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# Power of Attorney to Install Mortgages Made by Notaries in The Process of Charging Mortgage Guarantees on Ships

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### Abstract

*The Mortgage Deed in the process of guaranteeing ship mortgages based on Law number 17 of 2008 concerning Shipping becomes the authority of the Registrar and Registrar of Ship Transfers (hereinafter referred to as P3BK). However, the mortgage deed product issued by P3BK is considered less protective and representative of the interests of the parties, namely creditors and debtors and has the potential to cause legal problems, it is necessary for a Notary to make a Power of Attorney to Install a Mortgage (hereinafter referred to as SKMH) using an authentic deed in accordance with Article 1171 of the Civil Code. The importance of making SKMH itself is basically to represent and protect the interests of the parties and as a means of reflecting the wishes of the parties. The existence of SKMH in the process of guaranteeing ship mortgages is the choice of the parties. The function of the SKMH made currently is not only used limitedly because the parties are in a different place from the registered ship, or because the parties are unable to be present at the time the guarantee binding is carried out, but the SKMH is made because it is desired by the parties in the Mortgage binding agreement to get more benefits. special protection that is felt to be able to bridge their desires that are not fulfilled by the P3BK mortgage deed.*

**Keywords:** Marine Mortgage; Notary Public; Guarantee; Power of Attorney Installing Mortgage

## A. Pendahuluan

Collateral institutions arise in the practice of daily life as a community needs guarantees in economic activities, especially those concerning debt, capital and banking agreements. Article 1131 and Article 1132 of the Civil Code (hereinafter referred to as the Civil Code) provide protection related to guarantees as described in "Article 1131 of the Civil Code that all the material debts, both moving and immovable, both existing and new will exist in the future, become dependents for all individual engagements. All the debtor's property will be a guarantee of repayment of the debtor's debt to all creditors." Thus, all debtor's wealth becomes a guarantee of repayment. Article 1132 of the Civil Code states that the materiality is a guarantee for the person who owes him. Under Article 1132 of the Civil Code, all creditors have the same position as other creditors. The guarantee of materiality is distinguished by its guarantor institutions, namely moving and immobile objects. For moving objects, the guarantee institution by using Pawns or with Fiduciaries and for immovable objects, the guarantee institutions available are Mortgages or Dependent Rights.<sup>1</sup>

Since the enactment of Law No. 4 of 1999 concerning Dependent Rights, Book II of the Civil Code related to land rights mortgages has not been valid. Therefore mortgages are charged on ships and aircraft.<sup>2</sup> Mortgage Guarantee according to Article 1162 of the Civil Code is a sovereign right to immovable objects by taking reimbursement for the repayment of an alliance.

<sup>1</sup> Fani Martiawan Kumara Putra, "Benturan Antara Kreditor Privilege Dengan Kreditor Preferen Pemegang Hipotek Kapal Laut Terkait Adanya Force Majeure," *Jurnal Perspektif* 18, no. 1 (2013): 32–45.

<sup>2</sup> Putra, "Benturan Antara Kreditor Privilege Dengan Kreditor Preferen Pemegang Hipotek Kapal Laut Terkait Adanya Force Majeure."



A mortgage is an additional agreement due to the existence of a principal agreement. The conclusion is that if the party does not fulfill the obligations of the engagement then what is done is to sell the auction of objects belonging to parties who do not fulfill the obligations forcibly. The purpose of conducting the auction is to replace the repayment due to the non-fulfillment of the obligations of the engagement.

Legal expert, Moch. Isnaeni mentioned that creditors are mortgage holders of ships whose legal certainty and position is strong in order to regain repayment of their receivables. If one day the debtor defaults. Creditors of mortgage holders of ships have material rights born at the time they have been registered in a general register characterized by special characteristics. so that every mortgage act requires an authentic deed made by an authorized official. Notaries have the authority to make authentic deeds (Article 1 number 1 of the Notary Department Law). In Article 1 of the Notary Department Act, the phrase "the only one" is omitted because not only the Notary is authorized to make an authentic deed because the Law determines this authority is also given to other officials authorized to make authentic deeds.<sup>3</sup> The official in question because the Law determines this authority is given also to other officials other than notaries who are also authorized to make authentic deeds, among others; Clerks, Bailiffs, Civil Cataan Offices, Registrant Officers and Ship NameBack Registrars, etc.

