

Transactions on Land and Apartment Rights: Between Business Practice Facts and Adat Norms

Iwan Erar Joesoef

Fakultas Hukum, UPN “Veteran” Jakarta

iwan.erar@upnvj.ac.id

Abstract

The objective of this research was to study the business practices on Land and Apartment Rights of which refer to Western Law whilst the Indonesia Land Law including Apartment Law based on Adat Law. The transaction is running expeditiously in business community. Refer to Apartment Law in Indonesia, the transaction of which based on Adat Law. The conception stated that land rights transaction is "terang, riil dan tunai" ("transparent, real and cash") it means that the transaction should be in cash, real and delivery in front of Land Deed Officer_Pejabat Pembuat Akta Tanah (PPAT). The legal problem is how the developer can sell the Apartement ("strata title") to the consumer with pre-payment (indent) of which the Apartment not yet construct or under construction or in planning. The result of this research is that the developer sold the Apartment by Pre-Project Selling of which the Bank Institution ask the Developer the Buy Back Guarantee. The method of this research is legal document study. The conclusion of this research is the transaction should be in front of Notary Public by issuing a fair Pre-Agreement (Perjanjian Pengikatan Jual Beli_PPJB).

Keywords: Adat Law, Apartment, Pre-Project Selling.

A. INTRODUCTION

The Apartment development in Indonesia refer to the condominium concept. This concept is legal term used in United States of America, and parts of Canada. In Australia and British Columbia it call as Strata Title. The Strata Title is the ownership right to an apartment unit (satuan rumah susun_Indonesia term).¹ This concept was adopted by Indonesian Government by the Law Number 16 Year 1985 concerning to Rumah Susun (Condominium Law).² This Law then be

¹ Adrian Sutedi, *Hukum Rumah Susun dan Apartemen*, Jakarta: Sinar Grafika, 2010, p.157.

² Undang-undang Nomor 16 Tahun 1985 Tentang Rumah Susun.

amended by Law Number 20 Year 2011 concerning to Flats (Rumah Susun_hereinafter refered to as Flats Law).³

Indonesian Government support such concept to develop of housing construction that the peoples can be lived in together in a multi-storey building of which the units can be owned separately and built both horizontally and vertically. Such construction of Flats can also include meeting the needs of upper, middle and low income people. This concept of housing development is in accordance with the needs of Indonesian society currently especially urban communities.⁴ Entrepreneurs who operate the apartment property so called as developers develop multy-storey residential buildings in the form of flats in an environment that are divided into sections that are structured functionally in both horizontal and vertical directions. The units that can each be owned and used separately, especially for residential areas which equipped with shared parts, shared parts, shared objects and shared land.⁵

Property management consultant, Colliers Indonesia in its report entitled "Property Market Conditions Q1 2024" explained that in the first quarter of 2024: "Up to the next two years or in 2026, it is estimated that there will be 9,317 apartment units that will be completed in the DKI Jakarta area, of which around 5 thousand units are located in South Jakarta," said Head of Research when holding the Colliers Virtual Media Briefing Q1 2024, Value Added Tax incentives will attract prospective buyers to look affordable," and while mentioning that apartment prices in Jakarta are still stable at around IDR 35.6 million per square meter.⁶

The legal problem arise in the transaction of land and apartment rights. Often the developer's apartment sales marketing department carries out sales strategies using the Pre-Project Selling system. The system namely promotion or marketing carried out before construction of the apartment. What are the developers offers are in the form of illustrations, drawings or designs. Pre-Project Selling marketing is often carried out by developers so that consumers understand market interest in the construction they are marketing. The government support for the fulfillment of condominium construction is refer to Law Number 16 of 1985 concerning Condominiums of

³ Undang-undang Nomor 20 Tahun 2011 Tentang Rumah Susun.

⁴ Arie S. Hutagalung, *Dinamika Pengaturan Rumah Susun atau Apartemen*, Jurnal Hukum dan Pembangunan, Volume 34, Nomor 4 (2004), p. 317.

⁵ Urip Santoso, *Hukum Perumahan*, Jakarta: Kencana Prenada Media Group, 2014, p.53.

