

## Power of Power To Sell as Collateral Confiscation In Debt Repayment Based on The Debt Recognition Deed

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### KEYWORDS

the debt agreement, the confession of debts act, and the selling powers act.

### ABSTRACT

The purpose of this study is to determine the power of power to sell as collateral confiscation in debt repayment based on the debt recognition deed. Deed of Debt Recognition is a deed made by a notary in the form of a Grosse Deed containing the irah-irah "For Justice Based on the One and Only God" which means it has the same executory power as the Court Decision. However, in practice the Deed of Debt Recognition is made followed by the preparation of the Deed of Power of Attorney to Sell as a new deed, even though one form of legal protection outside of the guarantee institution is the making of the Grosse Deed of Debt Recognition. Thus, it is interesting to study further why the use of the power to sell is used as a guarantee for debt repayment under the Deed of Debt Recognition is more desirable and how the form of legal protection for debtors defaults and settlement of disputes arising from the Deed of Power to Sell. This research uses normative legal research types and qualitative methods. The result of the study is that the parties prefer to use the Power of Attorney to Sell because it does not go through a long procedure, does not take time and does not incur more costs. The legal protection obtained by the defaulting debtor is to obtain the remaining proceeds from the sale of collateral and the selling price of the collateral which must not be below the value of the collateral that should be, and the creditor must not have a collateral object if the debtor defaults.

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### Introduction

The Deed of Debt Recognition is a form of unilateral legal action voluntarily made by the party receiving the loan (hereinafter referred to as the debtor) in order to guarantee and / or increase the confidence of the party who provides the loan (hereinafter referred to as the creditor). The Deed of Debt Recognition is a Grosse Deed if there is a sentence "for the sake of justice" in the deed and has the same force as a Court Decision as stipulated in Article 224 HIR and Article 258 RBg.

With respect to the Grosse Deed of Recognition of Debt made before a notary, the legal force is perfect in the sense that it does not require other evidence to validate its correctness and has the same force as a court decision that has permanent legal force (in kracht van gewijsde) for execution. The Deed of Debt Recognition is made as a continuation of the debt receivable agreement between the creditor and the debtor, so that the presence of the Deed of Debt Recognition can be considered as an agreement that follows or is an addition to the debt receivable agreement as the principal agreement.

Carrying out an agreement is of course not always in accordance with the things that have been agreed according to its contents, often the parties cannot carry out their obligations as agreed. Failure to carry out obligations is a fear of creditors, therefore creditors usually require to provide debtor guarantees to provide certainty that the debtor will return the debt in full to the creditor. The guarantee discussed in this study is in the form of immovable property guarantees, namely a piece of land and the yard on it and is stated in the Deed of Debt Recognition.

However, the preparation of the Deed of Debt Recognition is not in the form of a Grosse Deed but is followed by the preparation of the Deed of Power of Sale as a new deed. The Power of Attorney to sell is closely related to the transfer of land rights and is used to sell debtor debt repayment guarantees to creditors, so that the Power of Sale Deed no longer makes it Grosse The Debt Recognition Deed has executory power. As the following case examples:

Case in the High Court of Southeast Sulawesi Kendari Number: 49/Pdt/2020/PT KDI. The Plaintiff who has a debt to the Defendant is accompanied by the provision of a guarantee for the Certificate of Ownership stated in the Deed of Debt Recognition followed by the Deed of Power of Sale. The certificate used as collateral was held by the Defendant and when the Plaintiff did not pay the debt by the deadline contained in the Deed of Debt Acknowledgement, the Defendant transferred the certificate of guarantee to the Defendant's wife and the sale value was below the value of the guarantee. The judge declared the sale and purchase of collateral land null and void and the Power of Attorney to Sell Deed was declared an unlawful act because it was used improperly which caused losses to the Plaintiff.

Case in Bandung High Court Number: 261/PDT/2013/PT BDG. The Defendant used the Plaintiff's funds and stated the correctness of their use by making a Deed of Debt Recognition accompanied by a Power of Attorney to Sell. However, the Defendant did not submit the guarantee of the Certificate of Title stated in the Deed of Debt Recognition to the Plaintiff and it turned out that the Defendant had committed an act of sale and purchase to the other party against the guarantee. The judge stated that the sale and purchase of the Certificate of Property as collateral in the Deed of Debt Recognition made by the Defendant to another party, was not null and void and was declared valid. The judge stated that based on considerations because neither the Deed of Debt Recognition nor the Deed of Power of Sale is a deed of transfer of land rights, so the issuance of a Deed of Debt Recognition does not transfer a person's rights to the land object of dispute because the only person who has the right to transfer his land to another party is the owner of the Certificate of Property Rights.

