

## THE LEGAL FORCE OF CROSS COLLATERAL AGREEMENT ON MORTGAGE OBJECTS UNDER INDONESIAN LAW

Aziz Rahimy

Faculty of Law - Universitas Nasional

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### Correspondence

Email: [azizrahimy.edu@gmail.com](mailto:azizrahimy.edu@gmail.com)

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### ABSTRACT

Currently, the risk appetite of banks and other formal financing institutions in Indonesia still consider collateral as the main factor to guarantee debt repayment. For the purpose of collateral availability, there is a practice of pledging based on a cross-collateral agreement. However, the practice of cross collateral still raises legal issues in its implementation, especially regarding the legal force of the cross collateral agreement to the mortgage object. This issue will also have an impact on the executorial rights to the object of the mortgage, if the debtor defaults on the other debt. Based on the research results, it is known that to bind an object of mortgage rights as collateral for the repayment of more than one debt, it can be done by binding the object of mortgage rights based on a ranking system with the concept of senior-junior, or by making a cross-collateral agreement contractually based on the principle of contract law with an open system. To provide legal certainty and legal protection to creditors, agreements with cross collateral clauses need to be supported by a cross default clause which regulates that the main obligation in a contract becomes an obligation in another contract, and makes default due to non-fulfillment of the main obligation on a contract, become a default on another contract. So that this cross collateral agreement can provide binding legal force and creditors can execute based on the Mortgage Rights Law.

**Keyword:** cross collateral, mortgages, security law

### INTRODUCTION

The commonly known principles of credit analysis is the 5C principles, in which the creditor must carefully analyze or assess 5 (five) aspects, which are character, ability, capital, collateral, business prospects of the debtor.<sup>1</sup> In the Indonesian banking practice, which tends to make collateral a determining factor in approving the granting of credit, banks tend to require property or collateral security in granting credit. Based on research conducted by the World Bank, it shows that there is a general tendency for most credit applications to be rejected due to insufficient or unacceptable collateral.<sup>2</sup>

Indonesia has regulated regarding collateral, based on the type of the object, namely Gadai, Fiduciary Guarantee, Mortgage, Hipotek, and Warehouse Receipt Guarantee. According to the International Finance Corporation (IFC) research, in lending, banks in Indonesia generally focus more on collateral, especially collateral in the form of immovable assets.<sup>3</sup> Guarantee of immovable properties in the form of land rights and objects related to land as well as rights to apartment units is carried out through the collateral security based on Law Number 4 of 1996 concerning Mortgage

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<sup>1</sup> The Elucidation of Article 8 Law Number 7 of 1992 concerning Banking as amended by Law Number 10 of 1998 ("Banking Law").

<sup>2</sup> World Bank. 2019, *Secured Transactions, Collateral Registries and Movable Asset Based Financing*. Washington, DC: World Bank. Page 3.

<sup>3</sup> International Labor Organization (ILO). 2019, *Financing Small Business in Indonesia, Challenges and Opportunities*. Jakarta: ILO. Page 3

Rights on Land and Objects Related to Land ("**Mortgage Rights Law**"). In mortgage, and other collateral forms, there is the principle of priority or *droit de preference*, which gives the creditor priority in the event of enforcement against the object of collateral compared to other creditors.<sup>4</sup> With this priority position (*preference principle*), the creditor is more assured of the repayment of his debts.<sup>5</sup>

In considering an asset as collateral, the creditor will calculate the value of the asset compared to the value of the loan, to ensure that in the event of default and enforcement of the collateral, the proceeds from the sale of the asset will be sufficient to pay off the debtor's debt, which generally requires the value of the collateral to be more than 130% of the loan amount.<sup>6</sup> In providing credit facilities to debtors, there may be conditions where the value of the loan provided is much lower than the value of the collateral provided, either because the outstanding value of the loan has decreased due to payments from time to time by the debtor, or because from the beginning the value of the object submitted as collateral is much higher than the value of the loan, so that the debtor can request additional credit facilities, or collateral in the form of objects that have previously been provided as collateral is reused to guarantee debt for other credit facilities, and therefore a cross collateral clause or agreement is applied. The principle of cross collateral is a situation where there is one object as collateral for two or more credit facilities or loans,<sup>7</sup> and it is often also accompanied by a cross default agreement, which is a default caused by an event of default under another credit agreement.<sup>8</sup>

