

## **Optimization of Debtor Protection in Problems *Misbruik van omstandigheden* What Creditors Do in The Execution of Viat Parate on Collateral Items**

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**Abstract.** *The existence of HT agreements often creates opportunities Misbruik van omstandigheden or misuse of circumstances that often harm the debtor as a powerless party due to a low bargaining position, because the debtor is a party that needs loan funds from the creditor, one of which is in the execution of parate collateral objects. This article aims to analyze the urgency of debtor protection from Misbruik van omstandigheden which is carried out by creditors in the implementation of parate HT executions. The method used in this paper is normative juridical. Based on the analysis conducted, it can be seen that Article 6 and Article 20 of the UUHT, which are also supported by Article 1178 paragraph (2) of the Civil Code, have resulted in loopholes for misuse of circumstances or misbruik van omstandigheden by creditors against debtors in terms of implementing agreements related to the execution of mortgage collateral objects. separately.*

**Keywords:** Agreement; Creditor; Debtor.

### **1. Introduction**

The existence of Act No. 5 of 1960 concerning Basic Agrarian Regulations (UUPA), has basically become the basis for the birth of Act No. 4 of 1996 concerning Mortgage Rights over Land and Land-Related Objects (UUHT).

In accordance with the provisions of Article 29 of the UUHT, the provisions regarding credit-verband are automatically no longer used or declared entirely no longer valid, while mortgage provisions:<sup>1</sup>

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<sup>1</sup>Ivida Dewi Amrih Suci and Herowati Poesoko, 2011, Rights of Separatist Creditors in Executing Collateral Objects of Debtors Cannot afford to pay, LaksBang PRESSindo, Yogyakarta, p. 200.

1. It is stated that it is no longer valid only with regard to the imposition of mortgages on land rights and objects related to land, because they are automatically subject to the terms and conditions set out in the UUHT.

2. It still applies with regard to the imposition of mortgages whose object is other than land rights along with objects related to land, namely mortgages on ships and mortgages on airplanes.

Referring to the provisions of Number 4, the general explanation of UUHT, among others, states: "A Mortgage Right is a security right over land for repayment of certain debts, which gives priority to certain creditors over other creditors".

This statement observes that if the debtor defaults, the creditor holding the Mortgage Right has the right to sell through a public auction the land used as collateral according to the provisions of the relevant laws and regulations with prior rights to other creditors. Thus, according to the description above, the UUHT stipulates that to protect creditors if the debtor defaults is through the execution of Mortgage Rights. So that if the debtor defaults, the holder of the first Mortgage has the right to sell the object of the Mortgage on his own power through an auction and collects the settlement of his receivables from the proceeds of the sale.<sup>2</sup>

The creditor as the petitioner for execution can execute the Mortgage object through parate execution (*beding van eigen matigen van koop*) provided that the deed of encumbrance of the Mortgage contains a promise that the holder of the first Mortgage has the right to sell the object of Mortgage under his own authority.<sup>3</sup>

With the promise to sell on their own power stated in the Mortgage Deed (APHT) and Mortgage Certificate (SHT), then if the debtor defaults, the creditor can execute the Mortgage object directly through the State Auction Office without the need for fiat from the District Court. Furthermore, the provisions of Article 6 UUHT state that:

If the debtor defaults, the holder of the first Mortgage has the right to sell the object of the Mortgage on his own power through an auction and collect the settlement of his receivables from the proceeds of the sale.

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<sup>2</sup>Ivda Dewi Amrih Suci and Herowati Poesoko, loc. cit.

<sup>3</sup>Ivda Dewi Amrih Suci and Herowati Poesoko, loc. cit.

Then it is also explained in the elucidation of Article 6 UUHT that the right to sell the Mortgage object over one's own power is a manifestation of the priority position held by the Mortgage holder or the first Mortgage holder in the event that there is more than one Mortgage holder. This right is based on the promise given by the Mortgage giver that if the debtor defaults, the Mortgage holder has the right to sell the Mortgage object through a public auction without requiring further approval from the Mortgage giver and then collects the settlement of his receivables from the proceeds of the sale beforehand. other creditors. The remainder of the proceeds from the sale remains the right of the mortgagee.

