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Comparison Of The Tenancy In The Mortgage Right Object In Indonesia And The Netherlands

By

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Abstract

This study aims to analyze the differences in the mortgage rights laws between Indonesia and Netherlands. In the mortgage right, other material rights can be given i.e., tenancy rights which the writer analyses from the laws of each country.This study uses normative legal research that refers to the legal norms contained in the legislation. The legislative approach is to conduct research based on the law as the basis of this research and to collect data using the library research method.The result of this research; there are different laws regarding mortgage rights in Indonesia and Netherlands, and these two material rights are rights that can be diverted and can be laden with tenancy rights by fulfilling their respective terms and conditions. In Indonesia, it is regulated by Mortgage Law while in the Netherlands is regulated by The Civil Code of the Netherlands. This research refers to the laws of the respective countries of Indonesia and the Netherlands as a comparison and reference for the authors to seek answers in research.

KeywordsContract Law, Mortgage, Tenancy, Property Law

Introduction

In the advanced and developing era, economic development is also growing, and it is also happening in Indonesia. It shows from the businesses that evolve in society to fulfil their needs. People have different needs hence, it needs the effort to fulfil them. The need for fulfilment is conducted to survive in the community. To run a business, they need venture capital. Venture capital is a start to running the economic wheel in the community. Not every person has sufficient venture capital to start and develop their business. To fulfil their daily needs, people begin to feel that they are impossible to escape from facilities that are offered by bank institutions. (Isnaeni, 2016). Some of these people choose to seek loans as a way to connect their businesses.

The bank is one of the institutions that have an assignment to collect funds from the people. Aside from collecting funds from the community, banks also have a primary function as a funds channel to the community, known as credit. A bank could give credit to the community that needs the credit, it is not unconditionally but to fulfil some requirements. Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 on Banking is "Provision of money or equivalent claims, based on an agreement or loan agreement between the bank and another party that requires the borrower to repay the debt after a certain period with interest." According to Black's Law Dictionary, the definition of credit is "The ability of a business actor to lend money, or obtain goods promptly, as a result of the lender's proper arguments, as well as its reliability and ability to repay." Financial deepening, investment, and economic growth are interrelated. Land ownership rights and mortgage rights do not have a direct impact on economic growth but through financial deepening and investment. (Hajar et al., 2020) The land certification aims to provide legal certainty over land ownership and provide opportunities for land owners to gain easy access to credit (financial inclusion). (Sakprachawut and Jourdin, 2016).

Credit is a covenant in which there is a legal correlation between the creditor and the debtor. One party is the provider of funds or a creditor then the other party is the recipient of funds or debtors. The parties involved have their respective rights and obligations to complete the engagement. Engagement arises from the existence of a covenant. A covenant is an agreement between two or more parties who pledge to each other something and could be made in verbal and written form. The verbal covenant is only known by the parties involved in the covenant and its legal certainty is different from a written covenant that can be proven to exist. This written form is stated in the contract. The contents of the contract are mainly determined by what is mutually agreed upon by the parties. (Hernoko et al., 2017) In its implementation, Indonesian law regulates the legal terms of the covenant in Article 1320 of the Civil Law.

Generally, the legal relation between creditor and debtor makes the debts agreement require collateral debts. The collateral is divided into two types; material collateral (material) and immaterial collateral (personal). (HS, 2011). The occurrence of credit, especially in Indonesia, must use collateral that functions as a guarantor that the debtor will pay off the obligations that will arise from the credit. The collateral is a guarantee for the repayment of debts to creditors. Then the task of the creditor is to provide funds to the creditor in the amount of the collateral provided. A credit is expressed in the lines of an agreement commonly referred to as a credit agreement. The credit agreement regulates the agreement in implementing credit and all its legal consequences. As for the guarantee, it is further regulated in the collateral agreement. It depends on the guarantee provided. Land and/or buildings can be used as collateral for credit by guaranteeing a certificate of proof of ownership, then encumbered with mortgage rights.

The rule of law is that every object with a Mortgage certificate has the primary right for the holder to get repayment from the debtor because the rights that the debtor has from the mortgage object are interpreted as legally being transferred to the mortgage holder. (Riyadhi et al., 2021). A mortgage is the largest asset of banks and non-bank financial institutions and the single considerable liability of households. (Liu et al., 2014) With the encumbrance of the mortgage, the right to act on the goods is the recipient of the mortgage or the creditor. Hence, if the debtor defaults, the creditor can use the guarantee as debt repayment by the execution. However, if the debtor has completed all his debt repayment obligations, the mortgage can be abolished. This credit agreement is the main agreement, while the guarantee agreement is an assessor agreement that occurs due to the existence of the main agreement first so that its existence follows the primary covenant.