Thus, it is clear that the use of the Deed of Debt Recognition followed by the Deed of Power of Sale does not provide protection to both parties, even though one form of legal protection other than the guarantee institution is the making of the Grosse Deed of Debt Recognition made before a notary. It is interesting to further examine why the Power of Attorney to Sell is still used as a debt security confiscation, a form of protection for

debtors in default because the object of the guarantee is confiscated and sold by creditors based on the Power to Sell, and it is also necessary to study the solution of the problem if the use of the Power to Sell Deed causes problems.

## Research Methods

The research method used in this study is a qualitative method by interpreting the processed legal materials, then giving pictures (descriptions) of the legal materials obtained. This type of research is normative legal research that uses a statutory approach, conceptual approach, case approach, and empirical approach.

Data collection techniques by collecting and analyzing legal books related to this research and written documents such as court decisions on power of attorney disputes based on debt recognition deeds, then the materials obtained will be analyzed, compared, and combined to form a systematic, integrated, intact study and can answer questions in this research problem.

## Results and Discussions

There are two kinds of receivable debt agreements, namely because it is purely a receivable debt agreement and because it is against the background of other agreements, in the receivable debt agreement there are two parties who make an agreement, namely the party who lends money from the party who receives the money loan, the term used in the agreement for the party who provides the loan is the party who owes or creditors, While the party who receives the loan is called the party who owes or debtor.<sup>1</sup> Debt is an obligation that is stated or cannot be expressed in the amount of money either directly or that will arise in the future, which arises due to an agreement or law and which must be fulfilled by the debtor and if not fulfilled gives the creditor the right to get its fulfillment from the debtor's assets.<sup>2</sup>

The object of receivable debt is all goods that are used up on condition that they must not contradict the law, public order, and decency. Basically, borrowing money or goods that are exhausted in use is allowed to make conditions for the loan to be paid along with interest, but it is not an obligation or necessity because both in the Civil Code and other laws promise interest is not one of the conditions for the validity of the agreement. If there is no<sup>3</sup> obligation from the borrower to pay interest, there is no need for payment along with interest.

### Use of Theory on the Use of Power of Attorney to Sell Debt Receivables Collateral Based on the Deed of Debt Recognition

First, the theory of legal certainty is the theory used in this study because the Power of Attorney to Sell debt guarantee object does not have a specific law that regulates it, causing multiple interpretations of a regulation and public understanding combining the Power of Selling for the public and the use of a special Power to Sell. The urgency of the Power to Sell issue for receivables is something that must be considered because there is no prohibition or procedure for using the Power to Sell the object of collateral for receivables, therefore the presence of a law is needed.

The presence of law in society is to integrate and coordinate the interests that are usually at odds with each other to provide certainty. Legal certainty is a feature that cannot

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<sup>1</sup>Gatot Supramono, *Banking and ..... Problems*, Op.cit., p. 9-10.

<sup>2</sup>Subject, *Law of Treaties*, Nineteenth Printing, Jakarta: Intermasa, 2011, p. 34.

<sup>3</sup>Gatot Supramono, *Accounts Receivable Agreement*, First Edition, Jakarta: Kencana, 2013, p. 25.

be separated from the law as an effort to realize justice, especially for unwritten legal norms. Laws without certainty value will lose meaning, because they can no longer be used as a code of conduct for everyone.<sup>4</sup>

Talking about legal certainty, it means that we discuss how legal norms, legal processes and legal sanctions to be applied have clear certainty. The law must be clear, both at the norm level and at the time it is implemented. That is what Friedrich von Hayek later said that legal certainty means that laws can be predicted or meet the element of predictability, so that a legal subject can estimate what rules underlie their behavior and how those rules are interpreted and implemented.<sup>5</sup>

Second, the theory of legal protection is needed in this study to determine the extent of legal protection obtained by the debtor if the default and if the collateral object is sold by the creditor. Although as a party that often defaults because it does not make debt payments, the debtor also has rights that must not be violated or hindered by creditors, such as getting the remaining proceeds from the sale of the collateral object after being paid in full the debt, and the creditor may not transfer the collateral object to himself or to another person with the value of the collateral object that does not match the value of the collateral object should be. The protection is obtained in Article 1365 of the Civil Code, which violates the rights of the owner and is sold too low so that it is not in accordance with applicable regulations because it has carried out an auction related to the auction price too low / below the market price so that it violates the rights owned by the owner of the item (debtor).

