



## Legal Security Assurance of Creditors in Ship Mortgages

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**ABSTRACT:** This study aims to (1) identify and assess the existence of mortgage insurance agency collateral vessels in the legal system in Indonesia, (2) identify and assess the position of the ship mortgage deeds grosse provide legal certainty for creditors. This type of research is a normative legal research and supported with empirical data obtained through interviews with the parties involved in this case judges, notaries, banks and officials., Applicant and Registrar Behind the Name Vessel. The results showed 1) In collateral in the Indonesian legal system, ship mortgage is a special warranty applies because the agreement (Article 1132 Civil Code). Ship mortgage is collateral material (*zakelijke zekerheidsrechten*) which gives property rights to creditors in order to protect creditors in the fulfillment of the obligations of the debtor to repay the debts. 2) In a ship mortgage deeds listed grosse executorial title "For the sake of Justice Based on God" that serves as a court decision final and binding. Executorial title will facilitate the execution of collateral objects without having to file a lawsuit if the debtor in default.

**Keywords:** Rule of law, Creditors, Ship mortgage, Deed grosse

### I. INTRODUCTION

In the framework of the national development of various sectors developed by the government, one of whom is given the maritime sector of Indonesia is a maritime country even the largest archipelago country in dunia. Perhatian government in the maritime sector has been emphasized in the vision and mission of the National Long-Term Development Plan 2005-2025 the Year by growing insight for the maritime community and the government for marine oriented development in Indonesia (Chapter III point 7 of the Law of the Republic of Indonesia Number 17 Year 2007 on National Long-Term development Plan 2005-2025).

Community involvement in this business in the maritime sector has not been as expected. No other constraints faced related to the problem of capital. To meet the needs of the business capital, then the solution is often adopted by the business world in general is to utilize banking services through the loan application to the banking institutions.

Banks as financial institutions that collect public funds to extend credit to the community always puts the precautionary principle (Article 2 and Article 8 of the Banking Act No. 10 of 1998). The purpose of the precautionary principle is that banks are always in a state of good health to run their business and comply with the provisions and legal norms prevailing in the banking world (Imaniyati, 2007: 17). [1]

As the implementation of the precautionary principle, the existence of the guarantee is absolute and into special consideration before the loan application is approved by the bank. The concept is intended to guarantee the Law Banking Law is the belief in the ability of the bank and the customer's ability to repay its obligations in accordance with the agreed (Explanation of Article 8 of the Law of the Republic of Indonesia Number 10 of 1998).

However, confidence in the capability and capacity of borrowers to repay their debts have not provided a sense of security, so banks need a specific guarantees in the form of collateral granted the debtor in a credit agreement.

One form known insurance agency in the practice of binding agreements in Indonesia collateral is mortgage insurance agency on board. Law of the Republic of Indonesia Number 17 Year 2008 on the cruise ships provide an understanding of mortgage is the "right of collateral material on the ship listed to ensure the repayment of certain debt positions that give precedence to certain creditors against other creditors".

Provisions restricting ship mortgages that not all vessels can serve as the object of mortgage collateral vessels, but only certain vessels, which vessels are recorded in the register of the ship. As stated in the

provisions of Article 314 paragraph (1) Civil law of trade that ships can be recorded in a register ship is a ship that weighs at least 20 m<sup>3</sup> (twenty cubic meters) of gross tonnage. In Shipping Law equated with the size of the vessel GT 7 (Seven GrossTonnage).

Domicile and legal substances mortgage collateral vessel is essentially to provide protection for creditors if the debtor does not fulfill the obligation to repay the debt at the time determined (debtor defaults). Imposition of ship mortgages as collateral in the credit agreement is not another aim to provide certainty for creditors to debtors settlement.

Under the provisions of Article 60 paragraph (3) of the Act. Law of the Republic of Indonesia Number 17 Year 2008 on the cruise asserted, that every mortgage deed issued 1 (one) Grosse mortgage deed mortgage given to the recipient. Furthermore, in paragraph (4) confirms that the Grosse Mortgage Deed referred to in paragraph (3) has the same strength executorial court decision having permanent legal force. The legal implications of this provision are to give ease in executing objects bagikreditor collateral if the debtor broken promise (wanpretasi).