⁶ <https://propertiindonesia.id/post/penjualan-apartemen-hingga-semester-i-2024-diproyeksi-masih-melambat>

which the concept adopts the condominium concept. The implementation of such condominium or flats is regulated under Article 1 of Law Number 20 of 2011 concerning Flats (“Flats Law”) that states: “a multi-story building constructed in environment that is differentiated into functionally structured sections, both horizontally and vertically, and are units that can each be owned and utilized separately, especially for residential areas equipped with common parts, common objects, and common land”.⁷

The construction of Flats for the commercial needs or known as apartment is carried out by private limited companies as developers. Therefore, the discussion further is about commercial flats namely apartments. The legal problem of the building such apartments, often occur between developers and buyers of which often arise during the process of implementing apartment unit transactions. Generally, the developer’s apartment sales marketing department carries out sales strategies using the Pre-Project Selling System, namely promotion or marketing carried out before the construction of the apartment is carried out, so that what the developer offers is in the form of illustrations (drawing design). Pre-Project Selling marketing is often carried out by developers so that consumers understand market interest in the construction they are marketing.

In this case, the buyer purchase an apartment with financing facility (KPR_Kredit Pemilikan Rumah) in this case PT. Family Financial Friends (PT. SFK). In the credit process, even after being offered compensation from Developer (PT. Hutama Anugrah Propertindo), the Buyer (Erlina Fitri Setyowati) get a default on PT. SFK, resulting in an obligation for the Developer to pay the debtor’s remaining debt to PT. SFK, which is based on:⁸

- (1) Financing Facility Cooperation Agreement and Buy Back Guarantee between the Developer and PT. SFK;
- (2) Credit Agreement and Power of Transfer Agreement that have been signed between PT. SFK and the Buyer, as well as;
- (3) Sale and Purchase Pre-Agreement (PPJB) between the Developer and the Buyer.

⁷ Wibowo Turnady, Hak Milik Atas Satuan Rumah Susun, <http://jurnalhukum.com/hak-milik-atas-satuan-rumah-susun/>, diakses 13 September 2024.

⁸ Berlian Septiani, Iwan Erar Joesoef, Suherman, “Buy Back Guarantee between Developer and Creditors: Study of Apartment Sale and Purchase Pre-Agreement Based on the Pre-Project Selling System”, International Journal of Social and Human Research, Volume 07 Issue 05 May 2024.

The above mentioned situation implies that Indonesian Agrarian Law adopted the “legal pluralism” conception. The question is what kind of legal pluralism as stated by Indonesia Parliament Decree (TAP MPR RI No. IX/MPR/2001) concerning to Agrarian Reform and Natural Resource.⁹ There are two interpretation, at first, the pluralism based on “dual systems theory” that merge two legal system (Adat Law and Western Law) together, autonomous, interaction each other, existence in the society and implemented in Indonesian legal formal framework. We call it “state-law pluralism” of which State Law dominate Adat Law. Secondly, legal pluralism refer to situation that in society there are several law obeyed by the society. The existence of such several law not depend on State Law. Notwithstanding, theoretically, Indonesia tend to under the “weak legal pluralism” or “state-law pluralism” of which the adoption of Adat Law not merely by making rules or regulation but also through judge made law (jurisprudence).¹⁰

The legal questions are how about the existence and its implementation of Adat Law concept especially the conception of land right transfer (“Terang, Riil dan Tunai”) concept and how should the government to take legal transplant of such concepts simultaneously (Adat Law and Western Law) which giving the legal certainty for both parties under National Positive Land Law. The legal solution is, by making a good academic of legal transplant of those conception (Adat Law and Western Law) into the positive law of Indonesia Land Law. This research is normative with regulation and conception approach. By making a good academic of legal transplant as Otto Kahn-Freund says: it is very unlikely that the laws of one nation can suit another. It means that the laws should suit with the society of which the laws is made. The type of research that the author will use in this research is normative juridical.

B. RESULTS

Based on our research,¹¹ there was the breach of contract (default) committed by Developer of the Serpong Garden Apartment (PT. Utama Anugrah Propetindo) to the Buyer (Erlina Fitri Setyowati). In that circumstances, the Developer and Buyer had agreed to sign a Sales and

⁹ Maria S.W. Sumardjono, *Tanah Dalam Perspektif Hak Ekonomi Sosial Dan Budaya*, Jakarta: PT. Kompas Media Nusantara, 2009, p. 56-65.