Legal protection is also provided to creditors who are entitled to recover their assets lent to creditors, this protection is regulated in Article 1131 of the Civil Code, creditors also as stated that all movable and immovable property belonging to the debtor, both existing and future, becomes security for the debtor's individual engagements. So that when the debtor transfers the object of collateral contained in the Deed of Debt Recognition or in the deed of agreement, the creditor is still entitled to recover his assets by selling the debtor's assets through a District Court decision.

Although the use of the Power of Attorney to Sell Deed does not have specific regulations, there are several articles in the Civil Code that limit obligations and provide rights for both parties. Restrictions on the use of the Power of Attorney to Sell can be known from cases that have received a decision in Court and the results of the judge's decision can be used as a reference regarding restrictions on the use of the Power to Sell.

Third, the theory of Dispute Resolution is used to resolve problems that occur, and find alternative solutions if problems occur due to the Power of Sale Deed. Disputes can happen to anyone and anywhere, in other words disputes can be public or civil and can occur in the local, national or international scope. A dispute is a situation when one party feels aggrieved by the other party, then that party conveys this dissatisfaction to the second party. If the situation shows a difference of opinion, then there is what is called a dispute. In the context of law,<sup>6</sup> especially contract law, disputes usually occur due to conflicts of interests of the parties that are not fulfilled and feel injustice. The occurrence of disputes is usually characterized by the pre-conflict stage (the complaint stage comes

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<sup>4</sup>Margono, *Basics of Justice, Benefits.....*, *Op.cit.*, p. 114.

<sup>5</sup>Isharyanto, *Teori Hukum: Suatu Pengantar.....* *Op.cit.*, hlm. 100.

<sup>6</sup>Aris Prio Agus Santoso, (*et.al*), *Alternative Dispute Resolution*, Yogyakarta: Pustaka Baru Press, 2021, p. 1.

from feelings), the conflict stage begins to convey to the other party its complaints, and the dispute stage that has involved third parties in its resolution.<sup>7</sup>

**b. Use of Selling Power as Confiscation of Amortization Guarantee of Indebted Debts Based on Debt Confession Act**

Receivables payable as an agreement gives rise to the rights and obligations of creditors and debtors reciprocally. The provision of debt is usually done with the condition that the debtor provides collateral to the creditor to ensure that the money borrowed will be paid in full and become a protector if the debtor defaults, then the guarantee can be used as a substitute for paying the debtor's debt. The object of the agreed guarantee should be of higher value than the amount of debt given to the debtor.

Guarantees have been arranged by the state which are divided into four parts, namely special Collateral for land, Fiduciary Guarantee for movable objects, Pledge Guarantee for anything except land, and Mortgages for airplanes and ships. If you look at the content of this study, the guarantee used is a guarantee of land rights to the debtor's property rights which is used as debt collateral and is stated in the Deed of Debt Recognition followed by the preparation of the Power of Attorney to Sell.

The transfer of title to land should only be carried out by the owner of land rights because it is an absolute right. Transfers may be made based on the grant of Power of Attorney to Sell for the benefit of the authorizer not for the benefit of the power of attorney. However, the transfer of collateral should be done through the Right of Dependent, not through the Power of Attorney to Sell, or you can use the Deed of Debt Recognition to minimize problems that occur later. The possibilities that can happen are:<sup>8</sup>

1. The title certificate can be owed to another party, if the title certificate is held by the debtor;
2. If the title certificate is held by the creditor, the debtor declares to the National Land Agency that the title certificate has been lost and only brings a photocopy to make a new title certificate.
3. Other things can also happen as in case Number: 49/Pdt/2020/PT KDI, where the creditor transfers ownership rights to land used as debt collateral to another person, namely his own wife.
4. Another case is found in Number: 1011 / K / Pdt / 2014 namely the debtor sells property rights to land that has been used as debt security to others without the knowledge of the creditor and the proceeds of the land sale are not paid by the debtor to the creditor.

The above is a possibility that can occur if the collateral object is not registered with the Right to Guarantee institution, but uses the Power of Attorney to Sell to bind the guarantee even though for legal certainty the Power of Attorney to Sell cannot bind the collateral object. If you do not want to register in the Right of Dependents, the parties can make a Deed of Debt Recognition made in the form of a Grosse Deed.

The parties' disinterest in registering collateral in the Right of Liability and making a Grosse Deed of Debt Recognition because according to them the use of both has a long, time-consuming and more expensive registration process.<sup>9</sup> Thus, the parties prefer to use the Power of Attorney to Sell to sell the collateral object. Although the use

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<sup>7</sup>*Ibid.*, p. 5.

<sup>8</sup>Mazwar, *Perkuliahan Pendaftaran Tanah: Tema Pembahasan Hak Tanggungan*, Banda Aceh: Universitas Syiah Kuala, pada tanggal 25 November 2023.