Granting credits is the main activity of a bank, but there is a credit risk for the bank because of the credit failure to fulfill the commitment with the bank. Hence, a bank needs to identify and do risk management carefully because it can affect the profitability and lead the bank into a banking and economic crisis to a systematic conjuncture. (Noman, 2015). Some of the creditors are softer than the others. Most of them depend on the overall risk profile of the debtor. (Parnes, 2018). Banks as creditors are providers of funds to the public, while debtors receive funds from the bank. The funds' provision by the bank is followed by collateral as a guarantor that the debtor will return the money under the agreement. The amount of funds given also follows the value of the guarantee provided, this is done if the debtor default on the creditor. The creditor gets a return from the collateral with the same value as what the bank has given him. The collateral is also beneficial for building trust from creditors to debtors. Every agreement has legal consequences if there are rights that are not fulfilled from one party to another.

For a collateral object, a lease can be carried out depending on the agreement made in the guarantee agreement. In Indonesia, creditors can give this authority to debtors under the regulation in Article 11, paragraph (2) letter (a) of the Mortgage Law. The law regulates the limits of the debtor's authority as the owner of the collateral can lease the object under certain conditions. Based on what is stated above, the one who is allowed to pledge is the owner of the collateral's owner or the leasing object. The tenant does not have a right to make the item the debt collateral. In the Netherlands, known mortgage rights are created for transferable rights to land and buildings. It is not only the owner that has property rights who may charge the object as collateral for the mortgage but also the owner of the lease, so the lessee is also allowed to use the object as mortgage collateral.

According to Netherlands' regulations, all the material and building rights are accessible for encumbrance of mortgage rights as long as they are transferable. (Hutagalung et al., 2012). The mortgage is regulated by The Civil Code of the Netherlands Book 3 (the law of property, proprietary, and interest) in title 9, Liens and Mortgages. Article 227 explains that liens and mortgages are limited rights that give collateral to the items deposited for a claim for payment of a sum of money, with precedence over other creditors. If such rights have been assigned to the registered property it is called a mortgage. However, if it is established upon another property, it is called a pawn. The mortgage made by the notarial deeds is related to debts and receivables on loans of a certain amount of money between the mortgage giver and the mortgage recipient. A mortgage serves as collateral for repayment of debt that is transferable if the mortgage giver defaults in carrying out his debt repayment obligations. In the Netherlands, people who find it difficult to buy land and buildings can use this facility to obtain them.

Every country wants its people and the nation to continue to develop to be more advanced. However, with cultural differences, each country also has different laws to regulate its own country. The application of law in Indonesia and the Netherlands is almost the same because Indonesia adheres to the legal system of the Netherlands, but not all regulations are the same. Indonesia has carried out legal reforms following the culture and development of its people. Security law relating to mortgage rights over land and buildings in Indonesia continues to develop. The Netherlands uses the term mortgage as collateral for land and buildings. Mortgages are security rights on the registered property. Based on the prior, the author would like to compare the mortgage rights in Indonesia and the Netherlands. Therefore, the author wishes to write an article entitled "COMPARISON OF THE TENANCY IN THE MORTGAGE RIGHT OBJECT IN INDONESIA AND THE NETHERLANDS."

Research Methodology

This research is normative legal research. Normative legal research is also known as doctrinal legal research. In normative legal research, the law is expected as what is written in legislation, or the law is conceptualized as a rule or norm that is a benchmark for human behaviour that is considered appropriate behaviour. The approach used in this research is the statute approach. The statute approach is conducted by analysing the laws and regulations regarding the legal issues being taken care of it. (Marzuki, 2014). Library research is being used to collect the necessary information. That is by studying the legal literature related to the subject matter, the set of laws and regulations, legal articles, and various other written sources.

Definition of Tenancy Agreement and Mortgage Rights

A contract is a legally enforceable bargaining agreement between many parties. Each party has given their consent based on the conditions agreed upon at the time of the contract. (Adiyanto, 2019). The definition of the agreement contained in Article 1313 of the Indonesian Civil Code states that: "Agreement is an act by which one or more persons bind themselves to one or more other persons." The most prime element in an agreement is concord between two or more parties. The agreement is the key to the occurrence of an agreement that is desired by the parties. The agreement must be based on the wishes of the two parties, not just one party.

