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Implementation of Material Law Principles in the Ship Mortgage Guarantee Legal System

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Abstract

This paper examines the implementation of material law principles in the ship mortgage guarantee legal system. This type of research is normative legal research and empirical legal research—determination of the sample purposively with data collection techniques through library research and interviews. The results of the discussion show that the ship mortgage is a material guarantee in order to provide guarantee for the repayment of the debtor's debt through the making of a mortgage deed by the Registrar Officer and the Registrar of Transferring the Name of the Ship at the place where the ship is registered. Ship mortgages as material guarantees are embedded in the principles of material law, namely the closed system principle, the principle of priority rights, the principle of material rights, the principle of specialty, the principle of publicity, and the principle of easy and certain execution.

1. Introduction

Indonesia's economic development aims to realize social welfare, and one factor that greatly influences achieving this goal is the field of guarantee law. In the Indonesian guarantee law system, there are general guarantees and special guarantees. General guarantees as regulated in Articles 1131

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and 1132 of the Civil Code whose existence is due to law. At the same time, the special guarantee is regulated in Article 1132, whose existence is due to an agreement. Article 1131 of the Civil Code stipulates that all material rights of the debtor, both movable and immovable, both those that already exist and those that will exist in the future, are borne for all his engagements. Thus, all the debtor's assets automatically become collateral when the person makes a debt agreement, even though it is not expressly stated as collateral. Against this guarantee, problems will arise when a debtor has more than one creditor, and each creditor wants his rights to take precedence. The law anticipates such situations by making guarantees that are specifically agreed upon.

This special guarantee is divided into material guarantees *(zakelijke zekerheidrechten)* and individual guarantees (*persoonlijke zekerheidrechten*). Individual guarantees create a direct relationship with certain people and can only be maintained against certain creditors against the debtor's assets. Meanwhile, material guarantees are guaranteed in the form of absolute rights to an object that directly relates to certain objects, can be defended against anyone, always follow the object (*droit de suite*), and can be transferred (Davidson, 2008).

Compared to individual guarantees, the position of material guarantees is far more profitable for creditors in order to guarantee the fulfillment of creditors' rights if the debtor defaults. As a material guarantee, the principles of material law are embedded in it, which makes the character of material guarantees stronger in providing guarantees to creditors. The prudential principle regulates collateral as additional collateral. Regarding collateral, it is specifically regulated in various laws and regulations that regulate debt guarantees, often called Guarantee Laws. The provisions of the Guarantee Law will protect parties with interest in the money loan and debt guarantee (McLeod, 2006).

One of the material guarantees is a mortgage, as stipulated in Article 1162 of the Civil Code. With the enactment of Law No.4 of 1996 concerning Mortgages, mortgage objects have changed. Namely, they are no longer land rights because they have been regulated in the Mortgage Law but apply to registered ships with a minimum weight of 20 cubic meters. In Law No. 17 of 2008 concerning Shipping, the ship's weight equals a minimum size of 7 GT (gross tonnage). Likewise, registered aircraft based on economic needs can be used as mortgage objects (Cook et al., 2013). The mandate of the Welfare State, which later became the state's foundation, resulted from a political agreement at the start of establishing the state (Krause et al., 2013). According to Utrecht, the Welfare State is related to the principles of the rule of law. There are two types of the rule of law: a formal or classical rule of law and the rule of law in the material sense or a modern rule of law state. In a formal sense, the state has to implement laws and regulations to carry out an order, better known as the night guard state (*nachtwackerstaats*). Meanwhile, in a material sense, the state's task is not only limited to maintaining order, but also the presence of the state is to achieve people's welfare to achieve justice (welfare state).

In a material sense, the concept of a state function makes the state have an interventionist function. It means the state will always participate in every movement and step of society to increase general welfare. Therefore, the duties of the state become very broad and reach every aspect of people's lives in all fields ranging from socio-culture, politics, religion, technology, defense, and security, even if necessary, entering into the private lives of its citizens (Giddens, 2021). Ship mortgages as material guarantees contain material law principles that give creditors certain rights in the legal certainty framework. The existence of material law principles in ship mortgage guarantees will be the subject of discussion in this paper.

