgage;
3. For a person who together with another person or for another person is required to pay a debt with an interest entailed in paying off that debt;
4. For an heir who is receiving an inheritance and has paid the inheritance debts with his own money.

In Article 1403 of the ICC, it is determined that the subrogation stipulated in the previous articles occurred both against third parties and against debtors. Subrogation cannot reduce the rights of the creditor if he only receives partial payment; in the event that he is able to exercise his rights regarding what is accrued to him earlier than the person from whom he receives only a partial payment.

Subrogation of creditor transfer is carried out and occurs due to payment of debts from third parties, either in whole or in part, resulting in the debtor being replaced by third parties.

In order for a contractual subrogation to be considered valid, the procedure due is as follows:

1. An authentic deed is established for a loan of money;
2. The act must contain detailed information about the loan to pay off the debtor's debt, and the amount of the loan;
3. A statement that the money used for payment to creditors was sourced from a third party stated in the debt settlement signing.

#### Settlement of Credit Agreements Through Subrogation When the Debtor is in Default

Any agreement regarding indebtedness/borrowing relationship between the parties (creditor and debtor) must be based on a written agreement. The debt agreement is specifically stated in Article 1754 of the ICC, as follows:

*"Lending-used consumables are an agreement that stipulates that the first party delivers a number of consumables to the second party on the condition that the second party will return similar goods to the first party in the same amount and condition."*

In another article of the ICC, namely Article 1131, it is stated that:

*"All movable and immovable property belonging to the debtor, both existing and future, shall serve as collateral for the debtor's individual engagements."*

Based on the aforementioned articles, it is stated that collateral agreement is an agreement where the debtor owning certain object, both material and immaterial, gives it to the creditor as collateral for the credit agreement. Collateral in material form is a guarantee in the form of material rights, such as guarantees for movable objects. Meanwhile non-material guarantees are immaterial in nature. While the applicable guarantees are:

1. Pledge Guarantee;
2. Mortgage guarantee;
3. Fiduciary guarantee;
4. Mortgage guarantees on ships and aircraft;
5. Borg guarantee or guarantee
6. Liability guarantee; and

#### 7. Warranty agreement.

The scope of guarantees is divided into 2 (two) i.e., special and general guarantees. Special guarantee are further divided into 2 (two) types, namely material and personal guarantees. Material guarantees include guarantees for immovable objects (including mortgage) and guarantees for movable objects.

Guarantee in the form of mortgages are clearly regulated in the Mortgage Law, which in Article 1 (1) explained as follows:

“Mortgage rights to land and objects related to land, hereinafter referred to as mortgage rights, are security rights imposed on land rights as referred to in Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles, including or not along with other objects which are an integral part of the land, for the settlement of certain debts which give priority to certain creditors over other creditors.

Mortgage holders are creditors, namely individuals or legal entities providing credit or debts. Meanwhile, those who provide mortgage rights are debtors, individuals or legal entities having the authority to take legal actions against the dependent object in question. Any third party who will pay off the debt due to the debtor's default will be the new creditor, and this transfer of creditor is referred to as subrogation. Based on Article 1400 of the ICC, it is explained that the subrogation or the transfer of creditor rights to a third party who pays to the creditor can and is possible due to approval in the law.

As previously explained, subrogation according to the law means that it occurs without the need for approval between a third party and the former creditor, as well as agreement between the debtor and a third party. In addition, it is also stated that: "if the receivables guaranteed by mortgage are transferred due to cessie, subrogation, inheritance or other reasons, the mortgage will also be legally valid to the new creditor. Therefore, if the receivables guaranteed with mortgages are transferred due to subrogation, then the mortgages will also be transferred by law to third parties as new creditors.

With the transfer of the creditor's rights, the next step is that the mortgage must be registered by a third party as a new creditor to the land office. The transfer of mortgage rights to the new creditors takes effect from the date and day of recording in the land book, namely the date and seventh day after the documents required for the registration of mortgage rights transfer are completed.

