

## Legal Implications of Private Credit Agreements Registered with a Notary on the Validity of Mortgage Guarantees in Banking Practices.

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### Abstract

*This study analyzes the legal implications of the use of private credit agreements registered with a notary on the validity of Mortgage guarantees in banking practices in Indonesia. Although the banking sector is highly dependent on collateral, often the principal credit agreement underlying the Mortgage is made privately and only legalized by a notary. The first problem formulation examines the legal status of private credit agreements registered with a notary. It was found that the deed remains a private deed. However, registration with a notary provides certainty of the date and signature, thereby increasing its formal evidentiary power. However, notary legalization does not guarantee the material truth of the agreement's contents, leaving the potential for disputes if the contents of the agreement are disputed. The second problem formulation discusses the legal implications of registering the deed on the validity of the Mortgage guarantee. Formally, this legalized deed is sufficient as a basis for the PPAT to issue a Deed of Granting Mortgage Rights (APHT). However, based on the principle of accession, if the principal credit agreement is proven to be legally flawed or void at a later date, the mortgage attached to it will also be void by law. This places a heavier burden of proof on the bank as the creditor in the event of a dispute regarding the validity of the agreement's contents. In conclusion, although registering a private credit agreement deed with a notary increases formal certainty, it does not completely eliminate legal risks related to the validity of the agreement's contents and its impact on the mortgage guarantee. Therefore, banking practices should prioritize the preparation of credit agreements in the form of authentic deeds before a notary to achieve maximum legal certainty and minimize the risk of disputes.*

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### 1. INTRODUCTION

Etymologically, the term credit comes from the Latin "credere" which means trust. For example, a debtor customer who obtains credit from a bank is someone who has the bank's trust. This shows that the basis for granting credit by the bank to the debtor customer is trust. According to the Big Indonesian Dictionary, one definition of credit is a loan of money with installment payments or a loan until a certain time limit permitted by the bank or other agency. In Article 1 paragraph (11) of Law Number 10 of 1998, it is formulated that credit is the provision of money or bills that can be equated with it, based on an agreement or loan agreement between the bank and another party that requires the borrower to repay the debt after a certain period of time with the provision of interest.

The banking sector is one of the main pillars of a country's economy, playing a vital role in mobilizing funds and distributing credit for various productive activities. In carrying out their intermediary function, banks rely heavily on collateral to mitigate the risks of their loans. One form of collateral commonly used in banking practice, particularly for large- or medium-scale loans, is called a Mortgage Right. This Mortgage Right provides a special position to the creditor (bank) because it is attached to the land and/or building, thus providing greater certainty of debt repayment. The establishment of a Mortgage Right must be carried out with an authentic deed drawn up by a Land Deed Official (PPAT), as stipulated in Law Number 4 of 1996 concerning Mortgage Rights. However, in practice, the principal credit agreement underlying the granting of the Mortgage Right is often made in the form of a private deed between the debtor and the bank.

A private deed, although legally binding on the parties who made it, does not have the same evidentiary power as an authentic deed. To provide stronger legal certainty and as one of the requirements for registering a mortgage, the private credit agreement deed is often registered or legalized with a notary. This registration or legalization raises legal questions regarding the legal status of the private credit agreement deed that has been registered with a notary, and further, its implications for the validity of the mortgage guarantee arising from the agreement.

This phenomenon is relevant considering that notaries, as public officials, have the authority to create authentic deeds and register and legalize private deeds. Article 15 of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary Public explicitly regulates the authority of notaries to legalize private deeds. However, notarial legalization does not automatically change the status of a private deed to an authentic deed; it only provides certainty regarding the date and signatures of the parties. This creates complexity, especially if a dispute arises later regarding the authenticity or validity of the contents of the credit agreement.