Although the use of cross-collateral agreements is quite common in practice, it still raises legal issues in its implementation. Therefore, it is important to examine the legal construction of the binding of the object of mortgage rights as collateral for repayment based on an agreement with a cross-collateral clause, and the concept of cross-collateral that can provide binding force and enforcement rights of creditors as collateral recipients based on cross-collateral agreements.

## 1. Research Method

This research is normative legal research, namely by means of literature studies. The legal material used in this research is secondary data consisting of primary legal materials and secondary legal materials. Analysis of legal materials is carried out qualitatively, which analyzes based on concepts, theories, laws and regulations, doctrines, legal principles, expert opinions or the views of the researchers themselves, and describes them in a descriptive analysis, which is an in-depth explanation of the implementation of cross-collateral agreements in mortgage collateral.

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<sup>4</sup> The priority position for the recipient of a mortgage can be seen from the definition of mortgage rights in Article 1 point 1 of the Mortgage Rights Law, which explicitly states that mortgage rights give priority to certain creditors over other creditors. In General Elucidation number 4 of the Mortgage Rights Law, it is stated that the purpose of the priority position is that if the debtor is in default, the creditor holding the mortgage right has the right to sell the object of the mortgage right, with the right to precede other creditors.

<sup>5</sup> National Law Development Agency (BPHN), Ministry of Law and Human Rights Republic of Indonesia, Naskah Akademik Rancangan Undang-Undang tentang Perubahan atas Undang-Undang Nomor 42 Tahun 1999 tentang Jaminan Fidusia. BPHN, 2019. Page 29.

<sup>6</sup> Ibid.

<sup>7</sup> Haposan Dwi Pamungkas Saragih, Abdurrahman Konoras, and Merry E. Kalalo, *Analisis Hukum Pemberian Kredit Dengan Klausula Cross Default dan Cross Collateral Terhadap Jaminan Hak Tanggungan*, Jurnal Lex Administratum, Vol. IX No. 1, 2021. Page 43.

<sup>8</sup> Kevin Kogin, *Karakteristik Klausula Cross Collateral dan Cross Default Dalam Perjanjian Kredit Perbankan*, Disertasi Doktor Universitas 17 Agustus Surabaya, 2018. Page xiii

## 2. Result and Discussion

### A. Construction of Cross Collateral to the Mortgage Object under Indonesian Law

Cross collateral is an arrangement that regulates that an object that has been pledged for the fulfillment of an agreement, and then used as collateral for the fulfillment of obligations under another agreement, both for the fulfillment of the same debtor's obligations and for different debtors. Meanwhile, cross default means an arrangement to make a default on an agreement, considered a default on other agreements, both agreements made by the same debtor, as well as different debtors.

In lending practice in Indonesia, the cross collateral agreement is applied to various objects of collateral, including land rights and buildings or the objects of mortgage rights that stand and are attached to them. The Mortgage Rights Law does not specifically regulate cross collateral. The Mortgage Rights Law regulates in Article 5 that an object of a mortgage right can be encumbered with more than one mortgage right to guarantee more than one debt.