An agreement is a deal between two or more people who bind themselves to do something in the field of wealth. (Eriyani, 2013). The agreement must refer to the four provisions of validity as stipulated in Article 1320 of the Civil Code. The first and second provisions concern the subject or party to the agreement. Therefore, it is called a subjective term. The third and fourth provisions are called objective terms because they involve the object of the agreement. (Mulyati, 2018) Every agreement made legally that fulfils the legal requirements of the covenant as stated in Article 1320 of the Civil Code, namely the existence of a deal, the skills of the parties, a particular matter, and because it is lawful, the agreement is binding on the parties involved in it. The parties must heed every rule that has become a mutual agreement because the covenant has bound the parties involved in the covenant. Pacta Sunt Servanda means that the contract is binding. (Vecchione, 2015) The contract will act as a "law" for the parties involved, where the contracts contain matters governing the rights and obligations of the parties and can be used as legal evidence if a dispute occurs in the future. (Syarief, 2021) Binding means that an agreement applies as law for the parties.

Article 1321 of the Civil Code stipulates that there is no valid agreement or agreement that it was given by mistake or obtained by coercion or fraud. The intended agreement is an agreement of will that occurs between parties involved, without any element of constraint, fraud, and oversight. After an agreement is reached, the parties put it in an agreement. This agreement can be made in writing or orally according to the wishes of the parties. With the making of this agreement, hence, it becomes an engagement, in Dutch, it is called verbintenis. Engagement is a translation of verbintenis or Verlinden, which means binding. The term verbintenis refers to the existence of a "bond" or "the liaison" so verbintenis is defined as a correlation. (Hariri, 2011) Based on the above understanding, what is called an agreement is an agreement between two or more parties that is mutually desired and can bind the parties related to parties. Consensual means that engagement has been reached as soon as the agreement occurs for the first time. The statement of the agreement must be stated by the two parties involved in the engagement. (Cindawati, 2016).

The engagement occurs as a result of an agreement, the engagement has legal consequences in the sense that it creates rights and obligations for both parties who have a legal relationship. A credit agreement made between a creditor and a debtor creates different rights and obligations and must be fulfilled by each party as an achievement in the mutually agreed agreement. These achievements must be mutually fulfilled because if they are not fulfilled it will cause a loss for the other party. After all, their rights are not fulfilled. Every agreement must be carried out in good faith so that the agreement can be carried out properly. The principle of good faith is one of the key concepts in the civil law system. (Mackaay, 2012) For a good faith obligation to be more likely to be enforced, it must (i) be part of a legally binding agreement; (ii) express or implied; and (iii) be able to conduct objective assessments by third parties, for example by having a narrow and clear scope. (Calvert et al., 2022) In Indonesia, the principle of good faith is regulated in Article 1338 paragraph (3) of the Civil Code, which states that Agreements must be made in good faith. Good faith is related to the implementation of achievements in the agreement by each party in the agreement.

An agreement must have a subject and an object. In a collateral agreement, this subject is related to the party to the agreement which can be an individual or a legal entity. When an object is related to the goods that are used as collateral. M.Bahsan believes that collateral is everything that is received by creditors and submitted by debtors to guarantee debt in the community. (Bahsan, 2012) While the meaning of collateral is by Article 1 number 23 of Law Number 7 of 1992 concerning Banking, additional guarantees are submitted by the debtor to the bank in the context of providing credit or financing facilities based on sharia principles. Collateral is used as a guarantor that the debtor will return the debt obligations to the creditor by the covenant in the agreement. If the debtor defaults, the collateral can be used to pay off the debtor's debt. With the promulgation and ratification of Law no. 4 of 1996 concerning Mortgage on Land and Objects Related to Land on April 9, 1996, a mortgage became the only institution for guaranteeing land rights in Indonesia.

