

THE EXISTENCE OF PASSIVE SUBJECTIVE NOVATION IN THE LEGAL SYSTEM OF AGREEMENTS AND WARRANTIES

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Abstract

Passive Subjective Novation is a replacement of the old debtor with a new debtor, and the creditor agrees that the old debtor is freed from the obligation to pay the debt. In Indonesia, Novation is regulated in the provisions of Article 1381 of the Civil Code, but in reality there is no single legal regulation that clearly explains Novation, especially Passive Subjective Novation. This legal vacuum regarding Passive Subjective Novation then causes legal uncertainty and creates problems because there are no clear references in terms of understanding, implementing regulations, and standard operating procedures (SOPs). The problems in this study are related to the existence of Passive Subjective Novation in credit agreements with mortgage rights in the legal system of agreements and guarantees, the meaning of Passive Subjective Novation in credit agreements by using mortgage guarantees on land, and the legal position of new debtors with Passive Subjective Novation so that can provide legal certainty. This research is normative juridical research using an analytical approach and a conceptual approach as well as grammatical interpretation analysis techniques, systematic interpretations and teleological interpretations to analyze primary, secondary and tertiary legal materials. The results of this study indicate that the existence of a novation credit agreement, especially a passive subjective novation if carried out will involve the parties who were originally involved in the previous credit agreement. The novation is carried out explicitly by using a concrete authentic deed to confirm the position of this novation in the credit agreement. Switching the debtor when the credit agreement is still halfway through, can cause problems for the bank, and the most important and first problem that arises is who will continue the credit agreement because it is impossible for the credit agreement to be released just like that.

Keywords: *Passive Subjective Novation, Legal System, Agreement, Warranties, Debtors.*

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1. Introduction

Novation or renewal of debt is one way of ending an agreement as regulated in the provisions of Article 1381 of the Civil Code. Novation basically occurs when the old

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engagement is replaced with a new one, the old creditor is replaced with a new creditor, and the old debtor is replaced with a new debtor. The novation which is carried out by replacing the old debtor with a new debtor is commonly done if the old debtor is unable to pay off its debt payments to the creditor, thus allowing a new debtor to replace the old debtor's position to pay a certain amount of money to the creditor. Thus the novation can be carried out as an effort to avoid the risk of default, either at the initiative of the old debtor or from creditors including banks.

Basically the novation was born because of the agreement made by the parties, using which the existing agreement was deleted and at the same time a new agreement was made to replace the abrogated agreement. Novation can be an effort to overcome bad credit because with novation the parties based on agreement can make new credit agreements, namely by way of the bank providing new debt loans to creditors which will later become a new credit agreement as a continuation of the old agreement. Thus, the risk of bad credit can be avoided. Regardless of the causes of credit congestion experienced by debtors, it is clear that this congestion meets the provisions of the legislation. For each debt, the principal obligation of the borrower is to returning the loan interest in the same amount and condition at a predetermined time. In the event of bad credit, the bank needs to make a rescue, in order to reduce the difficulty to a minimum, proper handling of bad credit is needed. Then based on Article 1413 of the Civil Code, it states that there are 3 (three) forms of debt renewal, including the following (Suhariningsih, 2020):

1. When a debtor makes a new debt alliance use the person who owes him, which replaces the old debt, which is written off thereby.
2. When a new debtor is appointed to replace the old debtor, who by the debtor is freed from his alliance (Setyaningrum, Septanti, & Imanullah, 2015).
3. If, as a result of a new agreement, a new creditor is appointed to replace the old creditor, against whom the creditor is released from his alliance.

The understanding as the author explained earlier is the opinion of an expert who interprets the provisions as regulated in Article 1413 of the Civil Code as a novation, but in reality there is no single legal regulation that clearly explains the novation, especially the passive subjective novation. This legal vacuum regarding Passive Subjective Novation then causes legal uncertainty and creates problems because there are no clear references in terms of understanding, implementing regulations, and standard operating procedures (hereinafter referred to as SOPs). Here the author describes examples of cases that occur related to Novation.