Problems arise when a private credit agreement deed that is only legalized or registered with a Notary is used as the basis for the creation of a deed granting Mortgage Rights by a PPAT. This has the potential to create legal uncertainty for banks as creditors, which ultimately can threaten the certainty of credit repayment and the stability of the banking sector. Therefore, research on the legal implications of private credit agreement deeds registered with a Notary on the validity of Mortgage Rights guarantees in banking practice is very crucial. This research is expected to provide a comprehensive understanding of the legal status of private deeds legalized by a Notary, analyze the extent to which such registration affects the validity of Mortgage Rights, and provide recommendations for related parties to create better legal certainty in credit transactions involving Mortgage Rights guarantees.

In the Big Indonesian Dictionary, collateral is defined as goods used as collateral, while the collateral itself means collateral for a loan received. In Article 1 paragraph (1) of the Mortgage Law, a mortgage is a Security Right imposed on land rights as referred to in Law Number 5 of 1960 concerning Basic Agrarian Principles, including or not including other objects that are an integral part of the land for the repayment of certain debts, which gives the creditor a priority position over other creditors. Prof. Budi Harsono defines a Mortgage Right as control of land rights, containing the authority for the creditor to do something regarding the land used as collateral. But not to be physically controlled and used, but to sell it if the debtor defaults, and to take all or part of the proceeds as payment for the debtor's debt to him.

Mortgage Rights are the use of land rights as collateral for financing, which is one form of credit activity. In financing agreements and debt-to-debt relationships between creditors and debtors, it is very necessary. In principle, the encumbrance of the Mortgage

Rights must be carried out by the Mortgage Right provider themselves. However, if the Mortgage Right provider is prevented or unable to attend before the Land Deed Making Officer when signing the APHT, it is permitted to use a Power of Attorney to Encumber the Mortgage Right (hereinafter written as SKMHT) which is a statement of power of attorney given by the principal or mortgagee by appointing another party as his attorney in an authentic deed made by a Notary or PPAT. In line with that, the power of attorney must be given directly by the Mortgage Right provider and must meet the requirements regarding its contents as stipulated in the provisions of Article 15 paragraph (1) of the UUHT.

In the provisions of Article 15 paragraph (1) of the UUHT it is stipulated that SKMHT is mandatory and may be made by a Notary or PPAT, however in its implementation, Notaries must often adjust to the wishes of the National Land Agency which requires notaries to make SKMHT in accordance with the form provided by the National Land Agency so that the SKMHT deed made by a notary does not comply with the provisions of Article 38 of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary (which will hereinafter be written as UUJN) which stipulates the form of notarial deed.

As legal entities, both individuals and companies face limitations in achieving their goals and developing their businesses, one of which is capital. In this context, the legal and economic sectors support each other. The need for capital can be met through credit/loans from third parties, including banks. A bank is a financial intermediary institution that collects funds from the public. Banks collect funds in various ways, including savings, deposits, checking accounts, and others. Banks not only collect funds but also distribute them in various forms. Credit agreements also bind the parties with collateral agreements. This is done by banks to ensure that the credit provided to customers can be used according to their needs and can be returned safely. Therefore, having collateral in the form of a specific collateral agreement can reduce the risk that might occur if the credit recipient defaults or is unable to repay the credit or loan.

## **2. RESEARCH METHODS**

The research method used is Normative Juridical to produce useful results. This normative juridical method is combined with literature related to the problem being studied, and prioritizes analysis using applicable laws and regulations as an important basis for analyzing legal issues. Secondary data sources, such as books, articles, and legal journals. This research aims to understand the relevant legal context and interpret existing provisions. The approaches used in this research are a conceptual approach through a doctrinal perspective, as well as a statutory approach, which analyzes laws and regulations that correlate and relate legally to the problem under study. The author's data collection method uses a literature study related to the object and cites references including Legislation, Journals, Books, Articles and the Internet. The data analysis method used is a qualitative analysis sourced from legislation, expert views, legal concepts and theories as well as an understanding of the results of the analysis itself.