Meanwhile, the provisions of article 20 UUHT state that if the debtor defaults, then based on:

- a. The right of the first Mortgage holder to sell the Mortgage object as referred to in Article 6; or
- b. The executorial title contained in the Mortgage certificate as referred to in Article 14 paragraph (2), the Mortgage object is sold through a public auction according to the procedure specified in the laws and regulations for settlement of the Mortgage holder's receivables with the right to precede other creditors .

The provisions of this paragraph are the embodiment of the convenience provided by this law for creditors holding mortgage rights in terms of execution. In principle, every execution must be carried out through public auctioning, because in this way it is expected to obtain the highest price for the object of the Mortgage Right. The creditor has the right to collect the settlement of receivables guaranteed from the sale of the Mortgage object. In the event that the proceeds from the sale are greater than the said receivable which is as high as the value of the Mortgage Right, the remainder becomes the right of the Mortgage giver.

Based on the existing explanations, it can be seen that Article 6 UUHT has also violated Article 3 of Act No. 8 of 1999 concerning Consumer Protection which states that:

Consumer protection aims:

- (1)increase consumer awareness, ability and independence to protect themselves;
- (2)elevating the dignity of consumers by preventing them from negative excesses in the use of goods and/or services;

(3)increase consumer empowerment in selecting, determining, and demanding their rights as consumers;

(4)creating a consumer protection system that includes elements of legal certainty and information disclosure as well as access to information;

(5)growing awareness of business actors regarding the importance of consumer protection so that honest and responsible attitudes grow in doing business;

(6)improve the quality of goods and/or services that guarantee the continuity of the business of producing goods and/or services, health, comfort, security and consumer safety.

Then it also violates Article 8 of Act No. 8 of 1999 concerning Consumer Protection which states that:

(1)Business actors are prohibited from producing and/or trading goods and/or services that:

a. do not meet or do not comply with the standards required and provisions of laws and regulations;

b. not in accordance with the net weight, net or net content, and the amount in the count as stated on the label or label of the said goods;

c. does not match the size, measure, weight and amount calculated according to the actual size;

d. not in accordance with the conditions, guarantees, features or efficacy as stated in the label, etiquette or description of the goods and/or services;

e. not in accordance with the quality, grade, composition, processing, style, mode, or certain uses as stated on the label or description of the said goods and/or services;

f. does not comply with the promise stated in the label, etiquette, description, advertisement or sales promotion of said goods and/or services;

g. does not state the expiry date or period for the best use/utilization of certain goods;

h. do not comply with the provisions of halal production, as stated in the "halal" statement on the label;

i. does not put a label or make an explanation of the goods containing the name of the goods, size, net or net weight/content, composition, rules for use, date of manufacture, side effects, name and address of the business actor and other information for use which according to the provisions must be installed/made ;

j. does not include information and/or instructions for using the goods in the Indonesian language in accordance with the provisions of the applicable laws and regulations.

(2)Business actors are prohibited from trading damaged, defective or used, and tainted goods without providing complete and correct information on the goods in question.

(3)Entrepreneurs are prohibited from trading damaged, defective or used and contaminated pharmaceutical and food preparations, with or without providing complete and correct information.

(4)Business actors who commit violations in paragraphs (1) and (2) are prohibited from trading the said goods and/or services and are required to withdraw them from circulation.

Then it also violates Article 9 of Act No. 8 of 1999 concerning Consumer Protection which states that:

(1)Business actors are prohibited from offering, promoting, advertising goods and/or services incorrectly, and/or as if:

a. the said goods meet and/or have a discounted price, a special price, a certain quality standard, a certain style or fashion, certain characteristics, a certain history or use;

b. the goods are in good condition and/or new;

c. the goods and/or services have obtained and/or have sponsors, approvals, certain equipment, certain benefits, work characteristics or certain accessories;

d. the goods and/or services are made by a debtor who has a sponsor, approval or affiliation;

e. the goods and/or services are available;

f. the goods do not contain hidden defects;

g. said goods are accessories of certain goods;

- h. the goods come from a certain area;
- i. directly or indirectly denigrate other goods and/or services;
- j. using exaggerated words, such as safe, harmless, no risk or side effects without complete information;
- k. offer something that contains an uncertain promise.