¹⁰ *Ibidem*.

¹¹ Berlian Septiani, Iwan Erar Joesoef, Suherman, Op.Cit.

Purchase Pre-Agreement (Perjanjian Pengikatan Jual Beli_PPJB) for an Apartment unit object. In accordance with the PPJB, the Developer will carry out the delivery of apartment unit in accordance with the agreement. However, due to the Covid-19 Pandemic which has influenced world economic to decline, the Developer has not completed the construction of the apartment building, and this has resulted in the Developer being unable to fulfill its obligation to the buyers regarding the delivery of units in accordance with the clauses contained in the PPJB. As a result of this default, there is compensation given by Developer (Serpong Garden Apartment) to the Buyer, namely by relocating the unit to another apartment that has been completed along with other additional compensation. So that, in not completing to build an apartment building, there was a good faith that has been carried out by the Developer as a form of accountability in default. But, in this case the Buyer did not respond to the offering made by the Developer.¹²

As the result of the above research found that there 4 agreements for sale and purchasing of flats (apartments) made and signed among the Buyers as a debtors, the Developer and the bank or financial institution as a creditors. The agreements is as follows:

1. Cooperation Agreement for Financing Sale and Purchase of Residential and Non-Residential Flats Number 012/PKS/SFK-HAP/062020:

A. Date: July 23, 2020

B. Parties: PT. Hutama Anugrah Propetindo (Developer) and Creditor PT. Family Financial Friends (SFK)

C. Content: Developer and SFK agree to work together in financing the sale and purchase units ("strata title") at the Serpong Garden Apartment. The Developer provides a guarantee for payment of the debtor's debts to SFK if there is a default such as a delay in installment payments 3 times in row or more than 90 days. The Developer is responsible for paying off the debtor's debt, including interest and other costs, up to maximum of facility disbursement proceeds received by debtor.

2. Buy Back Agreement "Buy Back Guarantee" Number 013/BD/BBG/SFK-HAP/062020:

A. Date: July 23, 2020

¹² Ibidem.

B. Parties: PT. Hutama Anugrah Propentindo (as Guarantor) and Creditor PT. Family Financial Friends (SFK).

C. Content: The Guarantor is committed to paying off the debtor's obligation to SFK if the debtor default, after SFK provides 3 (three) warning letter. Guarantee applies if the debtor is in default or shortfall in installments 3 times in a row or more than 90 days calendar days.

3. Apartment Unit Reservation Agreement (PPSA) Number 0445/PPSA-APT/UID/SGA-HAP/12/2020:

A. Date: December 22, 2020.

B. Parties: PT. Hutama Anugrah Propetindo (as Developer) and Erlina Fitri Setyowaty (as a Buyer).

C. Content: This agreement stipulates the ordering of apartment units ("strata title") by the buyer. If payment is made through a credit facility and the buyer is in default, the Developer has the right to cancel the agreement and all money received will be forfeited (lost). The Developer also has the right to collaborate with third parties in improving facility service without further notification to the Buyer.

4. Subrogation Deed Number 90:

A. Date: -

B. Parties: PT. Hutama Anugrah Propetindo (as Developer) and Erlina Fitri Setyowaty (as a Buyer).

C. Content: Developer takes over the obligations of debtors who are in arrears or default in payments for apartment unit after SFK sends a warning letter. The Developer paid the debtor's debt to SFK in full on February 22, 2021 and obtained subrogation rights over the collateralized property.

C. DISCUSSION

A. Pre-Project Selling Concept

Practically, the Developer of Apartment in this case is sales marketing department carries out sales strategies using the Pre-Project Selling System, namely promotion or marketing carried

out before the construction of the apartment is carried out, so that what the Developer offers is in the form of illustration, drawings or designs. Pre-Project Selling marketing is often carried out by Developers so that Consumers understand the market interest in the construction they are marketing.