Novation problems that occur between PT. BTN to PT. Tiara Futuba, this problem arose because the Novation agreement was unknown or not notified in advance to the original Debtor who had also entered into a relationship with a third party. Debtors (legal entities) engaged in property, sell units of land and buildings to Buyers. The credit is framed with a mortgage guarantee on the land belonging to the developer debtor. What is the problem with the Yasa Griya Credit facility by PT BTN to PT. Tiara Fatuba. The case began in April 2019 at the PT. BTN Semarang Branch has provided Yasa Griya Credit facilities to PT. Tiara Fatuba Rp. 15.2 billion in which the procedure for granting was carried out against the law, not by the Circular Letter of the Board of Directors of PT. Bank BTN (Persero), Tbk, resulting in bad loans amounting to Rp. 11.9 billion (Suhariningsih, 2020).

Asset Management Division (AMD) BTN Head Office in December 2015 conducted a novation (renewal of debt) to PT. Nugra Alam Prima (NAP) with a ceiling value of Rp. 20 billion and without any additional collateral, causing bad loans to returning to Rp. 15.6 billion. Then in November 2016, AMD Headquarters BTN carried out Novasi (renewal of debt) unilaterally from PT. NAP to PT. Lintang Jaya Property which is by the Standard Operating

Procedure (SOP) and without any additional collateral with a credit limit of Rp. 27 billion, causes bad loans to returning to Rp. 26 billion with the collectability category (Suhariningsih, 2020). Due to the unilateral Novation process, the process of changing the name of the certificate on behalf of PT. Tiara Futuba to PT. NAP, also cannot be implemented. So even though the Novation was carried out, the collateral has not been fully tied up. Whereat the time of doing the novation, PT. Tiara Fatuba did not know about this novation, and the certificate has not been changed yet it is still in the name of PT. Tiara Futuba. With this condition, how can you sell the object of a mortgaged house (housing loan) to a third party, while the certificate is still in the name of PT. Tiara Futuba. So that even though the innovation has been carried out, it does not provide a solution, because the innovation was carried out without the knowledge of PT. Tiara Futuba.

Reflecting on the case of PT BTN which carried out Novation unilaterally without the knowledge of the original debtor, PT Tiara Futuba, which then had implications for the new debtor of PT. NAP cannot sell the object of collateral to a third party, so there are legal security issues that must be resolved so that the Novation agreement can run without harming the parties and even third parties. Based on the background as previously described above, it can be concluded that the problem in this research is that there are no clear rules regarding Passive Subjective Novation, this is indicated by the absence of mention of the term Passive Subjective Novation in the laws in force in Indonesia, so there is a need for a study of how is the existence of the validity of the Passive Subjective Novation in credit agreements using mortgage rights in the legal system of agreements and guarantees that apply in Indonesia?

2. Research Method

The research method used is normative juridical, namely conceptualizing law as what is written in laws and regulations (law in books) or law as a rule or norm which is a benchmark for human behavior that is considered appropriate (Marzuki, 2008). The approach used in answering the problem is to use a statutory approach, and conceptual approach. The legislative approach is taken by examining all legal regulations in the form of laws and other regulations related to the problem of law. The conceptual approach moves on the views and doctrines that develop in the science of law (Ibrahim, 2006). This approach is used so that researchers can study the opinions and doctrines of legal science related to the terms of the validity of the agreement, so that researchers can use these opinions and doctrines as a basis for creating new concepts related to the meaning of Novation, especially for Passive Subjective Novation.

The legal materials used are primary, secondary, and tertiary legal materials. The procedure for collecting legal materials used in this research is a literature study, namely collecting data by reading laws and regulations, official documents and literature that are closely related to the problems discussed. The technique of analyzing legal materials uses analytical techniques in the form of grammatical interpretation and systematic interpretation (Nisa, 2013). By using a grammatical interpretation, the author can find out the meaning of passive subjective novation in a credit agreement by using mortgages based on the language used by the author in everyday life both in the KBBI and legal dictionaries, as well as the systematic interpretation used by the author to find out the meaning of passive subjective novation. In credit agreements by using mortgages based on the provisions in laws and regulations, the existence of the enforceability of passive subjective novation in credit agreements using mortgages in the legal system of agreements and guarantees, as well as passive subjective novation arrangements so as to provide legal certainty and protection.

