



RESCUE OF COLLATERAL OBJECTS OWNED THIRD PARTIES DUE TO BREACH OF DEBTORS WITH SUBROGATION AS LEGAL REMEDIES IN SHIP CASES ABOVE 20 m³

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Abstract

Payments can also have limited consequences in the sense that these payments only result in the role of the Creditor being replaced by another Creditor and the Debtor will be faced with a new Creditor who has the right to request payment from the Debtor or what is known as Subrogation and in this study occurs in the case of ships over 20 m² as a Hipotek . Ships can meet the criteria or requirements to become collateral for credit settlement in the form of a Hipotek. Ships As Collateral for Repayment of Credit where the Hipotek is a material right to immovable objects. Ships can be divided into two, namely those weighing above 20 m³ and below 20 m³ . This paper aims to find out which ships can be charged with a Hipotek, so that they can be used as collateral for credit repayment. The method used is normative legal research, namely an approach by studying the applicable laws and regulations. The conclusion of this paper is that a Hipotek is a form of credit repayment guarantee, which is regulated in Burgelik Wetboek . Hipotek can be applied to objects in the form of ships. Ships As Guarantees for Repayment of Credit where the Hipotek is a material right to immovable objects which in this study uses subrogation as a legal remedy used.

Keywords: Breach of Debtors, Cases of Ships Above 20 m³, Subrogation.

1. INTRODUCTION

Burgelik Wetboek provides a general understanding of Hipotek, but apart from the Hipotek it is also necessary to know about the Ship in question, so that the Vessel can meet the criteria or requirements to become collateral for repayment of credit in the form of a Hipotek. The ship in the General Indonesian Dictionary is a large boat that is run by an engine driven by smoke and can be used as a carrier.¹

Ships are usually large enough to carry small boats such as lifeboats. Apart from that, in Article 1 number (2) and Article 49 of Law Number 21 of 1992 concerning Shipping, it states that a ship is a watercraft of any shape and type, propelled by mechanical power, wind power or towing, including vehicles with carrying capacity. dynamic, underwater vehicles, as well as floating equipment and buildings that do not move around. Ships that meet the requirements to be charged with a Hipotek, namely the weight of the ship above 20 m³, besides that there are material rights (according to Article 1175 of Burgelik Wetboek), the ship has been registered in Indonesia, given with an authentic deed (deed made by an authorized official or Notary) and guarantee debt claims (Article 1176 of Burgelik Wetboek).

Ships are usually registered at the Sea Transportation Office (Syahbandar) and will be burdened with a Hipotek (loading) with an object weight of 20 m³ . Registration using a notarial deed. Presidential Decree No. 209 1958, as an employee official behind the name is Syahbandar , while the Notary only makes the deed.

¹ Poerwadar Minta. (2007) General Indonesian Dictionary (Third Edition), Balai Pustaka, Jakarta, p.519

After fulfilling these conditions, the Ship can be charged with Hipotek and can proceed with the Hipotek registration stage on the Ship, namely making a Hipotek deed by the parties, both the debtor and the creditor at the ship's registrar's office, then the Hipotek deed is brought to the Tax Inspector to obtain an PAP (Power of Attorney to Pay) bea materai. So that the ship can be used as guarantor of credit settlement.

Hipotek as explained in Article 1162 of Burgelik Wetboek is a material right over immovable objects, to take reimbursement for the settlement of an agreement.² The Hipotek is *accessoir* which means that the Hipotek agreement is an addition to the main agreement. Actions against a ship Hipotek will not be separated from the credit agreement and the Hipotek promises included in the agreement are *an accessoir* to the credit agreement.³ Ships can be divided into two, namely ships weighing over 20 m³ and ships weighing under 20 m³. So it is this difference that distinguishes the type of collateral charge for ships weighing over 20 m³ and weighing under 20 m³.