2. Materials and Methods

The type of this research is normative legal research and empirical legal research. Based on these two types of research, normative legal research includes research on legal principles, legal systematics, comparative law, and legal history. Meanwhile, empirical legal research uses a socio-juridical (socio-legal) approach (Adler, 2003). The technique used in data collection, both data in the form of primary legal materials and secondary legal materials, is library research (Cf. Miller, 2003). Empirical data was obtained through interview techniques with respondents with questions prepared in advance. The collected data is analyzed according to the character or nature of each data.

3. Results and Discussions

Ship Mortgage Loading

The imposition of a mortgage on a ship does not happen by itself but is an integral part of a credit agreement between the bank as the creditor and the customer as the debtor. According to Okafor et al. (2020), the bank shows its function as a public financial intermediary institution (financial intermediary) in this credit agreement. Banks become intermediary media for parties who have excess funds (surplus of funds) with parties who lack/need funds (lack of funds) (Tandilintin, Y., & Amiruddin, K., 2021). The specificity of bank credit is related to the goals of Indonesian banking, namely to support the implementation of national development to increase equity in economic growth and national stability towards increasing the welfare of the people at large (Indriaswari et al., 2022).

Based on the credit loan application submitted, the rights and obligations in the credit agreement will be attached to the credit applicant and the bank if the bank approves it. Credit agreements are not specifically regulated in the Civil Code but include agreements named outside the Civil Code. Some equate it with a loan agreement (Ganglmair, B., & Wardlaw, 2017). Concerning the imposition of a mortgage on ships, the provisions in Article60 paragraph (1) of Law Number 17 of 2008 confirm that the imposition of a mortgage on a ship is carried out by making a mortgage deed by the Registrar and Registrar of Ship Transfer at the place where the ship is registered and recorded in the Master Register of Ship Registration. Previously, in the provisions of Article 1 number 12 of Law Number 17, the definition of a ship mortgage was formulated, namely, "the right of collateral for a registered ship to guarantee the repayment of certain debts that give a priority position to certain creditors against other creditors."

Under the conditions, Article 60 paragraph (1) and Article 1 number 12 of Law Number 17 of 2008, the imposition of a mortgage on a ship must be carried out by making a mortgage deed by the Registrar and Registrar of Ship Transfer at the place where the ship to be mortgaged is registered and then recorded (registered) in the Master Register of Ship Registration. The imposition and registration of mortgages on ships are intended to give priority positions to creditors receiving (holders) of ship mortgages over other creditors in paying off certain debts.

Furthermore, as proof of a ship mortgage, a Mortgage Deed *Grosse* is issued, which is given to the mortgagee with executive power. Article 60, paragraph (3) of Law Number 17 of 2008 confirms that for each mortgage deed issued, 1 (one) *Grosse* Mortgage Deed is given to the recipient. Then the provisions in Article 60 paragraph (4) of Law Number 17 of 2008 confirm that the *Grosse* Mortgage Deed, as referred to in paragraph (3), has the same executive power as a court decision that has obtained permanent legal force.

From the provisions in Article 60 paragraph (3) and paragraph (4) of Law Number 17 of 2008, it is known that the *Grosse* Mortgage Deed functions as proof of the existence of a ship mortgage which has the same executorial power as a court decision that has obtained permanent legal force. With this executive power (title), the ship mortgage holder can use the gross mortgage deed of the ship as a

legal basis for executing without going through a lawsuit in court. Suppose the debtor defaults, based on the executorial power contained in the *Grosse* Mortgage Deed, the creditor receiving the ship mortgage can immediately execute as is the case with a court decision that has obtained permanent legal force through the institution of execution parade (executive). In that case, without going through the process lawsuit before the court.

The official of the Registrar and Registrar of the Transfer of the Name of the Ship can issue a replacement *grosse* deed for the lost ship's mortgage deed *grosse*. It can be done based on a court order as stipulated in Article 60 paragraph (5) of Law Number 17 of 2008, which stipulates that if a *grosse* mortgage deed is lost, a replacement deed *grosse* can be issued based on a court order. A gross deed to replace the *Grosse* Deed for a Ship Mortgage must be issued after a court order.