The cross default and cross collateral agreements can occur in several conditions. First, one debtor is bound by 2 (two) different agreements or debts. The second condition is, there are 2 (two) debtors who are bound by different agreements or debts, and both of them bind each other to make a default under the other party's contract considered a default on the contract that binds him, and the collateral provides to the creditor will also guarantee the fulfillment of the other party's contract. Generally, cross collateral and cross default conditions with 2 (two) different debtors occur if the two debtors have an affiliate relationship or are in the same business group

The pledge of one object for the fulfillment of more than one contract or more than one debt under Article 5 of the Mortgage Rights Law is carried out based on a ranking system, whereby there are several legal consequences and consequences, i.e. first, a new deed of granting mortgage rights (APHT) must be made and re-registered at the Land Office for its binding.<sup>9</sup> Second, there is a concept of senior-junior position among the holders of mortgage rights, where the right to execute if the debtor defaults is on the first rank of mortgage holders,<sup>10</sup> while the determination of the ranking of mortgage holders is carried out based on the creditor who first makes APHT and registers the pledge of mortgage rights to the Land Office.<sup>11</sup> In addition, the concept of senior-junior position also makes the first-ranked mortgage holder prioritized to take debt repayment from the execution of the mortgage object.<sup>12</sup>

Collateralization based on the ranking system in Article 5 of the Mortgage Rights Law has several issues, including if the object is used as collateral for 2 (two) debts to 2 (two) different creditors, then if the debt to the creditor of the first-ranked mortgage holder is still current, the second-ranked mortgage holder cannot execute based on the executorial title and *parate executie*, without the consent of the first-ranked mortgage holder.<sup>13</sup> Another problem is that the Mortgage Rights Law does not clearly and explicitly regulate the right to take repayment from the sale of an object of mortgage rights that is charged to secure the repayment of more than one debt. The creditor's right to take repayment from the sale of the object of the mortgage can be exercised if the debtor defaults, in the event that the debtor only defaults on one contract, it can be interpreted

<sup>9</sup> Article 5 paragraph (2) Mortgages Law

<sup>10</sup> Article 6 and Article 11 paragraph (2) letter e Mortgages Law

<sup>11</sup> Article 5 paragraph (2) and (3) Mortgages Law

<sup>12</sup> Elucidation of Article 6 Mortgages Law

<sup>13</sup> Yogi Gantika Gandawidura, *Perlindungan Hukum Kreditur Pemegang Hak Tanggungan Peringkat Kedua Dalam Pelaksanaan Eksekusi*, Jurnal Poros Hukum Padjadjaran, Vol. 1 No. 1, 2019. Page 85

that the repayment from the execution of the mortgage can only be used to pay for the defaulted contract, while because the other contract has not been defaulted, it cannot take repayment from the sale of the object of the mortgage.<sup>14</sup>

The binding of an object of mortgage rights to secure more than one debt or contract can also be done by making an agreement with a cross collateral clause which is generally accompanied by a cross default clause, in which to make the object as collateral for more than one debt, is carried out without making a new APHT and without registration with the Land Office, thus not "creating" a second rank mortgage right and so on. This binding is carried out contractually, based on the principle of open system of contract law, which means that everyone is free to enter into agreements, both those that have been regulated and those that have not been regulated in the law.<sup>15</sup> Based on Article 1338 of the Indonesian Civil Code, everyone is free to make any contract, with anyone, with the contents in the form of obligations, prohibitions, and any conditions, and in any form, whether oral, written, or authentic deed, as long as it fulfills the legal requirements of the agreement, including the formal requirements regulated by law, and does not conflict with law, decency, and order. Thus related to the signing of a cross collateral agreement, the agreement will apply to bind the parties and can be enforced by law like a statute, as per the principle of *pacta sunt servanda* which means that judges or third parties must respect the substance of the contract made by the parties, just like a law, no one may intervene in the substance of the contract made by the parties.<sup>16</sup>

However, the use of a cross default clause will become complex if the debtor in one contract and another contract are different legal subjects. Default is when the debtor does not fulfill or neglects to carry out its obligations as specified in the agreement made between the creditor and the debtor.<sup>17</sup> The issue that may arise from the use of cross default clauses for contracts with different debtors is how to declare a debtor in default due to the non-fulfillment of an obligation that is not the debtor's obligation, but is the obligation of another party. Therefore, the author considers it important in formulating the cross default clause, not only to agree that the default of one contract will be considered as a default in another contract, but also to regulate that the main obligation of one contract will be made an obligation in another contract.