## **3. RESEARCH RESULTS AND DISCUSSION**

### **3.1. The legal status of a credit agreement deed made privately but then registered with a notary in banking practice.**

In Indonesian banking practice, the creation of a credit agreement is often a crucial point in the relationship between the bank as creditor and the customer as debtor. Ideally, every crucial agreement, such as a credit agreement, should be drawn up in the form of an authentic deed before an authorized official to provide maximum legal certainty. However, it is not uncommon for credit agreements to be initially drawn up

privately, only to be registered or legalized with a notary. This raises fundamental questions regarding the legal status of such deeds and their implications for banking practice, particularly regarding credit guarantees.

Fundamentally, a private deed is a deed made and signed by the parties without the involvement of or presence of an authorized public official. The evidentiary force of a private deed is regulated in Article 1874 of the Civil Code, which states that a private deed only has full evidentiary force if acknowledged by the party against whom it is used. This means that if one party denies the authenticity of the signature or the contents of the deed, then the party claiming the authenticity of the deed must prove it. This certainly creates the risk of legal uncertainty and potential disputes in the future, which is highly avoided in banking transactions involving large amounts.

A credit agreement is a means of development to obtain credit, the credit recipient is bound by certain conditions and is an agreement made by the creditor and debtor based on the agreement or agreement of the creditor and debtor, while the creditor is obliged to provide money or credit to the debtor and the debtor is obliged to pay the principal and interest, as well as other costs according to the agreed time period between the two. The creditor is a person or legal entity that provides credit to the debtor. The debtor is a person or legal entity that receives credit from the creditor.

Credit according to Law Number 7 of 1992 Article 1 number 12, credit is the provision of money or bills that are equivalent to it, based on a loan agreement or agreement to repay the debt within a certain period of time with the provision of interest. The creditor provides credit to the debtor and the debtor is obliged to pay the principal and interest, as well as other costs. Loan interest is income received by the creditor periodically for the use of credit by the debtor, as agreed in the credit, as well as other costs including late fines in principal and interest payments. The credit term is the validity period of the credit agreement made by the parties.

A notarial deed as evidence will be fully substantiated if all provisions, procedures, and procedures for making the deed are met. If any procedure is not met and can be proven, the deed can be declared a private deed through a court process, the proof of which is submitted to the judge. The provisions in the form mostly benefit the bank/creditor and tend to be detrimental to the customer/debtor. Therefore, in addition to the requirement for a credit agreement as the main agreement, for the benefit of the bank, in this case the guarantee of repayment of the credit provided, the collateral or collateral submitted by the debtor, must be bound or burdened with a mortgage.

A notary as a public official has the authority to register or legalize private deeds, as regulated in Article 15 paragraph (2) letter b of the Notary Law (UUJN). Registration or legalization of private deeds by a notary is not to change the status of the deed to an authentic deed. This means that the deed remains a private deed. Registration or legalization by a notary provides two important benefits. First, certainty of date. By registering a private deed with a notary, the date of the deed is certain and has strong evidentiary power. This is important for determining the priority or chronological order of a legal event. Second, with certainty of signature, the notary will witness the signing of the deed or ensure that the signature on the deed is indeed the signature of the party concerned. This makes it difficult for parties who want to deny the validity of their signature at a later date.

However, notarial legalization does not make the contents of the private deed authentic. This means that the notary is not responsible for the material accuracy of the credit agreement. If the contents of the agreement violate the law, the notary cannot be held accountable based on the legalization.

In banking practice, banks often accept private credit agreements registered with a notary as the basis for securing collateral, particularly mortgages. From the bank's perspective, registration with a notary is seen as a step to strengthen the deed's legal standing, at least with regard to the date and signature. Banks assume that notarized legalization reduces the risk of the debtor denying the agreement. A potential risk for banks is the possibility of claims that the terms of the credit agreement do not conform to the original agreement or contain elements of fraud, even if the signatures and dates have been certified. Banks must be prepared for a more complex evidentiary process than if the credit agreement had been drawn up in an authentic deed from the outset.