<sup>9</sup>Gemi Sugiyarti, "Implementation of Power to Sell in Relation to Receivables Debt Agreement in South Jakarta Area", *Thesis*, Semarang: Diponegoro University Magister Kenotariatan, p. 59, 2008.

of the Power of Attorney to Sell does not provide legal protection and does not have legal balance and certainty related to its use on accounts receivable, the use of the Power of Attorney to Sell is more practical, does not cost much and is more profitable.

### **Legal Protection Against Default Debtors Because the Collateral Object Is Confiscated and Sold by the Creditor Based on the Power to Sell**

The obligation to fulfill what is agreed is called achievement, while if one party or even both parties do not carry out their obligations in accordance with the contents of the agreement, it is called default. The defaulting party in the agreement can be sued by another party who feels aggrieved, but the party accused of default can still make certain defenses in order to be free from paying damages.<sup>10</sup>

Compensation obtained due to default is the result of non-fulfillment of the main obligation or other additional obligations in the agreement. Indemnity provisions derived from law should receive attention, such as provisions on default and other provisions, can only be waived if the parties promise otherwise in the agreement. When it has been stipulated in the agreement, it is not the law that determines whether compensation must be paid or how much compensation must be paid, but both parties determine the terms and the amount of compensation contained in the content of the agreement.<sup>11</sup>

Defense or defense is carried out to obtain repressive legal protection to resolve disputes, including handling them in state judicial institutions, and preventive protection to prevent disputes. In this case, preventive protection in the form of the use of the Power of Attorney to Sell is made in the form of a special power of attorney in which it contains firm words and does not contain another legal act or only one or more specific interests that must be carried out by the power of attorney. Thus, the Deed of Power to Sell cannot be made in the form of a general or broad power of attorney, which is a power formulated in general words and covers only management actions. This specificity is carried out to avoid the formation of absolute power of attorney or abuse of authority beyond the essence of the Power of Sale Deed. The abuse of authority referred to here is to use the Power of Attorney to Sell for one's own benefit and can harm others, such as transferring ownership rights to the debtor's land to the creditor's personal self or to the creditor's own family.

Preventive legal protection through laws and regulations is widely regulated in the Civil Code depending on the problems that occur, such as the feasibility of the selling price of the collateral object must be in accordance with its value, regulated in Article 1365 of the Civil Code which violates the rights of the owner and is sold too low so that it is not in accordance with applicable regulations because it has carried out an auction related to the auction price too low / below the market price so that it violates the rights owned by the owner the goods (debtor). Then, prohibiting creditors from promising to have collateral objects if the debtor defaults, this provision has not been specifically regulated for the use of the Power of Sale Deed as debt repayment, but there have been cases filed up to the cassation level contained in Supreme Court Decision Number 3337 K / Pdt / 1991.

Even if the debtor does not make payments in accordance with the specified deadline, the creditor is not allowed to directly transfer the object of guarantee. This prohibition is an act of the State to provide fairness, balance and protection to the debtor,

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<sup>10</sup>Ahmadi Miru, *Contract Law and Contract Drafting*, First edition, Eighth printing, Depok: Rajawali Press, 2018, p. 67.

<sup>11</sup>*Ibid*, hlm. 79.

but this protection does not diminish or eliminate the debtor's obligation to pay his debt, as stated in Article 1131 of the Civil Code that all movable and immovable property belonging to the debtor, both existing and future, becomes security for the debtor's individual engagements. It is also stipulated in Article 1132 of the Civil Code that the goods become a common security for all creditors against whom the proceeds of the sale of the goods are divided according to the ratio of their respective receivables unless among the creditors there are valid reasons for precedence.

**Alternative Dispute Resolution Due to the Use of Power to Sell as a Debt Repayment Guarantee Seizure Based on the Debt Recognition Deed**

Basically, an agreement will take place well if the parties who implement the agreement are based on good *faith*, but when one party does not have good faith or does not carry out its obligations, actions will arise that can harm the other party. Mistakes on the part of the debtor usually do not carry out the agreement because they do not fulfill their promise to return the money they have borrowed, so the creditor should collect and give a warning letter to the debtor to want to pay the debt in accordance with the mutually agreed deadline. When viewed from the creditor's fault for not carrying out the agreement properly or doing actions beyond the limits of authority that should be owned by the creditor.