Even though the legal basis is expected to ship mortgages reliable in providing legal protection to creditors, but in reality it is still not as expected. The court in its decision on the general question of the strength executorial grosse ship mortgage deeds. It This is reflected in the opinion of the court to examine and review in advance of the requested grosse deed execution, the Supreme Court has stated that even though the deed has the power grosse executorial but not equal to the judge's ruling. Notes issued by Z. Asikin Kusuma Atmadja in Decision No. 1520/K/Pdt/ 1984 dated May 31, 1986 stated, that despite having a title deed grosse "For the sake of Justice Based on God", the judge retains authority to determine whether the execution grosse certificate can be granted or not (Assegaf, Elijana Tanzah, 2010: 59). [2]

Based on the above description, the issue of this research is the implementation of the mortgage collateral vessels in connection with the execution of collateral objects there is a tendency not to provide legal certainty to creditors. This issue becomes interesting to study because of this uncertainty there is a tendency sourced from legal arrangements that are unclear and contradictory to each other, as well as uncertainty in the application of the law by the institution / law enforcement officers in this case the court or judge.

### **Problem Formulation**

Based on the above, the author defines some formulation of the problem such as:

1. How does the existence of mortgage insurance agency collateral vessels in the legal system in Indonesia?
2. How does the position of the ship mortgage deeds grosse provide legal certainty for creditors?

### **Research Objectives**

1. To determine and assess the existence of mortgage insurance agency collateral vessels in the legal system in Indonesia.
2. To determine and assess the position of the vessel in the mortgage deed grosse provide legal certainty for creditors.

### **Benefits of Research**

This research is expected to provide several benefits:

1. The theoretical benefits of this research are expected to contribute ideas for the development and construction of the law, especially in the field of law guarantees mortgages ship, especially in the context of preparing the Ship Mortgage Act.
2. Benefits practice of this research is expected to provide information and knowledge for academics in enriching scientific insights in the field of Security Law. Also no exception for law enforcement officers, community banking institutions generally as interested parties to the existence of agency mortgage collateral vessels.

## **II. METHODS**

This type of research is normative and empirical legal research because it is supported by empirical data obtained through interviews with the parties involved in this case Judge, Notary, head of the bank, Entrepreneur Office Chair Ports and Shipping.

## **III. RESULTS AND DISCUSSION**

### **A. Existence of Mortgage Guarantee Institute Ships In Indonesia Legal System Security**

#### **1. Legal Protection against Creditors**

As collateral material, ship mortgages give property rights to the lender that aims to protect creditors in the fulfillment of the obligations of the debtor to repay the debts. Law of the Republic of Indonesia Number 17 of 2008 on shipping provide an understanding of the mortgage collateral material right the ship as the ship

listed to ensure the repayment of certain debt positions that give precedence to certain creditors against other creditors (Article 1 paragraph 12).

Some of the principles inherent in the collateral vessel mortgages have shaped the character of the ship as a mortgage guarantee insurance agency which aims to provide legal protection for creditors as mortgage holders vessel. The character of ship mortgage as collateral to creditors material gives property rights that are specifically as follows:

**a. Absolute**

As an absolute right or absolute, the lender as the mortgage holder has a direct relation ship on board which is used as collateral and may be maintained against any person (Usman, 2009: 62) [3]. However, the rights of ownership and physical control over the vessel still remain in the hands of the debtor or the mortgage provider. If a ship used as collateral in compliance with debt obligations, this means that there are some powers that should be released by the vessel owner (debtor). In principle, it should be released is the power to transfer title for the boat such as selling, exchanging and grant (Subekti, 1986: 27). [4]

**b. Is droit de suite (Article 1163 paragraph (2) of the Civil Law)**

As collateral material, ship mortgages have property rights which *droit de suite* is that always follow the object in the hands of anyone object was located (Padley, 1991: 214) [5]. Such nature of property rights the ship mortgages preclude a third party to have a boat that has been in the mortgage overload. In other words, the debtor is not allowed to transfer the ownership of the vessel to a third party as long as the vessel is still burdened with a mortgage. Because property rights ship mortgages that provide a guarantee for the repayment of the debt the debtor will remain in the hands of anyone following the ship is located. Thus it would bring harm to a third party if buying a boat being secured by the transfer of ownership because the ship would not eliminate the enactment of ship mortgage.

