



OBSTACLES OF THE SALE AND PURCHASE OF OBJECTS OF MORTGAGE RIGHTS PERFORMED UNDER THE HAND IN ACCORDANCE WITH INDONESIAN LAWS AND REGULATIONS

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Mortgage, Sale Under Hand, Execution of Mortgage The sale of mortgage objects under private agreement can be carried out based on an agreement between the debtor and creditor, in addition to public auction as a means of enforcement. In the Mortgage Law, specifically Article 20 paragraphs (2) and (3), it is stipulated that this mechanism is an alternative means of settling the debtor's obligations. This study aims to identify the obstacles that arise in the practice of selling mortgage objects under the table and to find solutions to improve the effectiveness of its implementation. The method used is normative legal research with a regulatory approach. Mortgage rights themselves are a type of collateral that grants priority status to certain creditors over others. From the research conducted, it can be concluded that the private sale mechanism demonstrates higher effectiveness. However, the implementation of the sale of mortgage objects faces significant obstacles, including the reluctance of debtors to vacate properties that are still occupied and the mismatch between the seller's expectation of a high price to cover all obligations and the buyer's desire for a fair price in line with market conditions. To address these challenges, strategies for resolving problematic loans in the banking sector are implemented through a consultative approach with debtors to reach a consensus on conducting under-the-table sales.

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A. Introduction

Credit is defined as a facility that offers money or bills comparable to it, provided that the bank and the other party have agreed or reached a consensus on it (Article 1 Point 11 of the Banking Law). In this instance, the credit recipient is required to pay back the amount, including interest, within a given time frame.

From this legal perspective, a credit agreement is a form of bilateral contract in which the bank acts as the party providing financing, while the other party acts as the

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recipient of credit facilities who is legally bound to fulfill their obligations within a mutually agreed period of time by providing compensation in the form of interest (Arba & Mulada, 2020).

In practice, banking institutions impose collateral requirements on customers. One of the collateral instruments that customers can submit to banking institutions is a mortgage. Article 10 paragraph (1) of the Mortgage Law stipulates that the process of establishing a mortgage begins with a commitment to transfer the mortgage to guarantee the settlement of payment obligations as stated in the principal debt agreement. The formalization of the mortgage right to the creditor is further realized through a separate document prepared by the Pejabat Pembuat Akta Tanah (PPAT) or Land Deed Official, namely the Akta Pemberian Hak Tanggungan (APHT) or Deed of Granting Mortgage Right. Referring to the provisions of Article 10 paragraph (1), it can be determined that the position of the Mortgage Right stated in the credit agreement acts as an accessory agreement, while the credit agreement functions as the primary agreement (Arba & Mulada, 2020).

The creditor has the authority to execute the collateral, including by private sale without the necessity for an auction procedure, if the debtor is unable to fulfill their responsibilities. Three methods of enforcement are outlined in Law No. 4 of 1996 on Mortgage Rights Over Land and Related Assets (UUHT), specifically Article 20: first, the mortgage collateral may be sold at auction under the creditor's own authority; second, enforcement may be based on the executory title listed in the Mortgage Certificate; and third, the mortgage collateral object may be sold and purchased through a private sale.

Several literature reviews, such as those conducted by Dwi Aryanti Ramadhani, Laily Maghfiroh, et al. in 2023 on the Implementation of Mortgage Enforcement Due to Default in Credit Agreements at Bank BRI (Study of Decision Number 1/Pdt.GS/2023/PN BAN), highlight the differences between this study and the author's research, where this study focuses more on the issues and the reality of default in credit contracts with Bank BRI, which resulted in the enforcement of mortgage rights, leading to enforcement based on a court decision through a civil lawsuit and subsequent auction at the auction house. Meanwhile, in this study, the author attempts to describe the execution of mortgage rights carried out privately and not as a result of a court decision.