As is the case with mortgages, a ship mortgage can be burdened with more than one mortgage so that there are first-rank, second-rank, and so on ship mortgage holders, which are determined based on the date and the serial number of the ship's mortgage deed in question. This possibility is emphasized in the provisions of Article 61 of Law Number 17 of 2008, which reads as follows:

(1) Ships can be burdened with more than 1 (one) mortgage.
(2) The rating of each mortgage is determined accordingly date and serial number of the mortgage deed.

It is also possible for a ship mortgage to be transferred to a new mortgage recipient by the mortgagee concerned. The provisions in Article 62 of Law Number 17 of 2008 confirm that the transfer of a mortgage from a mortgage recipient to another mortgage recipient is carried out by making a deed of transfer of mortgages by the Registrar and Registrar of Ship Transfers at the place where the ship is registered and recorded in the Master Register of Ship Registration. Based on the provisions in Article 62 of Law Number 17 of 2008, mortgage transfers can be carried out by going through the process of making a mortgage transfer deed by the Registrar and Registrar of Transfer of Ship Names at the place where the ship is registered, then recorded (registered) in the Master Register of Ship Registration at the place of the ship.

Previously concerning the imposition of mortgages on ships, the provisions in Article 33 of Government Regulation Number 51 of 2002 stipulates that the imposition of mortgages on ships must be carried out by making a mortgage deed by the Registrar Officer and Registrar of Ship Names at the place where the ship is registered, which is accompanied by documents in the form of:

a. *Grosse*deed of registration or transfer of ship name;
b. Credit agreement;
c. Brush lettera surfacing (if needed).

If one meets the requirements, a mortgage deed is drawn up by the Registrar and Transfer Registrar, then a mortgage deed *grosse* is issued, which is given to the mortgage recipient. If the *grosse* mortgage deed is lost, based on a court order, a replacement deed *grosse* can be issued. In practice, making a mortgage deed on a ship can be done in two ways. (1) The lending bank or financial institution applies for a mortgage on the ship to the Port Administrator/Head of the Port Office where the ship is registered by attaching the following documents, namely Original *grosse* deed of registration/transfer of ship name; (a) Power of attorney to install a mortgage (according to Article 1171 of the Civil Code); (b) Credit agreement; (c) Appearing power of attorney (if needed).

Each creditor and debtor apply for a mortgage on a ship to the Port Administrator/Head of the Port Office at the place where the ship is registered by attaching the following documents; (a) Original *grosse* deed of registration/transfer of ship name; (b) Credit agreement; (c) Appearing power of attorney (if needed); (d) Letter of approval from the Commissioner of the Mortgage-encumbered Ship Ownership Company.

Furthermore, in the provisions of Article 63 of Law Number 17 of 2008, it regulates again the provisions regarding the write-off of ship mortgages that are not much different from the provisions contained in Article 35 of Government Regulation Number 51 of 2002, which reads as follows; (1) Mortgage write-off (roya) is carried out by the Registrar and Registrar of Ship Transfer at the written request of the mortgage recipient. (2) If the request is referred to in paragraph; and (3) filed by the mortgage giver, the request is accompanied by a written-off letter of approval from the mortgage recipient.

Based on the provisions above, it can be seen that penstreak (roya) mortgage on the ship or other property rights on the ship is carried out by the Registrar and Registrar of the Transfer of the Name of the Ship, which is registered at a written request from the recipient or mortgage holder concerned or at a written request from the mortgage provider accompanied by a royal approval letter from the mortgage recipient. In addition, the write-off of mortgages on ships and other objects on ships, apart from being based on the request of the mortgage giver or recipient, can also be carried out based on a court decision with permanent legal force.

Implementation of Material Law Principles in Ship Mortgage

The legal principle is the most important part of enacting law in society. According to Satjipto Rahardjo, the principle of law gives ethical meaning to legal regulations from ethical values upheld. In other words, the legal principle is a bridge between legal regulations and the ethical views of society. If these ethical values are the result of consideration, in the sense that they reflect the will of the people who uphold them, then the principle is an abstract conception of how it should be (Satjipto, 2000).

According to Reid (2004), the principle of law is a fundamental rule of judgment in a legal system. Alexander, L., & Kress (1996) views legal principles as principles considered basic or fundamental to law and as notions that become the starting point for thinking about law, including the starting point for forming laws and interpreting the laws themselves.