As previously known, Hipoteks are regulated in Burgelik Wetboek . Even though the provisions in Burgelik Wetboek regarding Hipoteks are no longer fully applicable because there has been a law that specifically regulates guarantees, they are still guided by a higher regulation, Burgelik Wetboek . Apart from that, in Article 1162 of Burgelik Wetboek , in Article 1168 of Burgelik Wetboek it is also stated regarding the meaning of a Hipotek, namely that a Hipotek cannot be placed other than by the person in charge of transferring the encumbered object. So, it can be said that a Hipotek is a material right to an immovable object (fixed object), for the repayment of certain debts, which gives a priority or precedence position to the holder.⁴

According to Djaja S. Meliala, Objects can be divided into: a. Tangible and intangible objects (Article 503 of Burgelik Wetboek) b. Movable and immovable objects (Article 504 of Burgelik Wetboek) c. Objects can be used up and cannot be used up (Article 505 of Burgelik Wetboek) d. Objects that already exist and objects that will exist (Article 1334 of Burgelik Wetboek) e. Objects in trade and outside trade (Articles 537, 1444 and 1445 of Burgelik Wetboek) f. Objects that can be divided and cannot be divided (Article 1296 of Burgelik Wetboek) g. Registered and unregistered objects (Underholding Law, Fidusia) h. Objects in the name and not in the name (Article 613 of Burgelik Wetboek in the UUPA and PP No. 24 of 1997 concerning Land Registration).⁵ Based on the differences in the types of objects mentioned above, what is most important is the difference between movable and immovable property, as well as the difference between registered and unregistered objects.⁶

Examples of registered objects, for example: motorized vehicles, land, ships, copyrights, Hipoteks, fiduciaries, telephones, and so on. While objects that are not registered (not in the name) are movable objects that are not difficult to prove the owner because the principle applies "the owner is considered as the owner", such as household appliances, clothes, jewelry, pets etc. The importance of this distinction lies in proving the owner (for public order). Registered objects are proven by a registration mark, or a certificate in the name of the owner, while for unregistered objects (not on behalf of) the principle applies "those who control are considered as the owners."⁷ The Indonesian Burgelik Wetboek does not recognize the difference between registered and

²Enjoy, Sentosa. (2008) Banking Law, CV. Mandar Maju, Bandung , p.74 .

³Hasan, Djuhaendah. (1998) Indonesia Guarantee Law , ELIPS, no city of publication, p.254.

⁴Usman, Rahmadi. (2013) Property Law, Sinar Graphic , Jakarta , p.299.

⁵Djaj S. Meliala. (2015) The Development of Civil Law Concerning Objects and Contract law, Nuansa Aulia, Bandung.

⁶Sri Soedewi MMasjchoen Sofwan. (2020) Civil Law of Collateral Rights over Land, First Cet., Liberty, Yogyakarta.

⁷Abdulkadir Muhammad. (2014) Indonesian Civil Law, Citra Aditya Bakti, Bandung



unregistered objects, but the new BW (NBW) does. There are registered objects in the name and some are not in the name. On the other hand, some objects are registered and some are not registered. Objects on behalf of which are registered, for example, such as shares, receivables on behalf of, and others.⁸ Registered and registered objects are objects that are proven by registration marks or certificates in the name of the owner, for example: land, houses, copyrights, and others. Whereas registered objects are not in the name of , for example Hipotek rights, fidusia, warehouse receipt systems, and others, proven by a deed.

Article 1 number 12 No 17 2008 (Concerning Shipping), Ship Hipotek is a material collateral right for a registered ship to guarantee the repayment of certain debts that give priority to certain creditors over other creditors.

314 Paragraph 3 of the Commercial Law , Indonesian ships whose gross contents are at least 20 m³ can be recorded in the ship register according to regulations, which will be provided with a separate ordinance. This ordinance also stipulates the method of transfer of ownership and surrender of ships recorded in the register of said ships or ships under construction and shares in such ships or ships under construction. On ships under construction and shares on such ships and ships under construction recorded in the ship register can be held Hipoteks. On the ship mentioned in the first paragraph, lien cannot be held. For ships that are booked, Burgelik Wetboek article 1977 does not apply.

Based on this description, the author tries to provide an understanding in the literature review to answer the problems that arise in the credit for saving collateral belonging to third parties due to breach of debtors with Subrogation as a legal remedy in the case of ships above 20 m³ .

2. IMPLEMENTATION METHOD

The research conducted is a type of normative legal research. Based on several opinions relating to legal research, it can be defined that legal research is all a person's activities to answer legal problems that are academic and practical, both those that are legal principles, legal norms that live and develop in society, as well as those relating to legal reality in society.