3. Results and Discussion

3.1. Bad Credit and Passive Subjective Novation

The word credit comes from the Greek word “credere” which means trust. Many businesses in the industrial sector, both large and small, require credit that functions as capital assistance so that businesses can run smoothly and achieve progress. In general, entrepreneurs are not always able to provide all the capital needed for their own business, so they need credit from other parties, such as banks. Credit contains the notion of “Degree of Risk” which is a certain level of risk, because the release of credit contains a risk, both risk for the creditor and for the credit recipient (Bartlett, 1999). For the credit recipient, the risk that may arise is that if he cannot repay the loan, he will lose capital. For the creditor, one of the risks that can occur is if the credit recipient cannot pay off his obligations at the agreed time or in other words if there is what is called bad credit. If the creditor assesses that the debtor can no longer make installment payments on his loan, the management of the debtor's debt which is a state receivable is handed over to the State Receivables and Auction Service Office (KP2LN) or previously the State Receivable Affairs Committee, on the basis of the legality of Law Number 49 Prp. 1960 concerning the Committee for State Receivable Affairs or PUPN.

Although the management of state receivables has been taken over by the Office of Accounts Receivable and State Auctions, but bad credit handling efforts can be done through rescheduling (restructuring), re-requirements, rearrangement of installments, or can also be novation (Valeanu, 2014). Article 1413 Burgerlijk Wetboek, states that there are 3 (three) ways to carry out debt renewal (novation), namely first if a debtor makes a new debt alliance for the person who owes him, which replaces the old debt, which is written off, second if a new debtor is appointed to replace the old debtor, who by the debtor is released from his alliance, third when as a result of the new agreement, a new debtor is appointed to replace the old debtor, against the debtor is released from his alliance (Badruzaman, 2001).

Based on the provisions, if a deed in the event of passive subjective novation does not absolutely have to exist, however, the absence of the deed results in complicated problems, one of which is that creditors and the State Receivables and Auction Service Office (KP2LN) as the agency tasked with resolving the settlement of bad loans do not acknowledge the existence of a deed. debt renewal by the new debtor, for example what happened in the case of register No.288/Pdt.G/2006/PN.Sby. The new debtor is late in making installment payments to the State Receivables and Auction Service Office (KP2LN). As a result, the State Receivables and Auction Service Office (KP2LN) gave a warning not only to new debtors, but also to old debtors. This situation was even followed up with a notification that they wanted to conduct an auction on the assets of the credit collateral belonging to the old debtor.

Based on a summons or warning from the State Receivables and Auction Service Office (KP2LN) to the old debtor, and the new debtor's arrears in payment of installment obligations, it has implications for the old debtor to file a civil lawsuit to the Surabaya District Court for the accumulation or concomitant lawsuit for Unlawful Acts and Default (*samenloop van rechtsvorderingen*) (Soepomo, 2002). In principle, each lawsuit must stand alone. Each lawsuit is filed in a separate lawsuit and is examined and decided in a separate and independent examination and decision process. However, in certain cases and limits, it is permissible to combine lawsuits in one lawsuit if there is a close relationship or connectivity between one lawsuit and another (Kwon, 2013).

Although the *Het Herziene Indonesisch Reglement (HIR)*⁵ and *Rbg* did not regulate it, the judiciary has been implementing it for a long time. Supomo pointed out that one of the

⁵ *Het Herziene Indonesisch Reglement* is the UPDATED INDONESIAN REGLEMENT in Dutch, which means the Regulation on carrying out police duties, adjudicating civil cases and prosecuting sentences for Indonesians and Foreign Easterners in Java and Madura. Retrieved From <http://jdih.padangpanjang.go.id/public/aturan/hir.pdf>

Judgments of the Jakarta Justitie Raad on June 20, 1939 which allowed the merger of the original claims between the lawsuits, there was a close relationship (innerlijke samenhang). The same opinion was confirmed in the Decision of the Supreme Court of the Republic of Indonesia Number 575 K/Pdt/1983, dated June 20, 1984, Jo. Tanjung Karang High Court No.36/1982 dated 31 August 1983, Jo. Tanjung Karang District Court No.35/1981, dated March 24, 1982, which explained, among other things, that although Article 393 paragraph (1) of the Het Herziene Indonesisch Reglement (HIR) states that the procedural law is only concerned with the Het Herziene Indonesisch Reglement, but in order to achieve this process, doelmatigheid, it is possible to apply institutions and provisions for events outside those stipulated in the HIR. Therefore, based on this reason, it may be possible to combine (samenvoeging) or objective accumulation as well, as long as there is an innerlijke samenhangen or close connection between them. Merger of three, or several cases can be justified to facilitate the process and avoid the possibility of conflicting decisions. The Indonesian Civil Procedure Code recognizes the existence of an amalgamation rather than a claim which is known as an objective compilation. The prohibition of objective cumulation is contained in things (Mertokusumo, 2006):