Cross default clause, it must contain at least 2 (two) things, first, making the main obligation in another contract become an obligation in another contract, and second, default in one contract becomes default in another contract. This is more important if the cross default is applied to contracts made by different debtors. Then the obligations of one debtor based on the contract he made with the creditor, become the obligations of another debtor. The type of obligation that has similarities and is close to this concept is "perikatan tanggung menanggung" or joint responsibility as referred to in Article 1280 of the Civil Code,<sup>18</sup> which comprises factors, namely, the existence of two or more debtors, each debtor is obliged for the same obligation, namely each for the entire obligation, repayment by one debtor releases other debtors, and the obligations of the jointly and

<sup>14</sup> Article 6 and Elucidation of Article 6 Mortgages Law

<sup>15</sup> Salim H.S., *Hukum Kontrak, Teori & Teknik Penyusunan Kontrak*, Jakarta: Sinar Grafika, 2019. Hlm. 8

<sup>16</sup> Muhammad Muhtarom, *Asas-Asas Hukum Perjanjian: Suatu Landasan Dalam Pembuatan Kontrak*, SUHUF, Vol. 26, No. 1, 2014. Page 52

<sup>17</sup> Salim H.S. Op.cit. Page 98.

<sup>18</sup> Article 1280 of the Civil Code states "On the part of the debtors there is an obligation of responsibility, when they are all obliged to carry out one and the same thing, in such a way that one can be sued for the whole, and the repayment by one can release the other debtor against the creditor"

severally liable debtors have the same basis or origin.<sup>19</sup>

Therefore, to provide legal certainty for the protection of the rights and interests of creditors, the concept of binding collateral objects based on cross collateral must also be accompanied by a cross default clause. The cross default and cross collateral agreement is an additional agreement or addendum which is an integral part of each contract or main agreement. The consequence of this is that, even though the main obligation of one of the contracts has been fulfilled, it does not result in the end of the contract, as long as the obligations of the other contracts have not been fulfilled in full, with the contract not yet ended, the APHT which is a security agreement, which is *accessoire*, will also follow the main agreement, which does not end until all obligations from all contracts have been fulfilled, and the object of mortgage rights will also be a guarantee for the fulfillment of performance on all contracts.

In the case of agreements containing cross default and cross collateral clauses involving two different debtors, the legal implication is that if the obligations of one of the debtors under a contract have not been fulfilled, then the other contract is deemed not to have ended even though the principal obligations (e.g. loan and interest payments) have been fulfilled. Then if one of the debtors defaults, the other debtor is deemed to be in default, even though the other debtor is still fulfilling the main obligations based on the contract he made with the creditor. The logical consequence of this is that if one of the debtors defaults, it gives the creditor the right to execute the collateral submitted, even though the other debtor still fulfills the main obligations based on the contract he made with the creditor.

## B. Legal Force of Cross Collateral Agreement and Executorial Rights of Creditor as Collateral Recipient of Mortgage Based on Cross Collateral Agreement

To make a property as an object of mortgage object, it needs to be preceded by a promise to provide mortgage rights as collateral for the repayment of certain debts, which is stated in the APHT,<sup>20</sup> and is an inseparable part of the main agreement.<sup>21</sup> After the APHT is executed, it needs to be registered with the Land Office, which is then issued a Mortgage Rights Certificate (SHT) which has the same executorial power as a court decision with permanent legal force.<sup>22</sup>

As a security agreement, APHT must contain matters required by law, among others a clear designation of the debt or debts guaranteed, the value of the mortgage, as well as a clear description of the object of the mortgage, the identity of the debtor, the main agreement that is the reference for the guaranteed debts, and the value of the guaranteed debt repayment.<sup>23</sup>

<sup>19</sup> Cempaka Widowati and Ambar Budhisulistiyawati, *Efektivitas Tanggung Renteng Pada Perusahaan Modal Ventura Untuk Mengatasi Perusahaan Pasangan Usaha Wanprestasi (Studi di Perusahaan Modal Ventura Kantor Cabang Tasikmadu)*, Privat Law Vol. 6, No.1, 2018. Page 84