(2) Goods and/or services as referred to in paragraph (1) are prohibited from being traded.

(3) Business actors who violate paragraph (1) are prohibited from continuing to offer, promote and advertise the said goods and/or services.

Then it also violates Article 11 of Act No. 8 of 1999 concerning Consumer Protection which states that:

Business actors in terms of sales made through sales or auctions are prohibited from deceiving/misleading consumers by:

- a. declare the goods and/or services as if they have met certain quality standards;
- b. declare the goods and/or services as if they do not contain hidden defects;
- c. does not intend to sell the goods offered but with the intention to sell other goods;
- d. does not provide goods in a certain quantity and/or sufficient quantity with the intention of selling other goods;
- e. does not provide services in a certain capacity or in sufficient quantity with the intention of selling other services;
- f. increase the price or tariff of goods and/or services before conducting a sale.

## **2. Research Methods**

The method used in this paper is normative juridical. Juridical-normative research is a form of scientific research activity that uses library materials and laws and regulations.<sup>4</sup>

## **3. Result and Discussion**

### **3.1. Case Study of Debtor Protection in Parate HT Execution in Manado City**

The implementation of parate execution of collateral objects as referred to in Article 6 and Article 20 UUHT is in fact only based on Minister of Finance Regulation Number 27/PMK.06/2016 concerning Instructions for Auction Implementation, this is also messy when looking at the explanation of Article 26 UUHT. Such circumstances resulted in misuse of circumstances by creditors against debtors.

This can be seen in the Manado Court Decision Number 150/PDT.G/2012/PN.MND, in this case PT. Mahkota Ratu Hotels, represented by Mrs. Joy Emma M Tampi, filed a lawsuit against Panin Bank Kota Manado for illegal acts in determining the amount of receivables with Mortgage guarantees. The problem started when the plaintiff, who is a debtor from Bank BNI Manado City, wanted to apply for a credit loan to the defendant to pay his debt to Bank BNI Manado City in the amount of Rp. 6,800,000,000.00 (six billion eight hundred million rupiah). The plaintiff's loan application was later accepted by the defendant, namely Panin Bank Kota Manado through a loan approval letter dated September 4, 2006, The facilities provided to the plaintiff are credit facilities in the form of PJP (long-term loan) facilities, with a loan ceiling of Rp. 12,500,000,000.00.- Current Account) with a ceiling of IDR 500,000,000.00.- (five hundred million rupiah) with an interest of 16% per year. The credit proposed by the plaintiff was submitted against land and building collateral for the new queen hotel which is located at Jl. Wakeke No. 12-14 Manado, in the development of credit from the plaintiff experienced arrears caused by a decrease in the plaintiff's income and an increase in the price of building materials. On this basis, the plaintiff's credit payments are in arrears. Thus making the defendant submit a stipulation of execution against the HT collateral object owned by the plaintiff. The execution carried out by the defendant ignored the provisions stipulated in

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<sup>4</sup>Indah Rahmawati, Juridical-Normative Analysis of the Role and Actions of Telemarketing in Digital Transactions, *Cakrawala Hukum Journal*, Volume 11 No. 1 April 2020, Merdeka University Malang, p. 61. <https://jurnal.unmer.ac.id/index.php/jch/article/view/4047/pdf>. accessed on 12 June 2021.

Article 3 point 4 DJPLN Decree No.35/PL/2002 special requirements document, namely:<sup>5</sup>

- a. Photocopy of Confiscation Determination by the Head of the District Court (Article 3 point 4.3),
- b. Copy/photocopy of Minutes of Confiscation (Article 3 point 4.4),
- c. Copy of photocopy of details of debt/amount that must be met (Article 3 point 4.5).