1. If a specific claim (lawsuit) requires a special procedure (a lawsuit for divorce), while the other claims must be examined according to the usual procedure (for example, a lawsuit to fulfill an agreement), then the two rights claims may not be combined in the same lawsuit. one and the other.
2. Claims relating to the relative authority of the judge to examine one of the claims that are filed together in one lawsuit with another, then the claim for rights may not be filed together in one lawsuit. The relative authority of a judge is related to the jurisdiction of a court in relation to filing a lawsuit, violating Article 118 of the Het Herziene Indonesisch Reglement, for example a lawsuit regarding fixed objects is submitted to the District Court where the defendant resides.
3. The lawsuit (claim of rights) regarding “bezit”, may not be filed together with the “eigendom” lawsuit in one lawsuit (Article 103 Reglement op de Burgerlijke Rechtsvordering).

In the culmination of a lawsuit, between rechtelijke grond (affirmation of the legal relationship between the Plaintiff and the disputed material and or object), and the relationship between the Plaintiff and the Defendants relating to the disputed material or object and feitelijke grond (explanation of statements regarding facts or events related to directly with or around the legal relationship that occurs between the Plaintiff and the material or object of the case as well as with the Defendants, or explains facts that are directly related to the legal basis or legal relationship argued by the Plaintiff), are mutually dependent on one another. , or in other words, there is a close relationship between the lawsuits. The registration case No. 288/Pdt.G/2006/PN.Sby is a form of samenloop van rechtsvorderingen. The lawsuit was filed by the old debtor to the State Receivables and Auction Service Office (KP2LN) with the creditor (PT. Bank Negara Indonesia, Tbk).

The legal fact that occurs is that when the task of managing state receivables has been handed over to the State Receivables and Auction Service Office (KP2LN), then from that moment on, the responsibility of the creditor (PT. Bank Negara Indonesia (Persero) Tbk, has ended. His duties have ended. taken over by the State Receivables and Auction Service Office (KP2LN) on the basis of the legality of Law No. 49 Prp of 1960 concerning the Committee for State Receivable Affairs, as intended by the provisions of Article 4 paragraph (1) of Law No. 49 Prp of 1960.

There are 2 (two) factors that can change and decrease the value of the strength and minimum limit of proof of an underhand deed, namely if an opponent's evidence is submitted,

the contents and signature are denied, or not recognized by the opposing party. Without these conditions, the statement letter and agreement letter attach the value of perfect and binding proof of power. Therefore, in court, for the sake of law, there has been a confession from the Office of the State Receivable and Auction Service (KP2LN) and creditors of PT. Bank Negara Indonesia (Persero), Tbk there has been a debtor transition, and the act of giving a subpoena or warning to the old debtor for late installment payments by the new debtor is clearly an unlawful act carried out by the State Receivables and Auction Service Office (KP2LN). Article 1365 Burgerlijk Wetboek (Sulistyo & Harahap, 2019), states that: "Every act that violates the law, which brings harm to another person, obliges the person who because of his fault published the loss, to compensate for the loss."

The condition "predictable" is the condition that a normal human being with certain possibilities in a given situation can predict the result as stated in Article 1247 Burgerlijk Wetboek. Civil liability for default submitted by the old debtor to the new debtor is based on the reasons for the new debtor's ability to repay all the old debtor's loans to the State Receivables and Auction Service Office (KP2LN). The reason for this was stated in a statement dated October 12, 2003 which was then followed up with a notarial deed dated October 21, 2003 in which the new debtor was willing to pay off all debts from the old debtor. Without a clear and definite reason suddenly a new debtor just like that.

Based on the provisions of Article 1338 Burgerlijk Wetboek, the statement and agreement letter are binding on both parties and act as law. When suddenly the new debtor no longer pays the loan without a clear and definite reason, this is a form of implementation of the new debtor's default to the old debtor. Article 1236 of the Burgerlijk Wetboek and Article 1243 of the Burgerlijk Wetboek provide the basis for the rights of the Plaintiff which may be included in a civil suit due to default. These rights are compensation in the form of costs, losses and interest. In addition, in certain events, in addition to a claim for compensation, or the possibility of a claim for cancellation of the agreement. The indecisiveness of the regulations in Burgerlijk Wetboek regarding the need for a novation deed has the consequence that there is no legal protection for old debtors. Therefore, in the case as referred to in case Number 288/Pdt.G/2006/PN.Sby, it is expected to provide legal protection for new debtors.