A privately drawn up credit agreement that is then registered with a notary has the legal standing of a private deed, with a certain date and signature. A notary provides stronger evidentiary power regarding the formality of the deed, but does not make the contents authentic. In banking practice, this is considered an additional security measure, but it does not completely eliminate the risk of disputes regarding the material veracity of the agreement's contents. Therefore, for banks and customers, preparing an authentic credit agreement deed before a notary remains the best option to achieve the highest level of legal certainty and minimize the potential for future disputes.

### **3.2. Illegal implications of registering a private credit agreement deed with a notary regarding the validity of the underlying mortgage guarantee.**

In banking practice, a Mortgage Right is a very important form of collateral for banks, providing a preferential position and direct execution rights over land and/or buildings. The establishment of a Mortgage Right must be carried out with an authentic deed drawn up by a Land Deed Official (PPAT), as stipulated in Law Number 4 of 1996 concerning Mortgage Rights (UUHT). However, this deed of granting a Mortgage Right (APHT) is always a secondary deed arising from a principal agreement, namely a credit agreement. Often, the credit agreement itself is made in the form of a private deed which is then registered or legalized by a Notary. This raises crucial questions regarding the legal implications of registering the private deed on the validity of the Mortgage Right that serves as collateral.

An important principle in collateral law is the principle of accessor city, which means that the Mortgage Right acts as a subsidiary agreement (accessories) to the principal agreement, namely the credit agreement. This means that the existence and validity of the Mortgage Right are highly dependent on the existence and validity of the underlying credit agreement. If the principal credit agreement is legally flawed or void, then the Mortgage Right arising from it may also be invalid or lapse. As previously discussed, registering or legalizing a private credit agreement deed with a notary provides certainty of the date and certainty of the signature. The notary will record it in his/her record, making the date of the deed definitive and difficult to dispute. In addition, the notary can ensure that the parties signing the deed are indeed the real persons. However, it should be reiterated that notarial legalization does not change the status of a private deed to an authentic deed, and does not guarantee the material truth of the contents of the credit agreement.

Although a private credit agreement deed registered with a Notary has stronger evidentiary power regarding the date and signature, its implications for the validity of the Mortgage Right require a more in-depth analysis:

1. Formal Validity of the Deed of Grant of Mortgage Rights (APHT) The preparation of an APHT by a Land Deed Official (PPAT) must be based on a valid principal agreement. Registering a private credit agreement deed with a Notary helps the PPAT ensure that the principal agreement exists and is signed by the parties on a specific

- date. From a formality perspective, this legalization provides a strong basis for the PPAT to prepare an APHT, as the PPAT does not have the authority to verify the material validity of the principal agreement, but only the formality of its existence.
2. The Potential for Mortgage Cancellation Due to Material Defects in the Principal Agreement is crucial. Although registration with a Notary provides stronger evidentiary force regarding the formalities of a private deed, it does not prevent third parties or interested parties from challenging the validity of the contents of the credit agreement at a later date. For example, if it is proven that the credit agreement was made under duress, fraud, or contained a fundamental error in the object, the credit agreement can be declared null and void by the court. If the principal credit agreement is declared null and void, then based on the principle of accession, the underlying Mortgage Right will also be null and void by law.
  3. Burden of Proof in Disputes: If a dispute arises regarding the validity of the credit agreement that forms the basis of the mortgage, the bank, as the creditor, may face a heavier burden of proof than if the credit agreement were drawn up in an authentic deed. Even if the date and signature have been notarized, the bank must prove that the contents of the agreement are valid and true. This differs from an authentic deed, where the contents are presumed true until proven otherwise.
  4. Risks for Banks: For banks, using a private credit agreement registered with a notary as the basis for a mortgage increases risk. This risk arises primarily if the debtor files a lawsuit to cancel the credit agreement on the grounds of material defects. If the lawsuit is successful, the bank could lose the mortgage as collateral, which means losing preferential rights and ease of execution, as well as facing a lengthy and expensive litigation process.