If these special requirements documents are ignored, the application for tender implementation cannot be accepted (Inadmissible). The issue of execution carried out unilaterally by creditors also occurs in decision number 299/Pdt.G/2016/PN Mnd. Deep matter Decision number 299/Pdt.G/2016/PN Mnd occurred as a result of the execution of the deceased's HT collateral land WR with Certificate of Ownership No. 74/Tumumpa Satu, with an area of 600 m<sup>2</sup> unilaterally by PB Manado City, it is jointly known that the PB Manado Main Branch covered up the provisions in the HT agreement made in the form of a credit agreement deed number: 100 dated 26 March 2008 related to fraud in the form of an obligation even if the deceased dies to submit life insurance and building fires to the PB Branch of Uatama Manado. This then results in that apart from the heir having to pay off the deceased's debts, the heir also does not get life insurance from the deceased. This situation resulted in the heirs having no ability to pay off debts and in the end the land in the name of the late WR was executed unilaterally by the PB Branch of Uatama Manado.<sup>6</sup>

#### 1. Juridical Study of the Provisions of Article 6 of Act No. 4 of 1996 Concerning Mortgage Rights on Land and Objects Related to Land

Juridically, in its development, Article 6 UUHT states that:

If the debtor defaults, the holder of the first Mortgage has the right to sell the object of the Mortgage on his own power through a public auction and collect the settlement of his receivables from the proceeds of the sale.

The elements that are intertwined into the essence of Article 6 UUHT are:

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<sup>5</sup>[file:///C:/Users/windows%2010%20Pro/Downloads/decision\\_150\\_pdt.g\\_2012\\_pn.mdo\\_20221024102346.pdf](file:///C:/Users/windows%2010%20Pro/Downloads/decision_150_pdt.g_2012_pn.mdo_20221024102346.pdf), accessed on September 12, 2022.

<sup>6</sup><https://deciman3.mahkamahagung.go.id/direktori/decitan/ea027b180a4f418fb29da3b8dae3becf.html>, accessed on 12 September 2022.



- 1) the debtor defaults;
- 2) The creditor holding the first Mortgage Right is given the right;
- 3) The right to sell the Mortgage object on its own authority;
- 4) Terms of sale through public auctions;
- 5) The creditor's right to collect the settlement of his receivables from the sale proceeds;
- 6) The creditor's right to collect the settlement of his receivables is limited to the right to claim.

The elements contained in Article 6 UUHT show that there are 2 (two) things that are important when the debtor defaults, namely the transfer of rights and the exercise of rights for the creditor holding the first mortgage. The substance of Article 6 UUHT is similar to Article 1178 paragraph (2) BW in that they both regulate "selling" collateral objects in public, and the difference is that Article 6 UUHT regulates "selling on their own power", while Article 1178 paragraph (2) BW regulates "authorized to sell", so that in Article 6 UUHT, the creditor's right in the event that the debtor defaults, to sell the Mortgage object through auction, has been given its own law to the Creditor holding the first Mortgage Right.

The implementation of execution as intended by Article 6 and Article 20 of the UUHT can basically result in legal disharmony between the execution law according to the UUHT and the law of material civil executions and the law on the transfer of ownership rights to collateral objects and is also contrary to the consumer protection law. Including the rule of law in Indonesia. This is because the provisions of Article 6 and Article 20 of the UUHT open loopholes for misuse of circumstances and conflicts of law, execution in parate according to Articles 6 and Article 20 of the UUHT with the statement Article 26 UUHT which requires the execution of mortgage objects through Article 224 HIR which strictly requires execution of collateral objects through *aanmaning* in court.