<sup>20</sup> Article 1 angka 5 Mortgages Law mentioned that APHT is a security agreement made by an authentic deed, namely the deed of a Land Deed Official (PPAT) containing the granting of a mortgage right to a certain creditor as a security for debt repayment

<sup>21</sup> Article 10 Mortgages Law

<sup>22</sup> Article 8 paragraph (2), Article 13 paragraph (1), and Article 14 paragraph (3) Mortgages Law

<sup>23</sup> Article 11 paragraph (1) of the Mortgage Rights Law requires APHT to contain among others: a clear designation of the debt or debts guaranteed, the value of the mortgage, as well as a clear description of the object of the mortgage. Furthermore, Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Number 8 of 2012 on the Amendment to Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 3 of 1997 on Provisions for the Implementation of Government Regulation Number 24 of 1997 on Land Registration has determined the form and content of APHT as a reference for PPAT to make APHT. Based on this regulation, the APHT must contain, among other things, the

The matters that need to be examined to assess the binding force of the cross-collateral agreement and the enforcement rights in the event of default of the secured contract based on the cross-collateral agreement, is whether it is necessary to amend the APHT to include details of the new debt that will be secured by the object of the mortgage. Moreover, if other obligations secured by the object of the mortgage are obligations of other debtors, in the meaning that the debtor whose obligations are secured under the cross-collateral agreement is a different debtor. Given that the APHT does not mention other debtors whose obligations are secured by the object of this mortgage right.

In principle, a cross collateral agreement that has fulfilled the legal requirements of the agreement as mentioned in Article 1320 Indonesian Civil Code, has binding legal force, and can be enforced by law. However, what is very important is how the content or formulation of the agreement regarding the cross collateral. In the event that the cross collateral agreement is also combined with a cross default agreement which stipulates that the main obligation in a contract becomes an obligation in another contract, and default due to non-fulfillment of the main obligation of a contract becomes a default in another contract, then the creditor has an executorial right based on the Mortgage Rights Law.

Agreements that contain cross collateral and cross default have the enforcement rights of mortgage rights, even though no new APHT is made or no re-registration of second rank mortgage rights and so on, this is because by making the cross default and cross collateral agreements, the guaranteed obligations or debts as stated in the APHT, have included obligations or debts arising from other contracts. Registration at the Land Office, which aims to fulfill the principle of publicity, has been fulfilled by registering the initial mortgage rights as evidenced by the existence of a mortgage certificate. As referred to in the Explanation of Article 4 paragraph (1) letter a of the Mortgage Rights Law, the principle of publicity has been fulfilled by the existence of a record of the mortgage right in the land-book and the certificate of land rights encumbered, so that everyone can know about it. Thus, the principle of publicity in mortgage rights is openness to the public that the object is being bound by a mortgage right, which is a matter that, so that other parties who are not bound to the guarantee agreement know that there is a property right on the land right.<sup>24</sup>

The right of creditors to carry out the enforcement of mortgage rights based on cross default and cross collateral agreements is also applied in a case decided by the Supreme Court of the Republic of Indonesia in Decision Number 1632 K/PDT/2020, between PT Bank Mandiri (Persero) Tbk and PT Ananda Jataka Bayu Sejahtera. In this case, the debtor sued the creditor because it was considered to have committed an unlawful act by selling at auction an item that was considered by the debtor not to be an item that secured the debtor's debt, but the collateral for a loan granted by the creditor to another company affiliated with the debtor, PT Aneka Jasa Bersama Sejahtera.

The Panel of Judges at the Supreme Court examining the case at the final level decided that the implementation of the auction by the creditor on the object of mortgage rights registered for debt on behalf of another debtor was not an unlawful act, even though the other debtor had paid off his debt. This was due to the existence of cross collateral and cross default agreements, the

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identity of the debtor, the main agreement that is the reference for the guaranteed debts, and the value of the guaranteed debt repayment.