The authorized official in the mortgage charge is the Ship Name Registrar and Registrar Official (hereinafter referred to as P3BK) in accordance with Article 60 paragraph (2) of Law number 17 of 2008 concerning Shipping (hereinafter referred to as the Shipping Law) states that the loading of hipetek on ships is carried out using the creation of mortgage deeds by the registrant officials as well as the recording of the ship name (hereinafter abbreviated as P3BK) on ships registered and recorded in the registration master list. the ship "which is registered with the head of the registration section and reverses the name of the ship, the directorate of shipping and shipping, the Directorate General of Marine Transportation of the Ministry of Transportation for ships registered with the local Syahbandar". Based on existing regulations, P3BK is classified as an authentic deed maker general official. P3BK is also authorized to make authentic deed such as mortgage deed. "The Shipping Law means that the maker of the authentic deed of the mortgage of the ship has shifted to the designated Sectoral Officer (in this case P3BK)"<sup>4</sup>. Looking at the Shipping Law, P3BK who can issue Mortgage deed.

Based on Article 30 of the Regulation of the Minister of Transportation of the Republic of Indonesia Number 39 of 2017 concerning Registration and Nationality of Ships (hereinafter referred to as Permenhub Registration and Nationality of Ships) The mortgage deed contains:

1. "Number and date of deed;
2. Name and place of position of The Registrant Office and Registrar of the Ship Name;
3. Name and administrating the giver and recipient of the mortgage;
4. Number and date of registration deed or land title transfer documents;
5. Ship data;
6. The basis of mortgage fixing;
7. Mortgage value;
8. Things that are promised."<sup>5</sup>

<sup>3</sup> Retno Sari Dewi, "Legalisasi Pengesahan Foto Copy Akta Bawah Tangan Dalam Pembuktian," *Jurnal Yustitiabelan* 1, no. 1 (2015): 2.

<sup>4</sup> A.A. Andi Prajitno, *Pengetahuan Praktis Tentang Apa Dan Siapa Notaris Di Indonesia* (Malang: Selaras, 2013).

<sup>5</sup> *Peraturan Menteri Perhubungan Nomor 39 Tahun 2017 Tentang Pendaftaran Dan Kebangsaan Kapal*, n.d.

The ministerial regulation governing the Registration and Nationality of ships explains that mortgage deeds must have this, so if this adds things related to the agreement is not possible. Departing from this, considering the contents of the mortgage deed issued by P3BK has a standard format and it is not possible to add clauses in it. The standard format contained in the mortgage deed makes it impossible to promise anything else so that the mortgage deed issued by P3BK is considered to provide less protection and does not represent the interests of the relevant parties in this case, namely creditors and debtors, this makes the future potentially cause legal problems. This Mortgage Deed is what makes the parties both creditors and debtors feel less protected than other guarantees such as in the Deed of Dependent Rights where in the Deed of Burden of Dependent Rights provides an opportunity to include the wishes of the parties.

Given the lack of protection of the wishes of the parties in the Mortgage Deed made by P3BK, then here is the need for a notary role in making a Power of Attorney to Install a Mortgage (abbreviated as SKMH). SKMH is basically to represent and protect the interests of the parties, which can reflect the wishes of the parties. Departing from the description, it is necessary to study the role of notaries in the process of charging mortgage guarantees on ships, then in this case according to the author it is necessary to be further researched about the strength of SKMH in the process of charging mortgage guarantees on ships. So based on the above case, researchers have solved two legal problems, namely: What is the role of notaries in the process of charging mortgage guarantees on ships? and What is the strength of SKMH in the process of charging mortgage guarantees on ships?

## B. Literature review

Primary legal material is legal material that is authoritative, meaning it has authority.<sup>6</sup> Laws and regulations related to the problems submitted, namely: a. Civil Code; b. Trade Law Code; c. Law No. 5 of 1960 concerning Provisions of Agrarian Principles; d. Law No. 4 of 1999 concerning Dependent Rights; e. Law No. 15 of 1999 concerning Flights for ships; f. Regulation of the Minister of Transportation of the Republic of Indonesia Number 39 of 2017 concerning Registration and Nationality of Ships.

Secondary legal materials in the form of all publications on the law that are not official documents that include textbooks, legal dictionaries, legal journals, and comments on court decisions.<sup>7</sup> related to the creation of a Power of Attorney to Install a Mortgage.