Laws that are formulated in various forms of provisions in articles of the code of law, for example the Strafrecht, the Burgelik Wetboek, the Commercial Code and other laws are laws in the sense of norms or principles. Therefore in this study only use binding provisions based on legal norms, especially in civil law norms.

Data collection techniques in this study were in the form of document studies and interviews with respondents who are experts in the civil field, as well as parties who have been involved in similar matters in this study.

3. RESULTS AND DISCUSSION

3.1 Credit

According to Law no. 7 of 1992 concerning Banking as amended by Law no. 10 of 1998 (hereinafter referred to as the Banking Law) Article 1 paragraph (11), Credit is the provision of money or claims that can be equated with it, based on a loan agreement or agreement between the Bank and another party that requires the borrower to repay the debt after a certain period of time. certain time with interest, whereas in paragraph 2 Bank is a business entity that collects funds from the public in the form of savings and distributes them to the public in the form of credit and or other forms in order to improve the standard of living of the community.

⁸Djaj S. Meliala. (2015) The Development of Civil Law Concerning Objects and Contract law, Nuansa Aulia, Bandung.

From this article, it can be analyzed that the function of a bank in banking law in Indonesia is an institution that performs an *intermediary function*, namely an institution that collects and distributes public funds. Based on the *intermediary function*, the collection of public funds is called "savings", while the distribution of public funds is called "credit".⁹

Deposits are funds entrusted by the public to the Bank based on a fund deposit agreement in the form of demand deposits, deposits, certificates of deposit, savings and or other equivalent forms (Article 1 point (5) of the Banking Law). While credit is the provision of money or bills that can be equated with it, based on a loan agreement or agreement between the Bank and another party that requires the borrower to pay off the debt after a certain period of time with the provision of interest (Article 1 number (11) of the Banking Law). In relation to the function of channeling public funds in the form of credit, banking is one of the sources of funds for the community, both individuals and legal entities in meeting funding needs, so that credit today is used for the needs of the community in the continuity of its business, especially to meet capital needs. .

Credit activity is a process of forming the Bank's assets. Credit is a *risk asset* for the Bank because the Bank's assets are controlled by parties outside the Bank, namely the Debtor. Every bank wants and tries hard so that the quality of this *risk asset* is healthy in the sense of being productive and *collectable*. However, credit given to the Debtor is always at risk in the form of credit not being able to return on time, which is called a non-performing *loan* (NPL).

Non-performing loans always exist in bank credit activities because the bank avoids the impossibility of having problem loans. Banks only try to reduce the amount of non-performing loans to a minimum so that they do not exceed Bank Indonesia (BI) regulations and try to reduce these risks as desired by banking supervisors.¹⁰

The provision of credit facilities creates risks that must be faced by the Bank (Creditor). The level of risk (*degree of risk*) is as a result of the existence of a period of time that separates the granting of credit and repayment of credit to be received later. During the credit granting period, many events may occur to the Debtor, such as the Debtor's death, an increase in the Debtor's legal status in the event that the Debtor is a business entity, and so on. These events are not a problem as long as the payment is made.

Payment is one way to end a credit agreement/agreement, including ending receivables arising from billing rights. As long as the right to claim is still "alive", then the right to claim can change Creditor, Debtor or the object of the agreement. For example, if the debtor dies or an increase in the legal status of the debtor is carried out while the credit period is still ongoing, the bank needs to carry out a passive subjective novation (novation for the debtor), or other replacements may be carried out, such as in *cessie* and subrogation. In this case, there is the possibility of a triangular legal relationship or the involvement of three parties in a legal relationship. This legal event is a complicated legal institution as is the case with representation, promises to third parties (*derdenbeding*) and indirect enrichment (*indirecte verrijking*) because it can cause problems and require deeper thought as is the case with Subrogation, *cessie* and novation. Transfer or transfer of rights (*cessie*), replacement of creditors due to payment (subrogation) or renewal of debt (novation), are legal acts that are often carried out by banks related to loans extended to the public, which are variations and patterns in credit distribution.

⁹Try Widyono. (2006) "Operational Banking Product Transactions in Indonesia," Galia Indonesia, Indonesia, Bandung.

¹⁰Shadli Rolaskhi et al. (2022) Theory and Application of Financial Accounting (Muhammad Zaini Publishers Foundation,).