<sup>24</sup> Nadia Imanda, *Lahirnya Hak Tanggungan Menurut Peraturan Pemerintah Agraria Tentang Pelayanan Hak Tanggungan Terintegrasi Secara Elektronik*, Jurnal Notarie Vol.3 No.1, 2020. Hlm. 151

essence of which was that all assets including the object of the disputed mortgage became debt collateral not only for debtors who did not default, but also for other companies in the debtor's business group, including debtors who defaulted and filed a lawsuit.<sup>25</sup>

### 3. Conclusion

To bind an object of mortgage rights as collateral for the repayment of more than one debt or obligations arising from different contracts, it can be done in 2 (two) ways. First, is by charging the object of mortgage rights based on a ranking system with the concept of senior-junior, where the object of mortgage rights is bound by more than one mortgage right, which is the first-ranked mortgage right and the second-ranked mortgage right and so on. The second way is to make a cross collateral agreement contractually, based on the principle of open system in contract law. To provide legal certainty and legal protection to creditors, the cross-collateral agreement needs to be supported by a cross default agreement.

### References

- Court Decision of Surabaya District Number 388/Pdt.G/2018/PN.Sby.  
 Court Decision of Surabaya High Court Number 140/PDT/2019/PT SBY.  
 Court Decision of Supreme Court Number 1632 K/PDT/2020  
 Gandawidura, Yogi Gantika (2019). *Perlindungan Hukum Kreditur Pemegang Hak Tanggungan Peringkat Kedua Dalam Pelaksanaan Eksekusi*, Jurnal Poros Hukum Padjadjaran, Vol. 1 No. 1.  
 H.S., Salim (2019). *Hukum Kontrak, Teori & Teknik Penyusunan Kontrak*, Jakarta: Sinar Grafika.  
 Imanda, Nadia (2020). *Lahirnya Hak Tanggungan Menurut Peraturan Pemerintah Agraria Tentang Pelayanan Hak Tanggungan Terintegrasi Secara Elektronik*, Jurnal Notarie Vol.3 No.1.  
 International Labor Organization (2019). *Financing Small Business in Indonesia, Challenges and Opportunities*. Jakarta: ILO.  
 Kogin, Kevin (2018). *Karakteristik Klausula Cross Collateral dan Cross Default Dalam Perjanjian Kredit Perbankan*, Doctoral Dissertation Universitas 17 Agustus Surabaya.  
 Law Number 4 of 1996 concerning Mortgages Law  
 Law Number 7 of 1992 concerning Banking as amended by Law Number 10 of 1998  
 Muhtarom, Muhammad (2014). *Asas-Asas Hukum Perjanjian: Suatu Landasan Dalam Pembuatan Kontrak*, SUHUF, Vol. 26, No. 1.  
 National Law Development Agency (BPHN), Ministry of Law and Human Rights Republic of Indonesia (2019). *Naskah Akademik Rancangan Undang-Undang tentang Perubahan atas Undang-Undang Nomor 42 Tahun 1999 tentang Jaminan Fidusia*. BPHN.  
 Saragih, Hapson Dwi Pamungkas, Abdurrahman Konoras, and Merry E. Kalalo (2021). *Analisis Hukum Pemberian Kredit Dengan Klausula Cross Default dan Cross Collateral Terhadap Jaminan Hak Tanggungan*, Jurnal Lex Administratum, Vol. IX No. 1.  
 Widowati, Cempaka Widowati and Ambar Budhisulistiyawati (2018). *Efektivitas Tanggung Renteng Pada Perusahaan Modal Ventura Untuk Mengatasi Perusahaan Pasangan Usaha Wanprestasi (Studi di Perusahaan Modal Ventura Kantor Cabang Tasikmadu)*, Privat Law Vol. 6, No.1.  
 World Bank (2019), *Secured Transactions, Collateral Registries and Movable Asset Based Financing*. Washington, DC: World Bank.

<sup>25</sup> Supreme Court Decision Number 1632 K/PDT/2020. Page 10-11