## C. Resarch Methods

“Legal research is a scientific activity based on certain methods, systematics, and thoughts that aim to study certain legal symptoms, by analyzing them, to then seek a solution to the problems that arise in the symptoms concerned..”<sup>8</sup> This research will be prepared using a form of normative juridical research, which is an approach carried out based on the main legal materials by studying theories, concepts, legal principles and laws and regulations related to this research or research focused on examining the application of rules or norms in positive law.<sup>9</sup> Which means finding an answer about a problem. The form of research conducted is

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<sup>6</sup> Peter Mahmud Marzuki, *Penelitian Hukum, Edisi Revisi, Cet. Kesembilan* (Jakarta: Kencana, 2014).

<sup>7</sup> Marzuki, *Penelitian Hukum, Edisi Revisi, Cet. Kesembilan*.

<sup>8</sup> Soekanto Soerjono, *Pengantar Penelitian Hukum* (Jakarta: UI Press, 1989).

<sup>9</sup> Johnny Ibrahim, *Teori Dan Metodologi Penelitian Hukum Normatif* (Malang: Bayumedia Publishing, 2006).

normative juridical which is also referred to as literature law research. In this normative juridical research, the approach taken is an approach to legislation (*statute approach*).<sup>10</sup>

The research typology used in this study is in an explanatory and evaluative form. Explanatory research is research that strengthens the state of existing laws. While evaluative research is research conducted to assess and test certain things, and provide reinforcement or improvement formulations. This research refers to systematic scientific procedures carried out to measure an outcome or project in accordance with the planned purpose or not by analyzing and reviewing the decision objectively.<sup>11</sup>

Secondary data is a type of data used in writing. "Secondary data is data derived from literature research, namely data obtained not directly from the first source, but from data documented in the form of legal materials."<sup>12</sup> A qualitative approach will be used to process and analyze the data in this study. Research that uses a qualitative approach to the overall data collected will be processed and analyzed by arranging data systematically, namely connecting a research result with other data obtained, then interpreted to understand the meaning of the data obtained.<sup>13</sup> By using this method in research will be obtained data that is in accordance with the problem studied. From the results of the research is processed and put forward in an analysis that answers the problems of the research.

## **D. Results and Discussion**

### **1. The Role of Notaries in The Process of Loading Mortgage Guarantees on Ships**

The existence of notaries is very important in community life. Notaries provide assurance of certainty, order and protection to the community in making deeds. The authentic deed made by the Notary contains formal truths that can be understood and accepted by all parties who need a guarantee of legal certainty so that no losses are suffered. In carrying out his position, a Notary has the following authority:<sup>14</sup>

- a. The Notary shall be authorized as long as it concerns the deed he made the purpose of this is that a Notary is authorized to make all deed as long as it is assigned and not excluded from it based on applicable laws and regulations;
- b. The notary shall be authorized as long as the person for whom the deed was made The notary is not authorized to make the deed for the benefit of each person;
- c. The notary must be authorized as long as it concerns the place, where the deed was made;
- d. Notaries must be authorized throughout the time of making the deed.<sup>15</sup>

As a general official, the Notary has a role in the guarantee of mortgages on ships. According to Article 1162 of the Civil Code, the definition of Mortgage is a sovereign right to immovable objects whose purpose is in lieu of the repayment of an alliance. The object of the mortgage is a stationary object that is land. But after Law No. 5 of 1960 or better known as UUPA and Law No. 4 of 1996 on Dependent Rights, land rights can no longer be burdened with Mortgages. But it is burdened with Dependent Rights or HT. Mortgage guarantee agencies are

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<sup>10</sup> Jonaedi Efendi; Johnny Ibrahim, *Metode Penelitian Hukum: Normatif Dan Empiris* (Jakarta: Kencana, 2018).

<sup>11</sup> Sri Kantun, "Penelitian Evaluatif Sebagai Salah Satu Model Penelitian Dalam Bidang Pendidikan (Suatu Kajian Konseptual)," *Jurnal Pendidikan Ekonomi: Jurnal Ilmiah Ilmu Pendidikan, Ilmu Ekonomi dan Ilmu Sosial* 10, no. 2 (2016): 10.

<sup>12</sup> I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum Cet. 2* (Jakarta: Prenada Media Grup, 2017).

<sup>13</sup> I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum Cet. 2.*, h. 200.