When a loan becomes non-performing, banking institutions are required to immediately take steps to resolve the issue. Strategies for handling non-performing loans include rescheduling, restructuring, and reconditioning. If a loan has been classified as non-performing, the bank, as the creditor, may take various resolution measures against the debtor, either through litigation or non-litigation processes. The resolution mechanism through direct sale is applied to benefit debtors facing financing issues, allowing any remaining funds from the amount paid for the debt to be deposited into the bank. This is related to the provisions of Article 20 of Law Number 4 of 1996 on Mortgage Rights. The focus of this study is to examine the implementation of the

execution of Mortgage Rights through private sales as a solution to resolve non-performing loans (Herryani & Njoto, 2023).

The sale of collateral objects under hand is chosen because it is more efficient than litigation or public auction processes. The formal auction mechanism often requires banks to incur higher operational costs, which ultimately impacts the auction value and burdens the bank's financial position. Another risk faced is when the auction proceeds are insufficient to settle the debtor's total obligations, where the resulting shortfall technically becomes the bank's liability, although legally the remaining debt remains the debtor's obligation (Herryani & Njoto, 2018). Under-the-table sales methods have various advantages over auctions through the KPKNL or the courts, some of which include more economical expenses due to the absence of auction fees and the requirement of only administrative funds. Settlements can be reached more quickly because the parties involved can negotiate directly. Additionally, there is potential to achieve optimal sales value as the debtor can interact directly with potential buyers. The likelihood of legal disputes is relatively low since the sales outcome is the result of a mutual agreement among the parties. Furthermore, the transfer of ownership can be carried out swiftly through standard procedures handled by a Notary or PPAT (Ayunigtyas & Immanullah, 2017). Execution through private sale is considered the most practical alternative that can be mutually agreed upon by the parties with a view to achieving the optimal sale value so that the interests of the debtor as the owner of the assets can be protected.

B. Method

The author's research methodology is normative juridical. In legal science, the normative juridical technique is a research methodology that concentrates on relevant legal norms as well as applicable laws and regulations. In order to assess the legal issues under study, this research is more of a literature study, looking at legal documents including laws, government regulations, and court rulings as well as legal theories. The Statute Approach is the methodology used in this study. This approach is put into practice by reviewing laws and standards that are pertinent to the legal problems under investigation or analysis. From this definition, it can be briefly stated that the term "statute" refers to legislation and regulations. Thus, the statutory approach is an approach that uses legislation and regulations.

C. Result & Discussion

1. Analysis of the Sale and Purchase of Mortgage Objects Conducted Privately in Accordance with Indonesian Laws and Regulations

Non-performing loans are a natural consequence of lending activities, to support the data and information used in this paper, the author conducted interviews at Bank BJB Syariah Bogor Branch.

Bank BJB Syariah was first established on January 15, 2010, based on the Akta Pendirian Perseroan Terbatas, PT. Bank Jabar Banten Syariah Number 4. The

establishment of this Islamic banking institution has received official legitimacy from the Ministry of Law and Human Rights of the Republic of Indonesia through Decision Letter Number AHU.04317.AH.01.01 of 2010, issued on January 26, 2010. The portfolio of products and services offered by Bank BJB Syariah is categorized into three main groups, including financing facilities, deposits, and services. The financing facilities category includes funding schemes based on the concept of sale and purchase transactions (Murabahah), funding schemes based on the profit-sharing principle (Mudharabah, Musyarakah), as well as various special products such as the iB Maslahah Home Ownership Facility (FKR), the iB Maslahah Motor Vehicle Ownership Facility (FKKB), and the iB Maslahah Golden Partner program.

For the savings category, there are various options available, including iB Maslahah Savings, iB Maslahah Hajj Savings, iB Maslahah Plan Savings, iB Maslahah Children's Savings, and iB Maslahah Taspen Savings. For the service category, Bank BJB Syariah provides various facilities such as iB Maslahah Current Account, iB Maslahah Deposit, iB Learning Savings, Working Capital, Investment, Golden Partner, Transfer, RTGS, Clearing, PPOB, BI FAST, and Cash Management System. To complete this writing, the author conducted an interview at Bank BJB Syariah Bogor Branch.

At Bank BJB Syariah, the division that oversees and carries out credit rescue until the resolution of credit problems is the Financing Resolution and Rescue Division (Divisi Penyelesaian dan Penyelamatan Pembiayaan).