A debt guarantee is giving trust to creditors for payment of debts that have been given to debtors. This occurs because of the law or the issuance of an assessor of the agreement from the principal of the collateral in the form of an agreement that issues debt. (Pratiwi, 2017) The object of collateral in the mortgage here is not the form of a commodity, but only the ownership rights which are transferred using proof of ownership in the form of letters or certificates as collateral. Therefore, the owner can still have power over the goods that are used as collateral so that they can be used as they function. Objects that can be charged with mortgage rights are regulated in the Mortgage Law, namely property rights, use rights, building rights, and use rights. The imposition of mortgage rights as contained in Article 5 point 1 of the Mortgage Law can be burdened with more than one mortgage to guarantee the repayment of more than one debt so that it can be used as collateral for more than one debt with the same mortgage object. This also provides an understanding of the existence of levels of mortgage rights as collateral for debts and, from the ranking of mortgage holders, only the first mortgage holder has the right to sell the mortgage object if the debtor defaults.

Land rights guarantee institutions are Mortgage Rights as regulated in Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land (further referred to as the Mortgage Law). Mortgage rights are collateral for land for the settlement of particular debts, that prioritizes certain creditors over other creditors. The purpose of the creditor takes precedence over other creditors, when the debtor defaults, the creditor holding the mortgage can sell the collateral through a public auction to pay off the debtor's debt. This priority position,

of course, does not affect the settlement of debtor debts to other creditors. (Nurjannah, 2018) In the provisions of Article 13 Paragraph (1) of the Mortgage Law, mortgage rights must be registered, being an absolute requirement for the birth of mortgage rights and binding mortgage rights to third parties. The Mortgage Certificate has the same executorial power as a court decision that has permanent legal force. (Pratama, 2015) The abolition of Mortgage Rights due to the deletion of encumbered land rights does not result in the deletion of secured land rights. (Nurjannah, 2018).

If there is no debt guarantee agreement, or if the contract is void, then the mortgage in question will not come into existence regardless of registration. A mortgage contract is intended to secure the payment of debts by imposing charges on particular properties. (Lei, 2011). A mortgage is an assessor agreement whose existence is bounded by the main agreement, namely an agreement that gives rise to a debt and credit legal relationship. The existence, expiration, and termination of the Mortgage Rights automatically depend on the debt which is guaranteed to be paid off. According to the provisions of Article 18 of the Mortgage Law in Indonesia, it can be abolished because of:

a. Elimination of debt guaranteed by Mortgage Rights.
b. Release of Mortgage by the holder of the Mortgage Rights.
c. Clearing Mortgage based on ranking by the Head of the District Court;
d. The abolition of land rights burdened with Mortgage Rights.

Leases in Mortgage Objects in Indonesia and the Netherlands

The law in Indonesia and the Netherlands gives the security owner the authority may rent out his mortgage object. This authority relates to the right of the owner of the warranty may use his land and buildings. The lease upon the collateral was conducted by asking for prior approval from the mortgage recipient. The authority of the mortgage rights provider or the debtors, to make leasing upon the collateral object must be done by the written contract.Agreements made orally/unwritten are still binding on all parties, and do not eliminate both the rights and obligations of the parties to the agreement. However, for ease of proof, the reference for working together and carrying out transactions should be made in writing. It means if there is a violation, it can refer to the agreement that has been agreed upon and make both parties more responsible for cooperating. (Hariri, 2011).

The legal agreements also follow the principle of contract freedom and consensually as the resource of independence of the parties involved. Freedom of contract is the general right of individuals to make contracts. (Weber, 2013) The principle of freedom of contract can be analyzed from the provisions of Article 1338 paragraph (1) of the Civil Code, which states that all agreements made are legally valid as laws and regulations for those who make them. (Djumikasiha et al., 2021) Freedom of contract always has the consequence that the agreement to be made is always based on two unequal interests and leads to the same goal. The principle of freedom of contract must be understood as a pattern of partiality in the contract which means that in agreeing, the parties must consider the other party to obtain results and benefits that are equivalent to themselves. (Munif, 2008) The parties are free to determine the contents of the agreement to be made.

In this paper, the author formulates mortgages in Indonesia and the Netherlands through the table below:

Table I. Comparison mortgage in Indonesia and the Netherlands

Indonesia	Netherlands
It is regulated in a Special regulation, Law no. 4 of 1996 concerning Mortgage on Land and Objects on Land.	It is regulated in The Civil Code of the Netherlands Book 3 (the law of property, proprietary rights, and interest) Title 9, namely Liens and Mortgages.
It only applies to property rights, building rights, cultivation rights, and right of use. (Article 4 UUHT)	Applies to properties such as property rights and rental rights. (Article 262 and Article 264 of The Civil Code of the Netherlands).
Leasing can be done by obtaining prior written approval from the recipient of the mortgage and must follow the conditions given. (Article 11 paragraph 2 (a) UUHT)	The lease is carried out with the mortgagee's approval unless the object of the collateral is already a lease (Article 264 paragraph 1 of The Civil Code of the Netherlands).
Loan facilities are in the form of an amount of money that can be used for certain things according to the agreement of the creditor and debtor. (Article 15 paragraph 1 (c) UUHT)	The loan facility is only for the sale contract of the property. (Article 261 paragraph 1 of The Civil Code of the Netherlands).
More than one mortgage can be imposed on the same object, with preferential rights from the first-rank mortgage holder (Article 5 UUHT)	One or more mortgages can be charged for the same property but with a guaranteed limit of three years of interest. (Articles 262 and 263 of The Civil Code of the Netherlands).

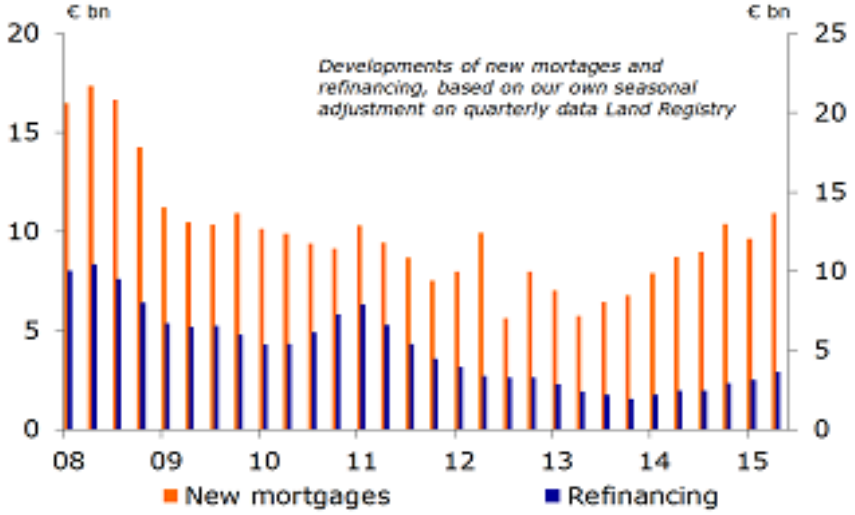
In Indonesia, mortgage rights are regulated by Law no. 4 of 1996 concerning Mortgage on Land and Objects Related to Land. Article 11 paragraph (2) letter a of the Mortgage Law in Indonesia has provided rules for the authority of the property owner as the provider of mortgage rights regarding the lease of land and buildings that served as collateral for mortgages. This article contains a lease agreement that limits its authority to lease the object of the mortgage, determine the lease term, change the lease terms, and or receive an advance for the lease. Based on these provisions, the mortgage holder does not lose the authority to take management and ownership actions against the collateral object with the mortgage. This authority must obtain prior written approval from the recipient of the mortgage.

Concerning Article 11 paragraph (2) letter an of the Mortgage Law which gives the right of the mortgagee to rent out the land and buildings that he guarantees or not, this depends on the mortgagee's policy. The Bank as one of the recipients of the mortgage can give the right to the owner by giving an approval made in written form and certain conditions desired by the Bank. The owner of the mortgage object must include these conditions as a clause in the lease agreement to be made, and the agreement must be made in written form so that there is definite legal certainty for the parties.

In the Netherlands, mortgages are regulated by The Civil Code of the Netherlands Book 3 (the law of property, proprietary rights, and interests). The Netherlands uses the term mortgage as collateral for land and buildings related to loans. A mortgage is an important material right because, for most people, it is almost impossible to acquire land and buildings with their own money. Most people will make a loan agreement for it with the bank. Banks will not provide loans without getting a mortgage made for the land and buildings they financed

with the loan. A mortgage gives the mortgage holder the right to sell and transfer other people's property if the debtor does not fulfill his obligations concerning the loan. The Civil Code of the Netherlands Article 260 states that a mortgage is established by a notarial deed made between the parties in which the mortgagee to the mortgagee on the registered property, followed by the entry of the instrument, in the appropriate general register provided for that purpose. The letter must contain instructions about the receivables that are collateral for the mortgage, or the facts, based on which the claim can be determined. The amount for which the mortgage is granted must also be stated or, if this amount has not been determined, the maximum amount that can be claimed against the property under the mortgage. In the mortgage instrument, the recipient must choose a domicile in the Netherlands.