<sup>14</sup> Lumban Tobing, *Peraturan Jabatan Notaris* (Jakarta: PT Gelora Aksara Pratama, 1996).

<sup>15</sup> Tobing, *Peraturan Jabatan Notaris*.

applied to ships and aircraft. Arrangements against sea vessel mortgages in the KUHD, while aircraft mortgages are regulated in Law No. 15 of 1999 concerning Aviation.

Mortgage according to Article 1162 of the Civil Code is a sovereign right to immovable goods that are used as collateral in the repayment of an engagement. The birth of a mortgage if the mortgage bond must be registered in the general register so that everyone can find out and if in the event of no registration, the mortgage does not have any power, even against creditors who do not have a mortgage bond as stipulated in Article 1179 of the Civil Code. The object of the debtor's mortgage will be specially tied so that it must be registered.

The result of the law is the absolute right of the material or *zakelijke zekerheidsrechten*. Another legal consequence is to give *preferren positions* to the creditors of the holders, so that the rights of the treasury can have advantages when compared to other collateral rights including individual guarantees. In order for the right of matter to be born, there must be an additional agreement or *accessoir* agreement from the parent agreement. The point is that it must be promised in advance regarding objects that will be guaranteed specifically (Article 1132 of the Civil Code).

According to Sri Soedewi that the guarantee of the material is "a guarantee in the form of absolute rights over an object, which has the characteristics of having a direct relationship over a particular object, can be maintained against anyone, always follows the object or droid de suite and can be transferred. Ocean liner mortgage is one of the methods used by ship owners to increase capital in the shipping world. The right of matter is a right of power given directly to an object that everyone maintains. While the debtor's guarantee gives something to the creditor to convince the creditor that the debtor will fulfill his obligations, which can be valued with money so that later it will give birth to an alliance. Mortgages are usually used for ships, because since the enactment of the UUHT, land mortgages are now no longer valid so that the provisions in Book II of the Civil Code relating to land mortgages cannot be enforced. However, not all ships can be guaranteed using a Mortgage, the condition of the ship can be subject to a mortgage there:

- a. The existence of The Right of Treasury (articles 1168 - 1170 and article 1175 of the Civil Code) referred to by the Existence of The Right of The Land is that the ship already exists and is registered so that the rights have been born. Ships that are still in the process of construction and do not have grosse deed of registration of their ships cannot be burdened with mortgages (article 1175 civil code);
- b. The object is a ship weighing above 20m<sup>3</sup>;
- c. The ship must be recorded / registered in Indonesia The ship is registered at the local port The condition of the Sea Vessel can be subject to Mortgage;
- d. Provided with an authentic deed (Article 1171 civil code) In this case made before P3BK;
- e. Guaranteeing the debt bill (article 1176 of the Civil Code) In the provision of mortgages on ships, there must be debts guaranteed by the burden of the mortgage. Therefore, usually in the mortgage deed, in addition to listing the identity of the guaranteed ship, it also includes data on how much debt is guaranteed and how much the guarantee value of the Ship is intended. This is to provide legal certainty at the time of execution of the ship in question.

According to Article 314 of the Kuhd, it is stated that ships in Indonesia with a size of at least twenty cubic meters of dirty content, can be recorded into the ship register which is adjusted to the provisions contained in the Law. Based on this provision, what can be burdened with a mortgage is a ship with a gross contents size of 20 m<sup>3</sup> that has been registered with the Directorate General of Marine Transportation of the Ministry of Transportation. If the weight



of the ship is less than 20m<sup>3</sup> then the charge using the mortgage is not allowed and can only use the fiduciary guarantee. Mortgage can be given if a Ship Mortgage Deed has been made by P3BK at the Syahbandar Office where when it was registered. The recording / registration of the granting of a mortgage on the ship is recorded in the List Book and after that will be issued the charge of the mortgage on the ship. If the Ship Mortgage Deed has been completed, the next stage of recording / registration of mortgage provisions on the ship. The purpose of the recording / registration is to meet the conditions of publicity.

So that the privileges of the mortgage in the form of *droit de preference* and *droit de suite* can be exercised by the creditor on the ship guaranteed by the mortgage. According to Article 29 of the Permenhub Registration and Nationality of the Ship, it is explained that to be able to make a mortgage charge on the ship owner's ship and the recipient of the mortgage or mortgage recipient on his own at the power of the ship owner submits an application to the Registrar and Registrar of the Ship at the place where the ship is registered. The application must be completed with:<sup>16</sup>

- a. Credit agreement; and
- b. The original grosse deed of registration of the ship or grosse deed of return of the ship name.