### **3.2. Sociological Study Related to the Execution of HT viat Parate Against Mortgage Collateral Objects**

In its development, the existence of weaknesses in aspects of the provisions of Article 6 and Article 20 UUHT which are also supported by Article 1178 paragraph (2) of the Civil Code, has resulted in loopholes for misuse of circumstances or *misbruik van omstandigheden* by creditors against debtors in terms of implementing agreements related to the execution of collateral rights dependent. The term abuse of circumstances in Indonesian law is the equivalent

of the terms *misbruik van omstandigheden* and undue influence.<sup>7</sup>In the common law system, apart from undue influence, it is also known as unconscionability, which are both different, although they have something in common, namely that both are based on an imbalance in the bargaining position of the parties. If the contract is formed on the basis of impropriety or injustice that occurs in an unequal relationship between the parties, then it is called undue influence (a one-sided relationship), but if injustice occurs in a situation, then this is called unconscionability (a condition) which is one-sided). In the decision on the case of *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, Deane J. stated that the doctrine of undue influence was seen from the effect of the imbalance on the giving of agreement from the affected party,<sup>8</sup>Then in the case of undue influence there must be some form of exploitation by one of the parties over the weaker party. A party seeking to cancel a transaction on the basis of undue influence must prove that the transaction was dishonest, that he or she is an innocent party who has been harmed. Other parties must protect themselves by proving that professional and independent advice has been given before the transaction is entered into.<sup>9</sup>In its development, Nieuwenhuis always linked his discussions with arrestens found in the Netherlands. The inclusion of the provisions on abuse of circumstances into the NBW, more or less, is motivated by legal considerations in various judges' decisions.<sup>10</sup>The formation of the teaching about the abuse of circumstances was due to the absence (at that time) of the *Burgerlijk Wetboek* (Netherlands) provisions governing this matter. In the event that a judge finds a situation that is contrary to custom, a judge's decision is often found which cancels the agreement in whole or in part.<sup>11</sup> It turned out that the judge's considerations were not based on one of the reasons for canceling the agreement, namely the classic defect of will (article 1321 of the Civil Code) in the form of:

- a. *straying (dwaling)*;
- b. *coercion (dwang)*;
- c. *fraud (bedrog)* (article 1321 of the Civil Code).

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<sup>7</sup>NE Algra et.al, 1983, Dictionary of Indonesian Dutch Fockema Andreae Legal Terms, Binacipta, Bandung, p. 301.

<sup>8</sup>Hardjan Rusli, 1993, Indonesian and Common Law Treaty Law, Sinar Harapan, Jakarta, p. 113-115.

<sup>9</sup>Arthur Lewis, 2009, Fundamentals of Business Law, translator Derta Sri Widiowatie, Nusa Media, Bandung, p. 132.

<sup>10</sup>Henry P. Panggabean, 1991, Misuse of Circumstances (*Misbruik van Omstandigheden*) As (New) Reasons for Cancellation of Agreements (Various Legal Developments in the Netherlands), LibertyJogyakarta, p. 41.

<sup>11</sup>*Ibid.*

If you look at the various mortgage agreements between creditors and debtors, most of the agreements made by creditors only benefit creditors. This can be seen from the majority of mortgage agreements when it regulates provisions related to the execution of mortgage objects only looking at the provisions of Article 6 and Article 20 UUHT as well as Minister of Finance Regulation Number 27/PMK.06/2016 concerning Auction Implementation Guidelines alone, without balanced with the existence of a proof system in the form of a financial audit beforehand against the debtor, even though this contradicts the elucidation of Article 26 UUHT and also Article 224 HIR.

This is shown by the guarantee agreement on mortgage rights which was determined unilaterally by the creditor from the start, not negotiated with the debtor so that when there is arrears in the debtor's debt, it is immediately considered a breach of contract without being given space to prove the reasons for the arrears through fair negotiations, this is clearly included in deception. It can even be categorized as fraud, because the information on the contents of the agreement made by the creditor is not fully understood, and usually the creditor persuades with the promise of fast disbursement of funds if the mortgage agreement is quickly signed without providing detailed information regarding the contents of the guarantee rights agreement of dependents to be signed by the debtor. This clearly includes deception and fraud which are also included in the category of misuse of circumstances.

#### 4. Conclusion

Article 6 and Article 20 of the UUHT, which are also supported by Article 1178 paragraph (2) of the Civil Code, have resulted in loopholes for misuse of circumstances or *misbruik van omstandigheden* by creditors against debtors in terms of implementing agreements related to the execution of parate collateral objects.

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