**c. Of the level or levels Mortgages (Article 1181 of the Code of Civil Law)**

As for the meaning of the level that is in relation to the permissibility of a vessel charged with several mortgage ships. First mortgage existing ships or older have a higher rank than the existing mortgage then ship and so on according to the order of registration.

**d. Ship mortgage holder has the preferred position (*droit de preference*)**

Property rights guarantees mortgages ships provide special status for creditors that are preferred. In the position as preferred creditor when the debtor can not fulfill its obligations resulting in bad debts, the creditors have the right key or precedence to obtain repayment from the sale of collateral objects (Hasbullah, 2002: 8) [6]. The position of preferred creditor more secure position than the creditor unsecured creditors who are not secured by property rights (general collateral).

**e. Transfer of Mortgage**

Ship mortgage as part of the rights to the assets (*vermogensrecht*) can be transferred to another party. As *accessoir* rights, the transfer can not occur regardless of the principal debt. So here what happens is the transfer of the ship mortgage holders (creditors) while the debt remains. So when a creditor mortgage holder to divert the vessel (ie sell) mortgage his ship to the other party, in addition to receiving accounts, mortgage holders also receive a new ship transfer of ship mortgage.

**f. The suit material (*zakelijke Actie*)**

Holders of mortgages ship (the lender) has the right to sue in the event of disruption of the rights *dimilkinya*. The forms of the law suit can be filed by the prosecution re-mortgage holder, for example, to eliminate nuisance law suit over rights, law suit for the recovery of the original state and a lawsuit for compensation. The form of the suit is interrelated with the obstacles that arise in the fulfillment of the rights of creditors and may also be associated with a security object (ship).

**1. Imposition of Legal System Ship Mortgage**

**a. Ship registration**

One thing that is very fundamental in the law of the mortgage collateral vessels that can be used as collateral vessels is registered ship (Purnamasari 2011: 119) [7]. The law determines that not all vessels can be registered but is confined to the ship that weighs at least 20 cubic meters (Article 314 Code of Commerce) or equivalent with a gross tonnage of the vessel size 7 or GT.7 (Article 158 paragraph (2) Law of the Republic of Indonesia Number 17 of 2008). Against registered ship, the status of the vessel equivalent objects do not move.

Ship owners who will register the property rights to freely choose his ship in a place where the registration carried out, provided that the place or the port by the government was authorized to carry out the registration of property rights on the ship. Registration of ownership rights over the ship can also be implemented at the

Central Office of the Directorate General of Sea Cq. Directorate of Shipping and Maritime Affairs based in Jakarta.

Registration of property rights to the vessel can be done if the ship is not registered will be registered in the registration of another. This provision provides confirmation that the registration of the ship in Indonesia does not recognize the second leveling (second registry) as practiced several countries against the empty vessel chartered (bareboat charter). The second registration is not possible given the registration of ships in Indonesia based on ownership. If the ship is a foreign ship shall be registered, it must be equipped with a certificate of removal from the flag of the country of origin of the ship.

**b. Imposition Ship Mortgage**

In connection with the mortgage loading ships, then some of the parties involved therein suit the position and function of each are:

- The lender or mortgage holder ship;
- Debtor or any of the ship mortgage;
- Notary; and
- Officials Applicant and Registrar Flip Ship name.