Based on Article 30 of the Regulation of the Minister of Transportation of the Republic of Indonesia Number 39 of 2017 concerning Registration and Nationality of Ships (hereinafter referred to as Permenhub Registration and Nationality of Ships) The mortgage deed contains:<sup>17</sup>

- a. Number and date of deed;
- b. Name and place of position of The Registrant Office and Registrar of the Ship Name;
- c. Name and administrating the giver and recipient of the mortgage;
- d. Number and date of registration deed or deed of baliknama;
- e. Ship data;
- f. The basis of mortgage fixing;
- g. Mortgage value;
- h. Things that are promised.

Based on Article 30 paragraph 4 of the Permenhub Registration and Ship Internationality, it is explained that the form and contents of the ship's mortgage deed are made using the format of Example 10 Attachment II which is an integral part of this Ministerial Regulation. what is meant by the things promised is explained in the following sentences:

*"The defendant in his position also explained, that the installation of this mortgage is carried out with the conditions listed in the (credit agreement). and The Deed of Power of Attorney To Install a Ship Mortgage Number ..... date ....., made before ....., Notary in ....., and also uses the terms and agreements commonly used to install the First, Second, Third and so on Mortgages, especially the terms and conditions contained in Article 1178, Article 1185 and Article 1210 of the Civil Code and Article 297 of the Trade Law Code."*

In its principles in a mortgage agreement there are 2 (two) parties that must be protected, namely mortgage recipients and mortgage lenders. Mortgage agreements agreed by creditors and debtors where there is an achievement that the creditor is required to immediately

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<sup>16</sup> Peraturan Menteri Perhubungan Nomor 39 Tahun 2017 Tentang Pendaftaran Dan Kebangsaan Kapal., Pasal 29.

<sup>17</sup> Peraturan Menteri Perhubungan Nomor 39 Tahun 2017 Tentang Pendaftaran Dan Kebangsaan Kapal., Pasal 30.

disburse the money and the debtor is obliged to pay the debt and interest in accordance with the credit agreement, while the new debtor payment can be carried out after the credit is disbursed. This shows that there is a risk from the creditor side if at any time the debtor defaults so that the need to be promised further because in the mortgage deed is not possible because the form that has been standard.

"Mortgage Deed made by P3BK is considered to be less protective and represents the interests of the parties, namely creditors and debtors so that later it has the potential to cause minimal legal protection." It would be nice to tie the guarantee made in the form of a Notary deed, because the Notary as a general official and has the authority to make authentic deeds and other authorities regulated by the Notary Department Law.<sup>18</sup> "As long as the evidence in the form of authentic deeds is still needed as proof by the state legal system, the position of Notary will still be needed for its existence in the community."<sup>19</sup> Notaries have served the community in making evidence in the form of authentic deeds.

Notaries are authorized to make authentic deeds regarding all actions, agreements, and prerequisites required by law and/or as desired by interested parties. Notaries are also required to ensure and guarantee the certainty of the date of making the Deed, keep the Deed made, provide Grosse, Copy and Quotation of the Deed which are all throughout the making of the Deed. The function of the Notary Deed is to bind the guarantee and also as an authentic deed. The role of the notary in the mortgage charge process is the creation of an SKMH which contains a group of information and promises for the parties that are poured in the form of deeds and made before the Notary. After the SKMH is finished, the next stage is for the parties to face the P3BK. In the guarantee of Ships of the Sea it is necessary to pay attention that the ship is carried out in the form of a mortgage. Legal construction regarding mortgages refers only to the loading of immovable objects. The scope of the immovable object is not only on a ship measuring 20 m<sup>3</sup>, but also on the loading of land. However, land mortgages are no longer valid because Book II of the Civil Code relating to land mortgages has not been enforced with the presence of uuht which is still valid is a mortgage for ships measuring 20m<sup>3</sup>.