Subrogation

Subrogation is the change of old creditor to new creditor . For example, Debtor A enters into a debt agreement with Creditor B. Because Creditor B really needs funds from a loan made by Debtor A, there are 2 (two) possibilities for Creditor B's loan funds to return, namely *first*, Creditor B looks for Creditor C (as new creditor) to replace his position as creditor. That is, Creditor B transfers his receivables by asking Creditor C to pay off debts from Debtor A, so that later those who have a debt relationship are Debtor A and Creditor C. *Second*, Debtor A looks for Creditor C (as the new creditor) to pay off his debts to Creditor B. That is, if Creditor C repays Debtor A's debt, then only Debtor A and Creditor C will have a legal relationship.

Subrogation has the following characteristics :

1. Subrogation is an Accessoir Agreement, in which the agreement is also transferred to the New Creditor following the main agreement;
2. In Subrogation, old debts are deleted, to be revived again for the benefit of the New Creditor;
3. In Subrogation, Third Parties pay to Creditors, Debtors are passive parties;
4. Subrogation does not absolutely have to use a deed, except for Subrogation born from an agreement where the Debtor receives money from a third party to pay his debts to the Creditor;
5. In Subrogation, Notice is required but not a condition for the Subrogation to apply;
6. Subrogation must be stated explicitly because the purpose of a third party to pay the Creditor is to replace the position of the Old Creditor so that the Third Party can obtain full rights over the Debtor;
7. Subrogation must be made at the time of payment.

Objects of Subrogation are movable objects both tangible and intangible and immovable objects both tangible and intangible.

Occurrence of Engagement on Subrogation:

1. Subrogation occurs because of payments made by third parties to creditors, either directly or indirectly;
2. Subrogation can occur because of laws and agreements;
3. Subrogation occurs before *the Juridische Levering takes place* or the legal act of transferring property rights from the seller to the buyer.

3.2 Subrogation (Debt Payment by Third Parties)

According to Article 1831 of Burgelik Wetboek , payment is one of the elimination of a perfect agreement. Payment in a narrow sense is debt, while payment in a broad sense is fulfillment of obligations. With the payment or fulfillment of achievements to creditors, frees the debtor from his obligations and in principle terminates the engagement. Payments can also have limited consequences in the sense that these payments only result in the role of the Creditor being replaced by another Creditor and the Debtor will be faced with a new Creditor who has the right to demand payment from the Debtor or what is known as Subrogation.

The result of subrogation is the transfer of creditors' receivables to third parties who make payments. The provisions of Article 1400 of Burgelik Wetboek provide a formulation, Subrogation is "replacement of the rights of the debtor by a third party, who pays the debtor, occurs either by agreement or by law," Based on this formulation, Subrogation is a third party payment to the

creditor either directly or indirectly, namely through debtors who borrow money from third parties. So, here debtors who have debts to creditors borrow money from third parties to pay money to creditors. This subrogation is an effort to prevent *unjust enrichment*, so that after the debtor has paid his debt to the creditor, he feels that he is free of debt even though he still has debt to third parties. Therefore, a third party must submit a Subrogation to replace the position of the old Creditor as a new Creditor against the Debtor. One of the cases that can be used as a settlement with subrogation is a ship above 20m³.

Ships are usually registered at the Sea Transportation Office (Syahbandar) and will be burdened with a Hipotek (loading) with an object weight of 20 m³. Registration using a notarial deed. Presidential Decree No. 209 1958, as an employee official behind the name is Syahbandar, while the Notary only makes the deed. After fulfilling these conditions, the Ship can be charged with Hipotek and can proceed with the Hipotek registration stage on the Ship, namely making a Hipotek deed by the parties, both the debtor and the creditor at the ship's registrar's office, then the Hipotek deed is brought to the Tax Inspector to obtain an PAP (Power of Attorney to Pay) bea materai. So that the ship can be used as guarantor of credit settlement.