In the explanation of Article 16 (1) of the Mortgage Law, the transfer of mortgage rights occurs by law. The recording can be done based on a deed that proves that the guaranteed receivables have been transferred from the former creditor to the new creditor, so it does not need to be proven by a deed by the official making the land deed.

Thus, if there has been a transfer of receivables through subrogation between the first creditor and a third party, the debtor is going to need:

1. The deed used as evidence of the transfer of money from the new creditor;
2. Copies of the mortgage certificate and certificate of land title and the land register with notes from the land office about the mortgaged object.

The next step is to confirm about the transfer of former creditor's receivables to the first creditor, then inform the registration official at the land office about the transfer of mortgage rights.

One of the reasons for the annulment of a debt agreement is the renewal of debt which is regulated in Article 1381 of the ICC in 3 (three) types of debt renewal methods as follows:

1. *If a debtor makes a new debt agreement for the benefit of the creditor who replaces the old debt, which is written off because of it;*
2. *If a new debtor is appointed to replace the old debtor who was released by the creditor and the agreement.*



3. *If as a result of a new agreement a new creditor is appointed to replace the former creditor against which the debtor is released and the agreement.*

So based on the article above, it can be concluded that subrogation is the reason for the renewal of debt between creditors and debtors so that their debt agreement is canceled, and so is the mortgage used as collateral. Therefore, it is now a new debt agreement and the deadline for payment of obligations in the new agreement between the new creditor and the debtor does not keep up the previously payment's deadline.

The renewal of the debt agreement and the deadline in the new agreement means that the former creditor cannot execute the object of the mortgage directly, but with deal from both to make a new agreement regarding the payment of the debt, completely with a new time limit. If the former creditor takes action to occupied the guarantee without the debtor known, then the action is included in the category of unlawful act as stated in Article 1365 of the ICC, as follows;

*"Every act that violates the law and causes harm to another person obliges the person who caused the loss because of his fault to compensate for the loss.*

That the acts that are against the law are:

1. Violate applicable laws;
2. Violating the rights of others guaranteed by law;
3. which is contrary to the legal obligations of the perpetrator;
4. Contrary to decency; or
5. Contrary to good attitude in society to care for others.

In the event that the former creditor takes action to occupied the collateral, it can be categorized as an unlawful act, if the registration regarding the status of the mortgage at the land office has not been carried out between the debtor and the former creditor but the former creditor has occupied the collateral which is the object of the mortgage is in default and regulated in article 1234 jo. Article 1238 of the ICC if the debt agreement between the debtor and the former creditor in the deed does not state a clause on obligations and regarding the terms of transfer of mortgage. In the debt agreement there must be a clause that state if the transfer of mortgage occurs without the knowledge and or without permission of the debtor, then the creditor has canceled.

#### Mortgage Assigned on Credit Guarantee After Subrogation

The position of the grantor of the mortgage remains as the owner, who also retains the authority to take legal actions against the object that is burdened with the mortgage. In Article 14 paragraph 3 of Mortgage Law, it is stated that:

*"The mortgage certificate as referred to in paragraph (2) has the same executorial power as a court decision that has obtained permanent legal force and is valid as a substitute for the grosse acte Hypotheek as long as it concerns land rights.*

*Parate Executie* is the authority possessed by the creditor to bid on his own power the goods that are the object of collateral if the debtor cannot fulfill his obligations without having to seek approval from the chairman of the court (*fiat*). As an embodiment of the position that is prioritized and owned by the mortgagee in the case of the debtor broke his agreement, the mortgagee can execute through *parate executie* which is a convenience provided by law. The Mortgage Law explains that it must include clearly and unequivocally the agreement relating to the execution of the *parate executie* when the debtor is unable to fulfill his obligations/breach of contract. However, the validity/ application must be further reaffirmed with a promise that must

be stated clearly and unequivocally in the deed of encumbrance of the mortgage that was made when the agreement was started.