Mortgage is an additional agreement due to the existence of a principal agreement. This means that if the party concerned does not fulfill its engagement obligations, then forcibly, the law can order to sell the auction of the person's objects to replace the repayment of the granted engagement obligation. SKMH and deed made by P3BK, of course there are differences, this is mainly because a notary has a very different background from the deed maker from P3BK. "The basis that distinguishes SKMH from the mortgage deed resulting from the P3BK. As a difference between the two, in SKMH list clauses or promises as follows:"<sup>20</sup>

- a. *Beding van eigen machtige verkoop* or clause containing that to sell the object of guarantee if the debtor does not fulfill the obligations in the credit agreement;
- b. *Huurbeding or called a lease promise*. Clauses containing promises in mortgage deeds that limit the freedom of debtors to rent out their collateral;
- c. *Assurantie Beding or insurance appointment*. Clauses containing the promise under creditors can directly receive money from the payment of insurance claims in case of a risk of loss to the ship burdened by the mortgage;

<sup>18</sup> Abdul Ghofur Anshori, *Lembaga Kenotariatan Indonesia, Perspektif Hukum Dan Etika* (Yogyakarta: UII Press, 2009).

<sup>19</sup> Anke Dwi Saputro, *Jati Diri Notaris Indonesia Dulu, Sekarang, Dan Di Masa Datang* (Jakarta: Gramedia Pustaka Utama, 2008).

<sup>20</sup> Fani Martiawan Kumara Putra, "Surat Kuasa Memasang Hipotek Dalam Jaminan Hipotek Kapal Laut."

- d. *Beding Van Niet Zuivering* or promise not to be cleaned. A clause that contains the provision of protection to mortgage holders not to make mortgage write-offs on credit guarantee items that have been burdened with a mortgage, that is, in the event that the ship is sold voluntarily at a price below the value of the mortgage, while the loan has not been fully repaid at the price of the ship;
- e. *Clauses relating to emptying* containing the provision that the owner of the ship at his own expense will vacate the guaranteed vessel if the creditor deems it necessary to sell the vessel in the framework of a credit settlement;
- f. *Clauses containing* that the mortgage applies to debts arising from existing credit agreements along with changes and/or extensions thereof and debts arising from credit agreements made later;
- g. A clause containing that the mortgage provider authorizes with the right of substitution to the creditor to receive and keep the original grosse deed after recording in the Mortgage List on the Ship Registration Master List until the credit is declared paid off;
- h. *Clause stating* that the mortgage covers ships with all existing equipment or to be placed or placed which by its nature and designation is an inseparable entity;
- i. *Clauses that contain if the mortgage* provider will change the arrangement of the mortgage object is required to first get written approval from the mortgage recipient.

These clauses and promises are part of the SKMH, and are made in detail, moreover, the inclusion of witnesses in the SKMH, this witness has an important role, which is intended as an outside party of the agreement who participates in knowing the existence of legal relationships made by the parties, so that the existence of this deed will be evidence as an authentic deed if in the future there is a dispute. Thus what is stated in the SKMH will certainly be felt to be able to better guarantee the interests of the parties, and accommodate the wishes of the parties (debtors and creditors). SKMH is considered more able to reflect the wishes of the parties. SKMH contains a set of statements and promises for the parties, in the form of deeds, and made before a Notary. After the SKMH was issued, the parties faced P3BK. This is because the Mortgage Deed contains general things such as the identity of the ship, the number of guarantees, registration status, the length of guarantee, and the statement of no duplication of guarantees. This is perceived to be less than fulfilling the wishes of the parties.

## **2. The power of SKMH in the process of loading mortgage guarantees on ships**

The Mortgage Deed made by P3BK has perfect evidentiary power, but has not been able to accommodate the wishes of the Parties, so this is where the Notary has his role in making SKMH that can accommodate the wishes of the parties. The existence of SKMH in the process of guaranteeing the sea ship mortgage is the choice of the parties, may be made, may not, because in essence SKMH is a power of attorney and form of agreement, hereby means that the principle of Freedom of Contracting applies in accordance with Article 1338 of the Civil Code. At the beginning of the use of SKMH, usually SKMH is made in the form of an "absolute power of attorney" to the exclusion of the provisions contained in Article 1813 of the Civil Code, it avoids the provision of power of attorney at any time can revoke the power of attorney.

The function of the SKMH made today is not only used limitedly because the parties are in a different place from the registered ship, or because the parties are not present at the time of the binding of the guarantee, but SKMH is made because it is desired by the parties (especially creditors) in each Mortgage binding agreement to get more special protection that is felt to be able to bridge their desires that are not fulfilled by the Mortgage deed made by P3BK.<sup>21</sup>

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<sup>21</sup> Ninin Diah Safitri, "Pejabat Pembuat Akta Hipotek Kapal Laut" (Universitas Airlangga, 2009).