The bank continues to strive to minimize the level of non-performing loans so that its implementation remains in accordance with applicable regulations. The procedures used are summarized in the Banking Operational Standards, where before execution is determined, there are several stages that need to be considered, starting from Kol-1, which is considered smooth, to Kol-5, which is considered stalled.

The concept of non-performing loans has become a standard set by Bank Indonesia as problem loans or Non-Performing Loans (NPLs), which is also a universal term in the global banking industry. NPLs indicate the ratio of non-performing loans to total loans, including substandard, doubtful, and loss loans (Wangsawidjaja, 2011).

Article 55 paragraph (1) of Financial Services Authority Regulation Number 16/POJK.03/2014 concerning the Assessment of the Quality of Assets of Sharia Commercial Banks and Sharia Business Units regulates the stages of credit rescue, including: 1) Restructuring as outlined in Fatwa DSN-MUI No. 48/DSN-MUI/II/2005 on Rescheduling. 2) Rescheduling, as referenced in DSN-MUI Fatwa No. 47/DSN MUI/II/2005, which states that collateral may be sold by the customer or the banking institution at a predetermined market price, and the costs incurred from the sale-purchase transaction shall be used to settle the debtor's obligations. 3) Reconditioning, based on DSN-MUI Fatwa No. 49/DSN MUI/II/2005, the bank may establish a new agreement if the debtor is unable to repay the financing.

In Article 20 paragraphs (2) and (3) of the Mortgage Law, the sale and purchase of mortgage objects under the table can be carried out under certain conditions (Sutedi, 2012):

- a. If an agreement has been reached by the grantor and the holder of the Mortgage.

The sale and purchase of collateral objects under private agreement can only be carried out after approval from the grantor and holder of the collateral. Thus, the marketing of collateral objects or credit guarantees cannot be carried out by banks without the approval of the debtor. To anticipate such issues after the loan is approved, the bank includes specific terms in the loan agreement. These terms grant the bank the authority to sell the collateral privately or require the debtor to submit a Special Power of Attorney allowing the bank to sell the collateral directly.

- b. After the interested parties have been notified in writing by the grantor and/or holder of the Mortgage Rights and a period of 1 (one) month has expired.

The one-month period provided is a grace period for the parties to respond, file objections, or take necessary legal action in relation to the notification. During this period, interested parties may conduct research, seek legal advice, or prepare for necessary action. After the one-month period expires and no objections or legal actions have been filed, the grantor and/or holder of the Security Interest may proceed with the actions that have been notified, such as enforcement of the security interest, transfer of rights, or other actions in accordance with applicable regulations.

- c. Announcement in at least two newspapers circulating in the relevant area and/or local media whose territory is located within the scope of the relevant Mortgage Rights.

purpose of this action is to protect the interests of all parties, including second and third mortgagees, as well as other creditors related to the mortgagee. Notifications through mass media other than newspapers may be made via radio and/or television. According to the interview results, both the debtor and creditor are free to market the collateralized property through any media, such as newspapers and brochures, as well as digital media like property websites, social media, and online buying-and-selling apps to reach a broader pool of potential buyers.

The concept of private sales transactions differs from that of private deeds. Private sales transactions are commercial activities carried out voluntarily by both parties, namely the seller and the buyer. The term “underhand” is used because the transfer of ownership rights is carried out through the signing of both parties on the sale and purchase document. Under Government Regulation No. 24 of 1997, it is stipulated that such transactions must be conducted in the presence of a Public Notary. Therefore, the transfer of land rights must be carried out using an authentic deed and is

not permitted to use an underhand deed. In the preparation of the deed, the parties are present, witnessed by at least two qualified witnesses as stipulated in Article 38(1) of the Mortgage Law.