The marketing of the Pre-Project Selling System is stated in Article 42 Paragraph (1) of Flats Law¹³ that must at least: (1) Certainty of spatial of land rights, (2) Certainty of the status of land rights, (3) Certainty of ownership status of condominium, (4) Have complete permits for building flats, (5) Guarantee for the construction of the flat from the guarantor institution. In the Flats Law, Developers are allowed to sell flats or apartment units ("strata title") that have not yet been built or are being built to Buyers by signing a Sale and Purchase Pre-Agreement (hereinafter referred to as PPJB) before the construction of the flats begins or through a Pre-Project Selling System which contains authority and the obligations of the parties are then stated in Deed of Sale and Purchase and settlement is carried out by cash or cash payment, gradual payment, and home ownership credit at Bank of Financing Institution.

Implementation of PPJB is contained in Law Number 1 of 2011 concerning Housing and Settlement Areas and is further regulated in Public Working and Housing Ministerial (PUPR) Regulation Number 16 of 2021 concerning the Implementation of Preliminary Sale and Purchase Agreements or Sale and Purchase Agreements for Public Houses and Public Flat, which allows for a house sale and purchase agreement to be made. The purpose of issuing PPJB is confirmed in Supreme Court Regulation (Surat Edaran Mahkamah Agung_SEMA) Number 4 of 2016¹⁴, is generally made to make it easier or faster for Developers to sell residential property to Buyers, where the main agreement namely the issuing of Sale and Purchase Deed (hereinafter referred to as AJB) is carried out at later date. So, PPJB is intended to create a house sale and purchase agreement between the seller and buyer while preparing the main agreement namely AJB.

Based on observations in research,¹⁵ in regarding the home ownership loans, usually the parties involved are consumers as buyers/ debtors, developers as sellers and the bank as creditors.

¹³ Undang-undang Nomor 20 Tahun 2011 Tentang Rumah Susun.

¹⁴ Surat Edaran Mahkamah Agung (SEMA) Nomor 4 Tahun 2016 Tentang Pemberlakuan Rumusan Hasil Rapat Pleno Kamar Mahkamah Agung Tahun 2016 Sebagai Pedoman Pelaksanaan Tugas Bagi Pengadilan.

¹⁵ Berlian Septiani, Iwan Erar Joesoef, Suherman, Op.Cit.

Briefly, the relationship between the parties before mentioned in the transaction for procuring or purchasing an apartment by using Home Financing Institution (Kredit Pemilikan Rumah_KPR). Practically they apply the Buy Back Guarantee. Buy Back Guarantee is an English term which literally means buy back guarantee. So far there is no literature or references written regarding to the first use of the term buy back guarantee to mean or guarantee from developers for credit received by consumers/debtors from banks in cooperation agreements providing home ownership credit facilities in Indonesia. Buy Back Guarantee is closely related to house ownership credit.¹⁶

In order to sale purchase the house or apartment, banks provide loan facilities in the form of KPR based on the Attachment to Bank Indonesia Circular Letter Number 12/38/DPNP concerning Guidelines for Preparing Standars Operatiing Procedures for House Ownership Credit Administration in the context of Securitization (hereinafter referred to as SEBI No. 2/38/DPNP) KPR is defined as credit intended for the purchase of property by individual debtors, where the property purchased becomes collateral and the value of the loan provided does not exceed the value of the property purchased. It can be understood that KPR is a real credit agreement. Where it requires a gift of the object used as collateral so that the collateral is the assessor, the existence of the agreement depends on the main agreement.¹⁷

Buy Back Guarantee arrangements are currently widely used in providing mortgage facilities. This guarantee occurs due to the Project (house or apartment) which has been financed by banking institutions is still in the process at Land Office administratively (change of ownership, or splitting/ breaking the land certificate). So, it is not possible to get binding with banking institution and could not get to sign the sale and purchase or collateral deed whilst the object (house, apartment) has become collateral in banking. In this circumstances, the bank will accept the guarantee even though the guarantee cannot be tied perfectly, namely encumbering the collateral object with a mortgage. Refer to such situation, a bond is needed between the bank and the developer namely in the form of a Buy Back Guarantee as an effort to protect the interests of banking institution as a creditors.

¹⁶ Ibidem.