SKMH made by the Notary is an authentic deed that has perfect evidentiary power, both in front of the Judge and to third parties, unless it can be proven otherwise by the opposing party concerned with submitting other evidence. An authentic deed has perfect evidentiary power for the parties and all their heirs or other parties who have the right of the parties. So that if a party submits an authentic deed, the judge must accept it and consider what is written in the deed to be true, so that the judge cannot order the addition of further evidence.<sup>22</sup> R. Subekti, stated that a deed is a writing that is deliberately made to be used as evidence of an event and signed.<sup>23</sup> An authentic deed itself is a deed made in a form determined by law by or before a public official authorized for it at the place where the deed was made.

The condition of an authentic deed must meet the "*verlijden*", it is drafted, read out, and signed by a Notary. Because the notary deed is an authentic deed that has perfect evidentiary power, the creation of a notary deed must be done carefully and follow the signs that have been determined in the legislation so that there are no errors in making the deed. If there is an error in the making of the deed, then the deed will become legally defective and lose its authenticity so that it can cause the deed that was authentic to be a deed under the hands, rights and / or obligations arising from the deed becomes non-existent or invalid due to imperfect evidence in court so as to harm the parties in the deed.

The evidentiary power of the authentic deed is a direct result because there is a necessity of the provisions of the legislation governing the deeds that must be made in authentic form as a means of proof and from the duties imposed by the law to certain officials or people, in this case are Notaries. In the common opinion, in each authentic deed, divided into three evidentiary forces, namely:<sup>24</sup>

a. The Power of Outward Proof (*Uitwendige Bewijskracht*).

This outward evidentiary force is intended for the ability of the deed itself to prove itself as an authentic deed. In essence, a deed can be seen whether it is an authentic deed or not from its physical form, for example, there is a state emblem, notary stamp, cachet, and others;

b. Formal Evidentiary Force (*Formele Beswijskracht*).

This formal evidentiary force is intended that the official concerned has stated in the writing, as stated in the deed and other than that the truth of what the official describes in the deed as done and witnessed in the exercise of his position. In the formal sense, it is guaranteed the truth / certainty of the date, the signature present, the place of making the deed, as well as the information submitted by the parties;

c. Material Proof Force (*Materiele Bewijskracht*).

The strength of this material proof is intended for the content of the information contained in the deed to act as true with the understanding that the deed can be used in front of the court and that the judge is not allowed to ask for other proofs besides that, as long as it cannot be proven otherwise.

Meanwhile, according to Retnowulan Sutantio, *an authentic deed is understood to have 3 (three) aspects*, namely:<sup>25</sup>

<sup>22</sup> Sony Nurul Akhmad, "Kekuatan Akta Autentik Yang Dibuak Oleh Notaris Untuk Pembuktian Terhadap Tindak Pidana Pemalsuan," *Jurnal Hukum dan Kenotariatan* 3, no. 1 (2019): 86.

<sup>23</sup> R. Subekti, *Hukum Pembuktian, Cet. 10* (Jakarta: Pradnya Paramita, 1993).

<sup>24</sup> Tobing, *Peraturan Jabatan Notaris.*, h. 55 – 60.

<sup>25</sup> Edmon Makarim, *Notaris Dan Transaksi Elektronik: Kajian Hukum Tentang Cybernotary Atau Electronic Notary, Ed. 2* (Jakarta: Raja Grafindo Persada, 2013).

- a. The strength of proof formil, because it proves between the parties that they have explained what is stated in the deed;
- b. The power of material proof, because it proves between the parties that the event in the deed has occurred correctly;
- c. The power of outward proof is binding, because its enforceability is also binding to third parties outside the parties in the deed.

That the power of the authentic deed is a means of evidence, this is proof in the trial by both parties to prove, and reject/ win and the parties to convince the judge in the trial. The power of authentic and proof deed, in which an authentic deed is made in front of a state official in the form specified by the law, when, where, it is made and signed so that it can be trusted by the judge who convenes. The strength of the authentic deed contains the meaning of formal evidentiary power, material proof force and proof power out, in addition to the deed under the hand not made by a notary.<sup>26</sup>

Proof in civil cases, is the work to use evidence for the justification of claims, thus the evidence is very related to the claims (*posita*). Similarly, evidence is closely related to events because events can cause rights and will in itself lead to prosecutions when they are disturbed. Registration is also intended as a fulfillment of the principle of publicity, one of the characteristics of modern debt guarantee is the fulfillment of the element of publicity. With the intention of the more publicized debt guarantee, it will be better so that creditors or the public can find out or have access to know important information around the debt guarantee.