Based on interviews conducted at Bank BJB Syariah's Bogor branch, there are three stages involved in the private sale and purchase of collateral rights: consultation between the debtor and creditor, execution of the sale, and transfer of land rights. During the negotiation stage between the debtor and creditor, discussions take place between the creditor/bank and the debtor who intends to settle their obligations without going through the auction process. In this stage, mutual agreement is reached between the two parties, which includes two matters discussed, namely:

- a. The agreement in question includes an agreement on the value of the object to be sold directly, i.e., through a sale without an auction process.
- b. In addition to discussing the price of the object to be sold, the debtor and creditor also discuss the agreement on the sales mechanism, where in the context of selling collateral objects, there are two methods that can be used, namely the debtor is expected to sell independently or the debtor grants special power of attorney to the bank for the sale.

The next step is to carry out the sale of the encumbered property without going through an auction mechanism, which involves the debtor independently searching for a buyer. At this stage, the legal action that takes place is a normal sale and purchase transaction in accordance with the provisions of Article 1457 of the Civil Code and its implementation using a PPAT deed. However, there are specific requirements that apply, namely that when payment is made, the payment funds for the collateral must be handed over directly to the bank by the buyer. After that, the bank will deduct the debtor's obligations, which include costs incurred such as professional fees, penalties, administrative costs, and others. The remaining balance will be returned to the debtor. Another available option is for the debtor to grant special authority to the bank to seek potential buyers. The debtor submits a special power of attorney for the sale of the collateral, thereby granting the bank the authority to execute the sale of the collateral. After the sale transaction is completed between the bank and the buyer, the bank will immediately deduct the debtor's debt from the proceeds of the sale. This deduction covers all incurred costs, including professional service fees, penalty fees, and administrative costs. The remaining funds from the sale proceeds will then be returned to the debtor.

Finally, the transfer of rights is carried out at the National Land Agency, based on the legal sale and purchase agreement between the parties concerned. The administrative requirements that must be met by the bank in its capacity as creditor include:

1. The bank submits a Partial Roya Application Letter to the National Land Agency/ Badan Pertanahan Nasional (BPN).
2. It is accompanied by the following documents:

- A copy of Akta Jual Beli (AJB);
- Sertifikat Hak Tanggungan (SHT);
- Land Certificate;
- As well as a letter of request from the PPAT, consisting of a Letter of Request for Partial Roya for the object of the Mortgage Right and a request for a name change to be transferred to the buyer's identity.

2. Obstacles of the Sale and Purchase of Objects of Mortgage Rights Performed Under The Hand In Accordance with Indonesian Laws and Regulations

Non-performing financing often results directly from a deterioration in loan collectability. This issue then affects the Provision for the Write-off of Productive Assets/ Penyisihan Penghapusan Aktiva Produktif (PPAP), which can ultimately erode the overall Bank Health Ratio/ Tingkat Kesehatan Bank (TKB). Although the option of selling collateral assets (Mortgage Rights) through private transactions offers many benefits, the process of completing such sales sometimes faces various obstacles. According to Article 1178 paragraph (2) of the Civil Code, if a debtor defaults, the first mortgagee has the authority to sell the asset publicly in order to obtain repayment of the debtor's obligations from the proceeds of the sale of the asset.

This legal provision allows parties to settle their financial obligations outside of court, provided that certain criteria are met: the creditor's right to release collateral must be explicitly agreed upon at the outset, and the sale must be conducted transparently by an auctioneer appointed in accordance with applicable laws and regulations. Issues regarding the eviction of houses used as collateral often arise when banks find that debtors are still occupying the houses. In such cases, Bank BJB Syariah prioritizes houses that are vacant. The steps taken by the bank to address this issue include providing guidance, such as informing the debtor to seek new buyers, with the expectation that the debtor may still receive a portion of the proceeds from the sale of the property.

To anticipate risks that may arise due to debtor default, eviction has been regulated in detail from the outset in the APHT, including the setting of eviction deadlines and penalties for late payment.

Article 20 paragraph (2) has a new innovation compared to previous mortgage laws, as it gives more freedom to parties providing collateral rights to execute agreements as agreed. This means that when a private sale occurs, the parties have indeed agreed to this method. However, in some cases, challenges still arise, particularly when the creditor is uncooperative in the private sale. Ironically, the debtor often actively seeks buyers during negotiations but later demonstrates a lack of good faith by no longer proactively seeking buyers, as if hoping the collateral property will not be sold promptly.