From the understanding of mortgages both provided by the Civil Code (Article 1162) and the understanding of ship mortgages provided for in the Shipping Law No.17 of 2008 (Article 1 number 12), classifying mortgages as collateral is included in the legal group of material guarantees (*zakelijke zekerheidsrecht*) which is a sub-system of the law of objects. Thus, the law on ship mortgage guarantees whose objects are objects is a sub-system of the object law system, which contains the principles of material law as follows. (a) Principle of Closed System (*Gesloten* system). The closed system principle implies that it is not permissible to hold other material guarantee rights based on an agreement other than what has been regulated in laws and regulations governing material guarantee rights. Arrangements for material security rights, among others, are contained in the Civil Code, laws and regulations concerning Ship Mortgage, Mortgage Law No.4 of 1996, and Fiduciary Law No.42 of 1999. Thus, this material security right is absolute and therefore limited.

(b) Principle of Priority Rights (preference). Based on this principle, if there are several creditors, there will be creditors who have the right to take precedence or preference (Droit de preference) in paying off their receivables by the debtor. This principle is expressly stated in Article 1 number 12 of Law No. 17 of 2008 concerning Shipping which states that a ship mortgage is a material collateral right for a registered ship to guarantee the repayment of certain debts, which gives a preferred position to certain creditors over other creditors. Preferred creditors are creditors who are domiciled as first mortgage holders.

(C) The principle of material rights (*droit de suite*). Ship Mortgage as a guarantee institution included in the material guarantee group is inherent like material rights where the ship mortgage

rights still follow the object (collateral) in the hands of whomever the object is in (*droit de suite*). In such a position, the creditor still has the right to the collateral object even though the ownership has been transferred to a third party, so if the debtor defaults, the creditor has the right to execute the collateral object to pay off the debtor's debt to the creditor.

(D) Principle of Specialty; The principle of specialization will provide a detailed explanation of matters related to the existence of an object of guarantee. The principle of specialization concerning ship mortgages requires information or information about the specifications of a ship that is used as collateral in a ship mortgage. This information will be clearly stated in the ship mortgage deed based on the ship registration deed, which must be attached in making the ship mortgage deed. Ship mortgage provisions in the Shipping Law stipulate that only registered ships can be used as collateral for ship mortgages. Fulfilling the principle of specialization will be very useful when the creditor executes the collateral object so that errors do not occur with the collateral object to be executed.

(E) Principles of Publicity. The principle of publicity in ship mortgage guarantees means that there is an opportunity for the general public to access data about whether a ship has been mortgaged or not. The provisions on ship mortgages in the Shipping Law explicitly stipulate that ships that have been burdened with mortgage collateral must be recorded in the master register of the ship. This registration is intended to make it easy to determine which ships have mortgage security rights attached to them. It is, of course, very useful for related parties, especially for creditors, so it can be a consideration in giving credit to debtors with a ship mortgage guarantee.

(F) Easy and Certain Principles in Execution. The purpose of imposing ship mortgage collateral in the credit agreement between the creditor and the debtor is to guarantee the creditor the fulfillment of his rights by the debtor. If the debtor defaults, the creditor can execute the collateral object to pay off the debtor's debt. Therefore, executing collateral objects must be carried out easily and with certainty. The principle of ease and certainty in the implementation of execution has been regulated in Article 60 paragraph (4) of Law No. 17 of 2008 concerning Shipping which states that the gross mortgage deed has the same executive power as a court decision that has obtained permanent legal force.

4. Conclusion

Based on the writing above, it is concluded some points as follows. (1) The legal system for mortgage guarantees on ships as material collateral is embedded in the principles of material law, which provide protection and legal certainty for creditors in fulfilling debtor obligations for repayment of credit or loans provided by creditors. (2) The existence of a ship mortgage guarantee institution in the guarantee law system in Indonesia has not been able to provide protection and legal certainty to creditors because the ship mortgage guarantee legal arrangements have not been comprehensively regulated in one law, nor are the arrangements in a complete material guarantee legal system. But still partially. (3) The legal nature of ship mortgage guarantees as the legal principles of ship mortgage guarantees which underlie the legal norms of ship mortgage guarantees will function properly if the formulation of ship mortgage law norms is formulated clearly so that it does not open up opportunities for multiple interpretations by law enforcement officials.

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