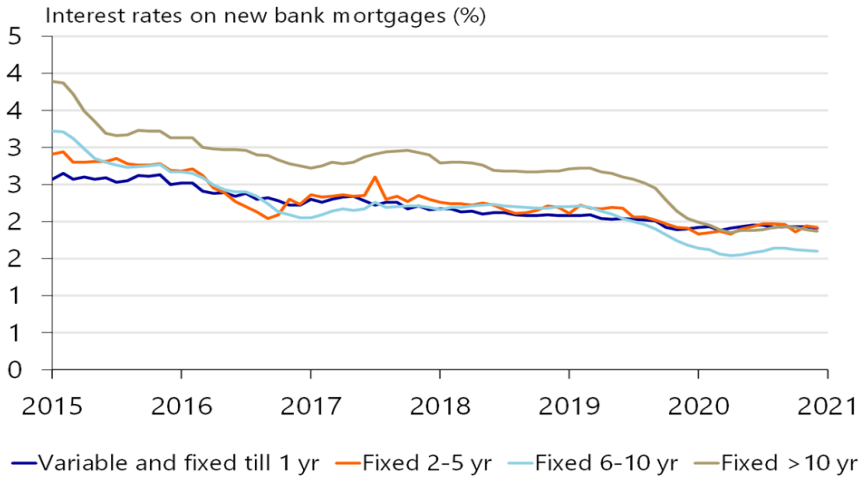
Figure I. New mortgage approvals



Source: Land Registry, computation Rabobank

Figure I, historically low mortgage interest rates are prompting more and more people to borrow more on their homes or refinance with a different mortgage lender. The land registry does not record any interest rate changes with the same mortgage lender during or at the end of the fixed-rate period. Also saw a rise in the number of refinancing transactions or extra borrowing.

FigureII. Mortgage interest rate in the Netherlands



Source: Statistics Netherlands (CBS), Dutch Land Registry, DNB

Figure II, mortgage rates in the Netherlands are quite low, which means that many homebuyers today have access to cheap finance.When mortgage interest rates are low, provided they meet the income requirements, people can take out higher loans and can therefore bid more for a property. Mortgage interest rates are partly driven by capital market rates.

This mortgage guarantee must be encumbered and registered. (Mashdurohatun, 2022) These mortgage rights can be made for transferable rights over land and buildings. Thus, it is not only the holders of property rights who are allowed to charge mortgage rights on their land. This includes tenants who can charge mortgage rights on the object of their rental. A lease can be established to give the tenant the right to enjoy the land for a certain period. According to Dutch law, all material rights to land and buildings are accessible for the assignment of mortgage rights, as long as these rights are transferable. Land and buildings that are used as mortgages can also be leased on them. In the case of a pre-emptive lease, the mortgage rights will not affect the power of the lessee. If the land owner does not fulfill his obligations related to the secured loan, it is the debtor who can sell and transfer the ownership rights that are burdened with the lease rights. However, for leases that occur after the existence of mortgage rights, the opposite applies. The power of the mortgage holder cannot be limited by the subsequent establishment of a lease. The mortgage holder can sell and transfer an ownership interest if the debtor does not fulfill his obligations related to the loan that has been granted. Several of these material rights can be created on the same item. Hence, the main rule plays a role, which says that the oldest material rights have the highest priority in the event of a clash between two material rights. (Hutagalung et al., 2012) So based on the legal rules, the oldest rights will occupy the same priority order. highest when there is a clash between two or more material rights on an object. Like Indonesian mortgages, Dutch mortgages also expire when the main agreement ends, namely the end of the loan between the debtor and the creditor.

Conclusion

The engagement arises from the existence of an agreement made by the parties. An engagement creates rights and obligations that must be fulfilled by the parties. The making of a credit agreement must be followed by a guarantee agreement, this relation arises from the existence of a principal agreement and an assessor agreement. This guarantee works as a guarantor of repayment from the debtor to the creditor. Related to land and buildings as collateral, mortgage rights can be charged on it. Mortgage rights in Indonesia can be assigned to property rights, building rights, business use rights, and use rights. Whereas in the Netherlands, a mortgage is known as a guarantee for repayment of debts on land and buildings. These mortgages can be charged to other transferable property rights, such as property rights and rental rights. Rent can also be made for mortgages or mortgages. In Indonesia, there is a limit of authority for debtors to be able to rent out the object of the collateral. While in the Netherlands the property rights attached to the same object are in the order of oldest, the most attached to the oldest will be the main priority.

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