3.2. Passive Subjective Novation Juridical Problems

There are 3 (three) types of debt novation or renewal, namely: Objective novation, namely debt renewal by which the debtor makes a new debt contract to replace his old debt. So in this case what is replaced with a new contract is solely the debt and there is no change to the debtor or creditor. Active subjective novation, namely the replacement of old creditors with new creditors. As a result, the debtor and the old creditor no longer have a debt contract. Passive subjective novation, namely the replacement of the old debtor with a new debtor, and the creditor agrees that the old debtor is released from his obligations. After the credit period runs and has not been paid off, the debtor is no longer able to carry out his obligations because the debtor who is also the owner of the guarantee dies, therefore the bank requires a novation (renewal of debt).

The old debtor who has died is replaced by a new debtor. By changing the old debtor to the new debtor, it means freeing the old debtor from his obligation to pay debts to creditors. Article 1318 of the Civil Code states that if a person asks to be agreed on something, it is considered that it is for his heirs and the people who have rights thereof, unless it is expressly stipulated or it can be concluded from the nature of the agreement, that this is not the case. The point is that if it turns out that the debtor dies even though the agreement has not ended or the credit has not been paid off while the credit is still being used for its business activities, the heirs are automatically obliged to continue the agreement, unless it is expressly stipulated or it can be concluded from the nature of the agreement that this is not the case.

In this case, the bank does not immediately consider the credit to fall to the heirs, but the bank requires a novation. Banks may actually not carry out novation if they want the execution of Mortgage Rights. It's just that, the bank has an interest in the continuation / smooth installments of loan repayments without having to execute Mortgage Rights. Meanwhile, on the other hand, the debtor regrets more if the collateral is executed, besides that the heirs are able and willing to continue paying the credit installments. Therefore, the novation was carried out in the interests of both parties.

Debt renewal is done based on an agreement of both parties where the creditors and debtors agree to cancel the old alliance and replace it with a new alliance. The accessoir agreement is also canceled if the principal agreement is canceled, unless the parties expressly state otherwise. Old receivables are written off and replaced with new receivables. Article 1381 of the Civil Code states that one of the events that led to the abolition of the alliance was due to the renewal of the debt. Novation or renewal of debt can only be carried out by a person who is competent to form alliances (Article 1414 of the Civil Code). The new debtor signs the debt renewal act (novation) with the replacement of the debtor. The Act is the basis of the implementation of debt reform. Before the process of novation or debt renewal is completed, for the security of the bank, it is necessary to erase the Dependents, Certificate of Inheritance, Power of Attorney to Charge Dependents (SKMHT), Joint Rights Division Act (APHB), Dependents Grant Act (APHT), and collateral must be correct. on behalf of the living person (can be all heirs or one of the heirs).

The bank provides an approval letter for the process of transferring rights to the Land Office on behalf of the agreed heirs, and then signing the novation agreement deed and installing new Mortgage Rights on behalf of the new heirs. According to Article 111 point 1 of the Regulation of the Minister of State for Agrarian Affairs Number 3 of 1997 concerning Provisions for the Implementation of Government Regulation Number 24 of 1997 concerning Land Registration, an application for registration of the transfer of land rights is submitted by the heirs or their proxies by attaching: Flats in the name of the heir or if the land has not been registered, proof of ownership as referred to in Article 24 of Government Regulation Number 24 of 1997. Death Certificate on behalf of the right holder listed in the certificate in question from the Village Head / Lurah where the heir lives at the time of death world, hospitals, health workers, or other authorized agencies.

Banks require a novation for the sake of administrative regularity and certainty of who will be responsible for the course of credit and its business so that it can pay off credit on time. So that if there is bad credit, the bank will find it easier to know who will be responsible for the credit. According to Article 1413 of the Civil Code, there are three ways to renew debts. One of them is replacing old debtors with new debtors and freeing old debtors from their obligations. With the implementation of the debt renewal (novation), all debts and obligations in the credit agreement are transferred to the new debtor. The implementation of passive subjective novation begins with an agreement on who will continue the debt. After the bank/first party and the new debtor/second party agree and agree on a novation, extending the period, maximum reduction and partial withdrawal of the credit collateral, provided that after the novation, the rights and obligations of the first debtor become null and void, then the rights and obligations become the responsibility new debtors, so that new debtors must channel their financial activities in the bank. The debtor is obliged to extend or renew the legality of his business license which has expired and submit it to the bank after completion. The debtor guarantees that the data, documents, information provided are complete and correct. If there is an heir who refuses, it must be stated firmly. Article 1057 of the Civil Code confirms that the rejection of inheritance is carried out firmly.