On the basis of this, the elements contained in Subrogation are a) replacement of creditor rights by third parties; b) payment; and c) occurs either because of the agreement or because of the law. What is meant by Creditor's rights are rights owned by Creditors against their own Debtors, while third parties are parties who are neither Creditors nor Debtors (main).¹¹The third party obtains the Subrogation because it pays the Debtor's debts. The third party who makes the payment may be: 1) The third party who pays because he thinks he has a debt; 2) A third party who pays out of necessity because he is the Debtor's Debtor; 3) Third parties who voluntarily and knowingly pay other people's debts; 4) Third parties pay voluntarily to protect larger interests (third parties are *borgtoch* or Hipotek guarantors / Hipoteks). With payments made by third parties, the debts and receivables between the Debtor are paid off and the agreement is erased and creates new billing rights, which are not based on the old agreement which was deleted against the Debtor (Articles 1208 and 1839 of Burgelik Wetboek). This means that the payment creates a new agreement between the third party and the Debtor. The main feature of payment in the event of subrogation is that a third party replaces the creditor's rights against the debtor, which is nothing but that what is transferred is the rights owned by the creditor against the debtor based on and in the legal relationship between the debtor and the creditor.

In Subrogation, with payments by third parties, the agreement between the Debtor and Creditor is not deleted, so all *accessoires* and promises attached to the old agreement remain intact and are transferred to the new Creditor (third party). Therefore the debtor's obligations are not affected by the subrogation, it's just that now the creditor has changed. Subrogation according to law is divided into 2 (two), namely: 1) Subrogation based on agreement (1401 Burgelik Wetboek). The creditor states emphatically that he has received payments from third parties and the third party replaces his rights against the debtor including claims, privileges and Hipoteks. In this study, it is a ship with a capacity of 20 m³. Or, the Debtor states emphatically that he borrowed a sum of money from a third party and stipulates that the third party replaces the Creditor's rights to the Debtor. This statement must be made through an Authentic Deed. 2) Subrogation based on law (Article 1402 of Burgelik Wetboek). Subrogation occurs without the need for agreement between a third

¹¹Nasrullah Nasrullah et al. (2020) Tourism Marketing: Concept, Planning & Implementation (Yayasan Kita Tulis, 2020).



party and the old creditor , or between a third party and the debtor. In this article it is stated that if a creditor holding a second Hipotek pays off the creditor's creditor holding the first Hipotek, a subrogation occurs, namely the buyer replaces the position of the creditor holding the Hipotek. In the *common law* legal system (England and the Commonwealth of Nations), Subrogation is divided into 2 types, namely: 1) *Simple Subrogation* : In *simple subrogation* , third party payments of debtors' debts, do not necessarily eliminate the debt relationship between debtors and creditors. Even though the Creditor has received payment from a third party, he still has the right to ask the Debtor again (*Unjust Enrichment Creditor*).

Therefore, a third party must request that Subrogation be carried out so that the third party can act under the name of the Creditor to request payment to the Debtor. 2) *Reviving Subrogation* . In *Reviving Subrogation* , third party payments to creditors result in the termination of the debt-receivable relationship between the debtor and creditor. Because they are considered to have paid their debts, the debtor is not obliged to pay his debts to third parties (*Unjust Enrichment Debtor*). Therefore, the law gives third parties the right of subrogation. In this case, the third party requests payment of debt to the debtor using his own name because the relationship between the debtor and the old creditor has been erased. Regarding the two different types of Subrogation, Indonesia prefers to use the Reviving Subrogation system because it is possible that a third party is also a Debtor in a joint responsibility agreement who also has the obligation to pay debts to Creditors.

4. CONCLUSION

Hipotek is a form of collateral for repayment of credit, which is regulated in Burgelik Wetboek . Hipotek can be applied to objects in the form of ships. However, not all Ships can be charged with a Hipotek. Ships that can be charged with a Hipotek are only Ships that weigh 20 m³ or more, which are then registered and a Hipotek deed is made. Ships can meet the criteria or requirements to become collateral for credit settlement in the form of a Hipotek. Ships As Guarantees for Repayment of Credit where the Hipotek is a material right to immovable objects which in this study uses subrogation as a legal remedy used.

Subrogation occurs without the need for agreement between a third party and the old creditor , or between a third party and the debtor. In this article it is stated that if a creditor holding a second Hipotek pays off the creditor's creditor holding the first Hipotek, a subrogation occurs, namely the buyer replaces the position of the creditor holding the Hipotek. Thus the rescue of collateral belonging to third parties due to default debtors by way of subrogation can be overcome.

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