In Article 1400 of the ICC, as previously stated, subrogation can occur because of the law and because of an agreement. In relation to the subrogation that occurs because of the agreement in Article 1401 of the ICC, the subrogation is distinguished as follows:

1. Creditor initiates Subrogation: occurs when a third party as a new creditor pays the former creditor. The new creditor will replace his privileges, mortgages, claims, and rights held against the debtor. In the event that the creditor initiates a subrogation when the new creditor makes a payment, it must be stated explicitly;
2. Debtor initiates subrogation: occurs when the debtor borrows money from a third party (new creditor) to fulfill its obligations to pay debts to former creditors. The new creditor will replace the rights owned by the former creditor. Subrogation initiated by the debtor must be stated in an authentic deed to ensure its validity. In the authentic deed of agreement there must be a statement that the money borrowed by the debtor from the new creditor will be used to pay off the debtor's debt to the former creditor.

In the subrogation initiated by the debtor, there are two different legal relationships, namely lending and borrowing money between the debtor and the new creditor and paying off the debtor's debt to the former creditor.

Subrogation due to law occurs because a third party as a new creditor pays the debtor's debt to the former creditor without making an agreement. Based on article 1402 of the ICC this happens if:

1. A creditor pays off another debtor who by virtue of a privilege or mortgage has a higher right;
2. A buyer of a fixed object who has used the money for the price of the object to pay off a debtor to whom the object is bound by a mortgage;
3. A person who together with another person or for another person is obliged to pay a debt, has an interest in paying off the debt, as in the payment by one of the creditors on a debt with several responsibilities or payments made by the guarantor;
4. An heir who receives with privileges, but has paid the entire debt of the testator.

Repayment of debt by a third party or a new creditor is a subrogation that occurs because of the law, in this case a third party or a new creditor paying the debtor's debt is because there is an interest in carrying out the settlement without requiring approval between a third party as a new creditor and the creditor. old or third parties, new creditors and debtors, as stated and stated in Article 1402 (3) of the ICC: "that for a person who, together with other people or for other people, is obliged to pay a debt, has an interest in paying a debt, has an interest in pay off the debt.

Subrogation carried out by third parties or new creditors in this case needs to be emphasized that it is not to free the debtor from his debts and obligations but the third party will replace the position of the former creditor with the new creditor. Debtors still have an obligation to settle their obligations, namely paying debts to third parties as new creditors.

From what has been said above, it is clear that both subrogation due to agreement and subrogation due to law, related to mortgage rights as objects of collateral in debt and loan agreements, if the debtor does not change the object of collateral as agreed in the initial agreement, then the mortgage will remain and be accepted by the new creditor.

Execution of Mortgage which will be carried out by the new creditor if the debtor is later broke, then the execution based on Article 20 paragraph 1 letter a and b of the Mortgage Law can be carried out in three (3) ways, namely:

1. Title Execution

Creditors who already hold mortgage certificates can collect receivables from debtors. Creditors can also execute mortgage rights without going through a lawsuit process.



## 2. Parate Execution

Creditors take what they are entitled to without an intermediary judge. The sale of mortgage rights is carried out in the manner as regulated in Article 1211 of the ICC, with direct assistance by the state auction office without going through fiat from the head of the district court.

## 3. Selling Under Handedly

The sale of mortgage is carried out after notification from the creditor to the debtor. The sale of the mortgage object will get the highest price in order to benefit all parties. If after notification there are no objections, then by agreement a sale of the object of collateral is made with a power of attorney from the mortgagee

## 4. CONCLUSIONS AND RECOMMENDATIONS

In the event that a certain debtor is in default and unable to fulfill his obligations to the creditor, then subrogation can be considered, namely through the reimbursement of the creditors' rights for payment by a third party. Subrogation occurs either by agreement or because it is regulated by law. It is different from debt relief in that it involves a third party who pays debts to creditors with the aim of not releasing the debtor from his obligation to pay the debt, but simply replacing the position of the former creditor. With regards to mortgages as objects of collateral in debt and loan agreements, if the debtor does not change the object of collateral as agreed in the initial agreement, then the same mortgage will be received by the new creditor as the security of his debts.

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