The process for applying for a novation at a banking institution is the same as for a credit application in general. Initially, the debtor must complete the form and fill in the data

provided as in a general credit agreement. The form contains the following: Name and address of the applicant, Field of business, Purpose/type of credit use, Collateral to be submitted. Then the prospective debtor completes everything requested by the bank. In addition, you must also attach the required requirements, namely a copy of the husband and wife's ID card (for those who are married) which are still valid, one copy of the Family Card (KK) which is still valid, a photocopy of SIUP or other business permits. Requests for debt renewal will be processed like new credit applications through the stages of credit application and credit assessment to assess the feasibility or ability of new prospective debtors. In this stage, an in-depth assessment of the economic condition of the new prospective debtor is held.

If the novation application is eligible to be granted, it will be stated in a novation approval letter. Administration in the novation process is the recording of all data related to the novation process. The process of implementing a novation is all the actions that must be taken in managing a novation, starting from the time a new debtor submits a novation application until the application is rejected or when the application is approved until the credit relationship ends. Deeds made in the process of renewing debt are: Deed of Renewal of Debt with replacement of the debtor, namely a deed signed by the new debtor who has obtained approval from his heirs and the bank which contains the transfer of debt and all rights and obligations of the old debtor. In this case replace the old debtor who has died. By Article 1416 of the Civil Code that debt renewal by appointing a new debtor to replace the old one can be carried out without the help of the first debtor.

Power of Attorney for Imposing Mortgage Rights (SKMHT), which is a deed signed by the new debtor and the bank whose contents are the binding of collateral between the new debtor and the bank for the collateral that has been transferred to the new debtor. Before carrying out a novation, what needs to be seen are: Land certificates, such as property rights, building use rights and so on used in the novation process, Deeds of binding guarantees, such as: Power of Attorney to Install Mortgage Rights (SKMHT), Mortgage Certificates, Cover notes from a Notary / PPAT bank partners. Other things that must be considered are that in the Certificate of Inheritance there must be no heirs left behind, All heirs must be capable of acting (in the event that there are underage heirs can be represented by their parents), there are no problems in the APHB (all heirs agree)). After that, the creditor and debtor mutually agree and agree on a novation, extending the period, maximum reduction and withdrawal of part of the credit collateral provided that after the novation the first debtor's rights become invalid, then the rights and obligations become the responsibility of the new debtor, so that the new debtor must channel activities the finances in the bank.

The debtor must renew or renew the business legality license that has expired and submit it to the bank upon completion. And the debtor must guarantee the data, documents, information provided is complete and correct. Novation can be carried out after fulfilling the conditions of the validity of the agreement as contained in Article 1320 of the Civil Code, namely the agreement of those who bind themselves, able to make an agreement, a certain thing and a lawful reason. By Article 1414 of the Civil Code that debt renewal can only be implemented for people who are capable of forming alliances. New debtors have been able to perform legal acts, that is, they have matured. If there is a minor child and has not been able to perform legal acts, then for that purpose there is a need for a guardian. A guardian is a person who must be trustworthy and honest and sincere to take care of the obligations and rights of a child and is obliged to take care and prepare the life of his child for the future of the child.

Novation is carried out by the bank because the bank has an interest in administrative order, so as to find out who is responsible for the continuity of its business so that his successor can fulfill his obligations to the bank on time. With the novation, the applicant as a new debtor is willing to bind himself as a new debtor and is willing to pay the debt of the old debtor and release the old creditor from being bound to the creditor for obligations based on the old

agreement. The implementation of the provision of credit facilities with mortgage guarantees to banks is by the Standard Operating and Procedures. The granting of Mortgage is preceded by a promise to provide Mortgage as a guarantee for the settlement of certain debts which are set forth in and are an inseparable part of the loan agreement or other agreement that gives rise to the debt by Article 10 of Law Number 4 of 1996 concerning Mortgage on Land. Along with Objects Related to Land.