The problems discussed in this study are related to the transfer of ownership rights to land so that in mentioning problems related to land have differences in their mention such as disputes, conflicts, cases and cases. Disputes, conflicts and cases have various kinds and types, as well as various ways of resolution, both through dispute resolution mechanisms by litigation or called the dispute resolution process through the judiciary and dispute resolution by non-litigation means or dispute resolution outside the court such as negotiation, mediation, conciliation, arbitration.

If we look at the scope of dispute resolution theory, it must be determined in advance the type of dispute that occurs, the factors that cause disputes, and the strategies to be used in dispute resolution. Disputes that occur due to the Deed of Power to Sell to pay off receivables usually begin because of a conflict of interest. The root cause of land disputes comes from conflict, in this study broadly it can be caused by conflicts of interest caused by competing interests related to substantive, procedural and psychological interests.

Other root causes can also occur with relationship conflicts caused by excessive emotions, misperceptions, poor or incorrect communication, and repetition of negative behaviors. When the creditor's needs are not met it is usually because the debtor does not pay the debt and it is a substantive interest, and/or the debtor's needs are not met because the creditor lacks empathy when the debtor is unable to pay the debt but the collateral is sold by the creditor to other parties as well as to himself and more of the proceeds of the sale are not given to the debtor as the owner of the collateral and this is in the psychological interest of the debtor, So this conflict of interest creates a dispute that must be resolved immediately.

The causes of disputes due to conflicts of interest also vary, so it is necessary to know what has happened when using the Power of Attorney to Sell to sell debt collateral objects. If there is an illegal act on the part of the creditor who transfers the collateral object to himself or his spouse such as the Kendari District Court case Number: 41 / Pdt.G / 2020 / PN KDI, or when the debtor sells the collateral object listed in the Debt Recognition Deed followed by the Power of Sale Deed to make a loss to the creditor

because the actual collateral object has been switched to pay off the debtor's debt, This case is available in Bekasi District Court Number: 17/PDT. G/2012/PN BKS.

From these two problems, the right legal remedy is to file a civil lawsuit with the local District Court if the actions of one party cause losses to the other party. In addition, if the creditor refuses to pay the debt from the debtor, the debtor can take an effort to determine consignment, namely the custody of money or goods to the court. This effort is to speed up the process of debt payments to creditors who no longer want to accept debtor debt payments on the grounds that they have missed deadlines or other reasons. In general, the dispute resolution mechanism that will be taken by the parties from the beginning has determined the way of dispute resolution in accordance with the principle of freedom of contract contained in the Deed of Agreement. As long as it does not contradict the law, decency and public order, the settlement process is allowed.

## **Conclusion**

The use of the Power of Attorney to sell collateral objects is more desirable for parties who make receivable debt agreements than registering collateral objects with a land collateral institution, namely Hak Dependan. In addition, making a Debt Recognition Deed in the form of a Grosse Deed is also less desirable because it has to deal with the District Court which takes relatively longer. The advantage felt by the parties when using the Power of Attorney to Sell to sell collateral objects is that they do not incur more administrative costs, do not go through complicated and lengthy procedures. So that this advantage makes the parties to the debt agreement use the Power of Attorney to Sell as a substitute for the guarantee institution, even though it has a high and large level of risk.

When the creditor uses the Power of Attorney to Sell to sell the collateral object, the sale must be made with the written consent of the debtor stating clearly and clearly the sale value and the remaining proceeds of the sale that must be returned to the debtor after repayment of the entire amount of the debt. The return of the remaining proceeds from the sale of collateral and the proper sale value of the collateral object is a legal protection that must be obtained by the debtor. Return of the remaining proceeds from the sale of collateral is a right of the debtor obtained when the debt has been paid completely, so that the debtor has carried out his obligations and obtained the remaining proceeds of the sale as a right that must not be eliminated. The debtor's legal protection is contained in the rules of Article 1338 paragraph (3) of the Civil Code of purchases made at a reasonable price, and in Article 1365 of the Civil Code that violate the rights of the owner and are sold too low so that they are not in accordance with applicable regulations because they have carried out auctions related to auction prices too low / below market prices so as to violate the rights owned by the owner of the goods (debtor).

When the proceeds of the sale of collateral are not given to the debtor, the debtor as the aggrieved party can ask directly to the creditor to provide the remaining proceeds of the sale of collateral, which is done independently or there is assistance from a third party to resolve the problem peacefully. If it is not achieved, the debtor can file a civil lawsuit in the District Court or through the Alternative Dispute Resolution stipulated in the content of the agreement. Similarly, when the creditor is harmed by the debtor due to the sale or transfer of the collateral object to another party. In the event that the creditor does not want to accept debt payments on the grounds that it has passed the payment deadline, the debtor can make consignment efforts to speed up the process of paying debts to creditors.



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