The rule aims to protect the interests of debtors so that they can continue their business activities. This is because private sales offer a comprehensive solution for all parties involved. The process begins with a mutually agreed and binding agreement. The interests of buyers are better protected during the transfer of rights, as the transfer

of assets from the owner becomes easier. This is possible because the transaction is based on voluntary agreement.

With regard to potential problems that may arise, such as when a third party as the owner of collateral opposes the execution of its land for the settlement of a debtor's obligations in the event of default, Bank BJB Syariah has the legal basis to declare that the property ownership certificate that has been used as collateral cannot be challenged by a third party in the context of settling the debtor's obligations through direct sale. This is because the third party was previously bound by the debtor's credit agreement as a guarantor, so the risk becomes a responsibility that must be borne in accordance with their role. However, the third party's responsibility is limited to the collateralized property rights pledged to the bank. After the execution is carried out as previously explained, the third party's responsibility for the debtor's debt repayment is considered to have ended.

Another obstacle lies in the inappropriate value, as the debtor objects to the auction price of the collateral. The creditor has set the value based on Nilai Pasar Wajar (NPW), but the debtor and/or guarantor disagree because they consider the determined price to be too low. The debtor is unwilling to release the collateral at a low price because they believe its value could exceed the price set by the creditor. To resolve this issue, the private sale of the mortgage right serves as a more adaptive alternative option where both parties can negotiate directly to reach a mutually agreeable valuation. Through the private sale mechanism, the debtor has the opportunity to actively participate in determining a more reasonable selling price aligned with market conditions, while the creditor can still recover the debtor's obligations without undergoing the rigid auction process that could potentially harm both parties.

Legal countermeasures taken by borrowers and/or guarantors usually take the form of filing civil disputes in the District Court on the grounds of refusal to execute collateral, as they believe that the financing contract can still be continued through additional credit restructuring efforts. However, the opportunity for restructuring is only granted a maximum of two times by financial institutions, and enforcement will be carried out if efforts to salvage the financing fail. Although the bank's position is relatively strong as it holds the SHT and the credit agreement has been notarized before a Notary, such legal defense strategies tend to delay and prolong the duration of the enforcement of the Security Interest. As an alternative to avoid a prolonged process, the sale of mortgage rights under the table is often pursued, allowing debt settlement through the voluntary sale of collateral by the debtor with the creditor's approval without going through a formal auction process.

Potential legal obstacles that may arise and have social consequences that could hinder the implementation of collateral asset sales through private mechanisms are the mandatory provisions to advertise the execution of collateral sales in two newspapers circulating in the relevant region and/or local media platforms. This announcement aims to ensure the protection of the rights of other creditors who have collateral on the same goods, as well as to ensure that no party objects or raises objections. The impact of this requirement will impose a mental burden on debtors and/or collateral providers,

as their financial status will be exposed to business partners, professional networks, and the surrounding community, which could ultimately affect the continuity of their company's operations.

D. Conclusion

Various obstacles arise when buying and selling collateralized property, such as the debtor's reluctance to vacate the property being sold, as debtors often continue to occupy the house or building that is the subject of the collateral, thereby complicating the handover process to the buyer. Additionally, the mismatch in price expectations between the seller and buyer poses a significant challenge, as the debtor tends to seek a high price to cover all their obligations, while the buyer desires a fair price in line with market conditions. The resolution strategy for problematic loans in the banking sector is implemented through a consultative approach with the debtor, where the deliberation process is expected to reach a consensus to facilitate an off-market sale by identifying potential buyers who can be facilitated by the creditor through the collections division, as well as the creditor's support in marketing the collateralized property for the problematic debtor.

E. Recommendation

In the event of obstacles, it is recommended that banks optimize their consultation strategies with debtors for the sale of collateral. Banks need to proactively identify potential buyers and support property marketing in order to achieve an appropriate selling price. In this way, price disputes can be avoided and the handover process to the buyer can run smoothly, even if the debtor still occupies the property.

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