3.3. Novations in Credit Agreements encumbered by Dependents

In the Credit Agreement which is encumbered with Mortgage, the Credit Agreement acts as the main agreement while the Mortgage Agreement is an additional agreement or accesoir. If the main agreement is terminated, then the accessory agreement is also deleted, unless the parties expressly state otherwise. Thus, an old debt agreement is written off, it will be replaced with a new debt. Article 1381 of the Civil Code confirms that one of the events that causes the engagement to be terminated is due to the renewal of debt or Novation. As previously explained, Novation can only be carried out by people who are capable of entering into engagements (Article 1414 of the Civil Code). In Passive Subjective Novation, the new debtor signs a debt renewal deed (novation) by replacing the original debtor's obligations. The replacement of the position of the debtor will have legal implications for the object of the Mortgage which originally belonged to and on behalf of the original debtor.

The granting of Mortgage is preceded by a promise to provide Mortgage as a guarantee for the repayment of certain debts, which are set forth in and are an inseparable part of the debt agreement concerned or other agreements that give rise to the debt by Article 10 paragraph (1) of Law Number 4 1996 concerning Mortgage Rights on Land and Objects Related to Land (hereinafter referred to as UUHT). Furthermore, according to the General Elucidation number 7 UUHT, that the process of encumbering Mortgage Rights goes through two stages of activity,

1. Mortgage Granting Stage

The stage of granting Liability Rights by the Land Deed Making Officer to be hereinafter referred to as PPAT which is preceded by a receivables debt agreement guaranteed in the liability rights.

2. Registration Stage

The stage of registration at the Land Office which is the time of birth of the Dependent Rights charged. Grant of Dependent Rights must be registered with the Land Office. Article 14 number 1 of Law Number 4 of 1996 on Liability Rights on Land and Property Related to Land as proof of the existence of Liability Rights, the Land Office issues a Liability Rights Certificate by applicable laws and regulations.” As it has been explained that the Liability Agreement is accesoir, meaning that this Liability agreement does not stand alone, because it was previously preceded by the main agreement, namely the agreement of debts.

If the principal agreement is deleted or canceled, the accesoir agreement will automatically be deleted as well. Furthermore, according to Article 2 paragraph (1) UUHT, Mortgage has the nature of not being divided. This means that the Mortgage encumbers the whole object of the Mortgage and each part of the Mortgage. Having paid off part of the collateralized debt, does not mean the release of some of the objects of the Mortgage from the burden of the Mortgage, but the Mortgage still burdens the entire object of the Mortgage that has not been repaid. Article 16 point 1 UUHT states that: “If the receivables guaranteed by the Mortgage are transferred due to cessie, subrogation, inheritance, or other reasons, the Mortgage also changes by law to the new Creditor. The transfer of Mortgage as referred to in paragraph (1) must be registered by the new Creditor with the Land Office. The registration of the transfer of Mortgage as referred to in paragraph (2) is carried out by the Land Office by recording it in

the Mortgage Land books and land rights books which become the object of the Mortgage Rights and copying the notes on the Mortgage Certificate and the relevant land title certificate. The date of recording on the land book as referred to in paragraph (3) is the seventh day after the complete receipt of the documents required for registration of the transfer of Mortgage and if the seventh day falls on a holiday, the note shall be dated the next working day. The transfer of Mortgage shall take effect for the third party on the date of recording as referred to in the provisions in paragraph (4).

Thus, if the receivable guaranteed by the Mortgage is transferred due to cessie, subrogation, inheritance or other reasons, including Novation, then the Mortgage should also be transferred by law. Likewise, if there is a Novation, keeping in mind that Novation is a process of replacing the old contract by a new contract, which causes the old contract to be terminated, so that what follows is a new contract with changes to the terms and conditions, and or changes to the parties in the agreement. the contract.⁴⁴ In the Novation process, the new debtor and the bank sign a debt renewal deed with the replacement of the debtor. The deed is the basis for the implementation of debt renewal. With the renewal of debt, the Mortgage Rights will be transferred. Regarding the transfer of Mortgage Rights, then there must be a process of transferring Mortgage Rights from the original Debtor to the new Debtor, which can only be done if the original debtor knows and agrees to the debt renewal.

Therefore, with respect to the transfer of Liabilities from the original Debtor to the new debtor, the involvement of the original debtor in the Novation process will be determinant of the existence of Liabilities as a guarantee in the credit agreement. Thus, the renewal of debt in the context of a credit agreement burdened by the Liability Rights should be carried out delegatively as stipulated in the provisions of Article 1417 of the Civil Code, ie where the Novation is done upon agreement between the original Borrower, Borrower and new Borrower. Thus, with the agreement, the process of transition of Liability Rights will not encounter any obstacles.