The concept of a state based on the rule of law, as mentioned above, is rooted in the Indonesian state ideology, Pancasila. The principle of legal protection, as outlined above, serves as a foundation and explains that legal protection provided by the state rests on the guarantee of human rights and prioritizes the principle of government basing its actions on the law. Therefore, to achieve legal protection, legal instruments are paramount. Furthermore, the spirit of law enforcement officers is also needed to diligently carry out their duties in accordance with applicable legal regulations without discrimination. The Notary Law is a legal instrument intended to provide legal certainty and protection for notaries in carrying out their profession as officials who make authentic deeds. Therefore, the UUJN contains legal regulations, one of which is a form of legal protection for notaries.

The authority of a notary in carrying out his/her duties is contained in Article 15 paragraph (1) of the UUJN, namely the authority to make authentic deeds as previously mentioned, guarantee the certainty of the date of making the deed, keep the deed, provide grosse, copies and extracts of the deed. In addition, there are other authorities held by a notary as referred to in Article 15 paragraph (2) of the UUJN, including making deeds related to land. As well as other authorities regulated in statutory regulations. The authentic deed referred to is a notarial deed or "a deed made by or before a Notary according to the form and procedures stipulated in the UUJN." The position of Notary as a public office has characteristics, including Notary as a Position, Notary who has certain authorities, Notary who is appointed and dismissed by the government. Although Notaries are administratively appointed and dismissed by the government, it does not mean that Notaries are subordinate to the government, but Notaries in carrying out their duties must be independent, not take sides with anyone, and not depend on anyone.

Registering a private credit agreement with a notary does increase the evidentiary power of the date and signature, which is formally sufficient for the PPAT to proceed with the issuance of the APHT. However, legally, this does not automatically guarantee the absolute validity of the Mortgage if the underlying principal credit agreement is found to contain material defects that could lead to its cancellation or nullification by the court. The principle of ancestralism remains in effect, and weaknesses in the principal agreement will impact the Mortgage guarantee. Therefore, to minimize risk and ensure maximum legal certainty, banking practices should prioritize the preparation of an authentic credit agreement before a notary from the outset. This will provide complete evidentiary power from both formal and material perspectives, thereby more effectively protecting the bank's interests as a creditor and providing legal certainty for all relevant parties.

#### 4. CONCLUSION

**Legal Status of Private Credit Agreements Registered with a Notary Regarding the Status of Permanent Private Deeds** Even though registered or legalized with a Notary, the credit agreement remains in substance a private deed. The notary does not change its status to an authentic deed. Registration with a Notary provides certainty of the date of the deed's creation and the certainty of the parties' signatures. This is very important to avoid future denials regarding when the deed was created and who signed it. It should be emphasized that notarial legalization does not guarantee the material truth of the credit agreement. The notary only ensures the formality of the deed and signatures, not the validity or truth of the agreement's contents.

**Legal Implications for the Validity of Mortgage Guarantees.** APHT Formalities Fulfilled From a formal perspective, registering a private credit agreement deed with a Notary is sufficient as a basis for the Land Deed Official (PPAT) to issue a Deed of Mortgage Grant (APHT). The PPAT only requires proof of a formally valid principal agreement to issue an APHT. Risk of Collateral Void Due to Defects in the Principal Agreement However, the principle of accessorizing remains absolutely valid.

If the principal credit agreement underlying the Mortgage is proven to be legally flawed or declared void by the court, then the Mortgage attached to it will automatically be void by law. **Heavier Burden of Proof for Banks.** In a dispute situation, the bank as the creditor may face a heavier burden of proof if the credit agreement is only in the form of a private deed legalized by a notary, compared to an authentic deed. The bank may have to prove the material truth of the contents of the credit agreement if it is disputed, even if the date and signature are strong.

Overall, the use of private credit agreements registered with a notary in banking practices does provide increased formal certainty. However, this does not completely eliminate legal risks related to the validity of the agreement's contents and its impact on the mortgage. To achieve complete legal certainty and minimize the risk of disputes, the credit agreement must be authenticated before a notary. since the beginning it has remained the most recommended choice in banking practice.

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