Registration as a publicity principle is becoming increasingly important to debt guarantees where the physical object of the guarantee is not handed over to creditors. Therefore, Rachmadi Usman added, the obligation to register mortgage guarantees to authorized agencies is one of the manifestations of the principle of publicity, and it is expected that no parties have bad faith (both debtors and creditors), by betraying once again or even selling collateral object goods.

What's more, the list of ships in the ship registration office is *open* or *openbaarheid* so that everyone can see the registration of a ship, can even ask for a copy of certain ship deeds to the Ship Registrar Employee so that if someone wants to buy the ship, or has other interests, can find out things about the ship, for example whether it is burdened with a mortgage, or not. From the description above, it can be understood that as required by Article 1179 of the Civil Code, mortgage registration, and ship registration are one of the aspects required in the shipping arrangement system as a form of *the Principle of Publicity*.

This Principle of Publicity is intended to have legal consequences against third parties. The protection arising in the event of registration of this mortgage agreement applies to the parties, namely debtors and creditors, as well as to third parties. Not only information about the status of the ship, weight, type and also burdened by the ship will be mortgage guarantees that give birth to vigilance in buying or burdening with other mortgage guarantee rights in a ship which of course because of the promises in the SKMH that have been registered, another thing that also relates to the implications of the promises in the SKMH is to make third parties more vigilant because if the debtor breaks the promise or bankruptcy, then the holder of this mortgage creditor has the power to sell the mortgage object himself without requiring approval from the debtor and does not need to ask for a court determination if it will execute the collateral, this is called the power to sell, and is regulated in Article 1178 of the Civil Code, which

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<sup>26</sup> Deo Fandy Tumembouw, "Tinjauan Yuridis Akta Otentik Sebagai Alat Bukti Dalam Perkara Perdata," *Lex Privatum* 7, no. 6 (2019): 56.

is allowed to be promised in advance between the creditor and the debtor, if the debt is not repaid, then it can take repayment independently.

## E. Conclusion

1. Notaries have their role in the mortgage loading process by making SKMH which contains a group of information and promises for the parties that are outlined in the form of deeds made before notaries. SKMH contains clauses agreed upon by creditors and debtors as protection from each party because the mortgage deed made by P3BK is not possible to contain clauses from each party then that protects the interests of the parties. SKMH is considered more able to reflect the wishes of the parties because the Mortgage Deed contains things that are general in nature.
2. The existence of SKMH in the process of guaranteeing the sea ship mortgage is the choice of the parties because in essence SKMH is a power of attorney and the form of the agreement, hereby means that the principle of Freedom of Contracting applies in accordance with Article 1338 of the Civil Code. SKMH has perfect proofing power because it is an authentic deed that has The Power of External Proof (*Uitwendige Bewijskracht*), Formal Proof Force (*Formele Beswijskracht*), and Material Proof Force (*Materiele Bewijskracht*). The existence of a publicity principle allows SKMH to bind third parties so that the clauses stated in the SKMH so that they can protect the parties in the agreement and can also bind third parties. Registration as a Publicity Principle is becoming increasingly important to debt guarantees where the physical object of the guarantee is not handed over to creditors. The obligation to register mortgage guarantees to authorized agencies is one of the manifestations of the principle of publicity, and it is expected that no parties have bad faith (both debtors and creditors). The Principle of Publicity is intended to have legal consequences against third parties. The protection arising in the event of registration of this mortgage agreement applies to the parties, namely debtors and creditors, as well as to third parties. Not only the information about the status of the ship, the weight, type and also burdened by the ship of mortgage guarantees that give birth to vigilance in buying or burdening with other mortgage guarantee rights in a ship which of course because of the promises in the SKMH that have been registered, another thing that also relates to the implications of the promises in the SKMH is to make third parties more vigilant because if the debtor breaks the promise or bankruptcy, then the holder of this mortgage creditor has the power to sell the mortgage object himself without requiring approval from the debtor and does not need to ask for a court determination if it will carry out the execution of the collateral, namely ships.

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