3.4. The Existence of Passive Subjective Novation Applicability to Credit Agreements by Using Mortgage Guarantees

The validity of the law can be divided into 3 (three) kinds, namely factual validity, normative validity, and evaluative validity. In principle, factual validity can be fulfilled if the community for whom the rule of law applies is seen as generally complying with the rule of law. Meanwhile, normative validity explains that pure law is only possible when people abstract it from the point where it stands from its formal structure, and is based on a higher legal rule so as to create suitable rules in a hierarchical legal system. While the evaluative validity which states that the rule of law is considered valuable if it is based on its substance, which has binding power or is obligatory.

Provisions regarding Novation are generally regulated in the Civil Code so that it can be said that in a legal system this provision is equivalent to the law and is based on other provisions above it, namely the 1945 Constitution and the MPR Decree. Factually and evaluatively the legal act of passive subjective novation is carried out based on a debt renewal agreement made in writing by the parties, both old debtors, new debtors and creditors, thus based on article 1338 of the Civil Code, the provisions in the agreement apply and bind the parties like law. Thus, it can be seen that if there is a violation of the debt renewal agreement that has been made either by the old debtor, new debtor or creditor, it can be subject to sanctions in the form of compensation, fulfillment of achievements or both.

The author in this chapter uses a research approach, namely a statutory approach with analytical techniques in the form of systematic interpretation so that they can find out that the existence of the enforceability of passive subjective novation on credit agreements using mortgage guarantees is different from passive subjective novation in general. This is because

both the Civil Code which regulates passive subjective novation in general does not discuss mortgage rights at all, as well as in the Mortgage Law which does not discuss passive subjective novation at all. Thus, it can be said that there are no legal rules governing passive subjective novation of credit agreements using mortgage rights so that they do not have the existence of validity either factually or empirically, normatively or formally, or evaluatively.

4. Conclusion

The meaning of passive subjective novation of a credit agreement with mortgage guarantees is a condition of debt renewal that occurs as a result of a new debtor replacing the obligations of the old debtor, resulting in the old debtor being released from his engagement, including the guarantee rights imposed on land rights as referred to in the UUPA. the following or not the following other objects which are an integral part of the land, because of their nature, the accessor is transferred and is binding for the settlement of new debtors, which gives priority to certain creditors (preferred creditors) over other creditors (creditors). concurrent).

The passive subjective novation of credit agreements with mortgage guarantees does not exist in the legal system of guarantees in force in Indonesia. This is due to the legal vacuum that regulates passive subjective novation of credit agreements with collateral rights so that they do not have factual, normative or evaluative validity. Preventive legal protection can be carried out by making a new statutory regulation or adding provisions to existing laws and regulations regarding passive subjective novation of credit agreements by using mortgage guarantees. Meanwhile, repressive legal protection can be carried out by imposing sanctions on violators of the agreements that have been made related to passive subjective novation of credit agreements by using mortgage guarantees, namely in the form of compensation, achievement fulfillment, and a combination of compensation and achievement fulfillment.

5. Recommendation

1. It is better if the debtor wants to transfer the debtor/over credit for the Home Ownership Credit, the debtor first informs the bank as the creditor regarding the intent and purpose of the transfer of the debtor. The Bank will then guide and facilitate the intention of the debtor, so that in the end the process of implementing the debtor transfer and the related procedures for transferring the debtor can be fulfilled by the applicable rules. For banks as creditors, it is better if during the process of providing credit to debtors they can provide socialization that if one day they want to transfer a debtor, the bank is open to facilitate the debtor's intentions and educate the debtor that in terms of making an underhand agreement related to credit, the debtor can from the bank, there are risks like this, especially if the bank does not know about making the agreements.

2. In order to avoid problems in the future, it is advisable for the bank to make a Standard Operating Procedure (SOP). It is recommended to the PPAT Notary to provide the best possible legal advice to the client in connection with any deed including the process of deleting Mortgage in order to create administrative order and there are no obstacles whatsoever.

3. The government and the House of Representatives as legislators must make a new provision that specifically regulates the novation, especially the passive subjective novation so that there are legal provisions that can provide assurance for the parties related to the passive subjective novation.

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