Under the provisions of Article 64 of the Law of the Republic of Indonesia Number 17 Year 2008 on the voyage, the ship mortgage in connection with the imposition of government has issued Regulation of the Minister of Transportation Decree No. 13 Year 2012 on the AM Registration and Nationality Ship. This regulation shall enter into force from the date of promulgation, ie on February 14, 2012.

Imposition of a mortgage on the ship mortgage deeds done by making the vessel by officials. Behind registrant and registrar in the name of the ship. The ship is registered and recorded in the master list in question. Making ship mortgage deeds based on a request from the owner of the ship and the receiving ship mortgage (creditor) or receiver mortgage itself on the authority of the owner of the ship. Forms of power boat owners should be made before a notary installing called mortgage power of attorney. Petition filed shall be equipped with the original credit agreement and deed registration grosse ship or vessel under the name deed .

Ship mortgage deed signed by the owner of the ship, officials applicant and registrar behind the ship name, as well as the assistant registration officer and turn vessel name. Signing, numbering, date of ship mortgage deeds, and records in the master list must be made on the date that sama. Sebagai evidence that the vessel has been mortgaged, then the receiver is given grosse mortgage deed mortgage executorial ship that has the same strength with a court ruling that has gained binding legal force.

**B. Position Grosse Ship Mortgage Act in Providing Legal Certainty For Creditors**

**1. Titel executorial In Grosse Ship Mortgage Act**

Grosse ship mortgage deed is a copy or a derivative of the ship mortgage deeds, who wears a head on it the words: "For the sake of Justice Based on Belief in God Almighty". At the bottom should be listed as grosse first to name the person who at his request was granted and the date grosse grosse provision that, where a copy of the same shall have the force execution by a court decision that is final and binding (Naja, 2005: 377-378) [8].

The purpose of the first grosse deed can be known from the provisions of Article 224 HIR (Herziene Indlansch Reglement) is to immediately realize the rights of creditors without the need for litigants again. Its purpose is to ensure the implementation of the rights of creditors more quickly without going through the procedure of filing a lawsuit as in ordinary court cases that is certainly very time-consuming and labor. Titel executorial provide power directly executable that can be run without any appeal first.

**2. Application of Title executorial**

The issue of the application of the title executorial objects appears in the execution of the guarantee. Supposedly as executorial title that reads "For the sake of Justice Based on God" in the mortgage deed grosse, equivalent evident as a court decision is legally binding, so no longer need the excessive role of the courts but only gives the determination or approval of the execution. Excessive involvement of the courts by way of check or test the returned documents related to the agreement and the imposition of a mortgage, has eliminated the nature of the title executorial.

Position title executorial in grosse mortgage deed, have been weakened by the power possessed by the judge. The supreme court in its decision No. 1520 / K / Pdt / 1984 dated May 31, 1986 stated, the execution can be carried out only with the approval of the judge. This ruling of course is contrary to the meaning behind the title executorial inclusion in grosse mortgage deed, if it still requires the approval of a judge again. The facts surrounding the issue of the execution of the deed of mortgage grosse under the provisions of Article 224 HIR used the courts, according to the author is caused by a lack of clarity in the legal norms governing.

#### **IV. CONCLUSION**

1. Existence of agency mortgage collateral vessels in principle contains the same philosophy as other forms of insurance agency (fiduciary and mortgage) that are recognized in the national legal system guarantees that in order to provide legal protection to creditors to guarantee the fulfillment of credit/financing if the debtor defaults.
2. Strength grosse ship mortgage deeds in providing protection and legal certainty to creditor's lies in the title executorial contained therein. However, due to the rule of law relied upon by the judge that the execution of the provisions of Article 224 is not HIR clearly set, then the function title executorial to provide convenience and certainty of execution guarantees objects can not be realized.

#### **V. SUGESTION**

1. It should be held revamping or restructuring of the legal system guarantees applicable in Indonesia to place collateral material settings in Indonesian law in the whole system, so avoid conflict of legal norms both vertically and horizontally.
2. In order to restore the essence of the title executorial it is necessary to restructure the mortgage law setting the ship in a separate regulation and regulate in detail about the mechanics of execution.

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