¹⁷ AbdulKadir, *Hukum Perdata Indonesia*, Bandung: Citra Aditya Bakti, 1990, p. 181

Even though the guarantee issued by Notary Public or Land Deed Officials (Pejabat Pembuat Akta Tanah_PPAT) with executorial power, the bank still need require Buy Back Guarantee that considered more effective and efficient even though it does not have executorial power in the even of default. This is driven by the principles of prudential banking which have been applied by banks to streamline auction efforts which have been used by banking institutions to resolve the problem or bad loans if debtors default. The existence of Buy Back Guarantee in this case should still be able to accommodate and play a role in providing legal protection and preferences for the parties, just like the existence of guarantee institutions that already exist and are known in the guarantee legal system. Most of all cooperation agreements providing house ownership credit facilities between developers and banks always regulate or agree on a Buy Back Guarantee (developer's guarantee for repayment of the debtor's debt).

B. Sales and Purchase Pre-Agreement Concept (PPJB) under Indonesian Agrarian Law.

The Pre-Project Selling System with the Buy Back Guarantee that applies in the marketing of sale and purchase of Apartment (“strata tittle”) is the foreign concept. The sale and purchase of Apartment (“strata tittle”) fall within category sale and purchase “land and building” of which governed under Indonesia Agrarian Law Number 1 of 1960. The Indonesian Agrarian Law based on Adat Law.

There are, of course, two conceptions of law, of which implemented in practicing of land transaction di Indonesia simultaneously, at first conception of Adat Law such as “Terang, Riil dan Tunai” (real, cash and carry transfer), “Asas Pemisahan Horizontal atas tanah dan bangunan” (Horizontale Scheiding – Horizontal Split Principle upon land and the building), secondly conception of Western Law such as “Sepakat” (Consensus or Indent), “Asas Accessie atas kesatuan tanah dan bangunan” (Accessie Principle), “Satuan Rumah Susun” (Strata Title). These difference conception will be matter for the buyer or the seller whose enter into land transaction.

The legal problem arise from which in the implementation of law, for instance: how the bank institution will confiscate or execute the land and the building on it as collateral under

mortgage facility of which there are different owner of such the land and the building,¹⁸ how the developer can sell the Apartment (“strata title”) to the consumer with pre-payment (indent) of which the Apartment not yet construct or under contraction or in planning,¹⁹ or how to implement the Adat Law conception “Terang, Riil dan Tunai” (real, cash and carry transfer) upon land right such as the right of ownership (Hak Milik), the right of exploitation (Hak Guna Usaha), the right of building (Hak Guna Bangunan), the right of use (Hak Pakai), right of lease (Hak Sewa), right to clear land (Hak Membuka Tanah), right to collect forest produce (Hak Memungut Hasil Hutan),²⁰ of which to be transferred to another person.

Otto Kahn-Freund claimed that law should not be separated from its purpose or the situation of which it be made. He argue that we cannot take for granted that rules or institutions are transplantable and convinced that there are degrees of transferability.²¹ In his paper, cited Ewald than concluded the theory Kahn-Freund as: *“legal institutions may be more-or-less embedded in a nation’s life, and therefore more-or-less readily transplantable from one legal system to another; but nevertheless at one end of the spectrum law is so deeply embedded that transplantation is in effect impossible.”*

It seems that Otto Kahn-Freund influenced by Carl Von Savigny thought, a philosopher of history law thought from Germany, he says that positive law originally comes from the spirit of its society (*volkgeist*).²² Hari Chand stated Carl Von Savigny that: *“Law is based on a common conviction of the people. Law has no independen existence. It is based on the (volkgeist) common conviction of the people. Law is as a product of the people’s life...”*

¹⁸ Arie S. Hutagalung, *Tebaran Pemikiran Seputar Masalah Hukum Tanah*, Jakarta: Lembaga Pemberdayaan Hukum Indonesia, 2005, p. 336.

¹⁹ Maria S.W. Sumardjono, *Kebijakan Pertanahan Antara Regulasi dan Implementasi*, Jakarta: PT. Kompas Media Nusantara, 2009, p. 135-145.

²⁰ Article 16 Law No. 5 Year of 1960 concerning to Basic Regulations on Agrarian Principles.

²¹ Mistelis, Loukas A. “Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations”, Reproduced with permission of 34 International Lawyer 1055-1069 (Pace Law School Institute of International Commercial Law - Last updated February 13, 2001). (2000). Mistelis, “Regulatory Aspect”, p. 1066.

²² Hari Chand, *Modern Jurisprudence*, Kuala Lumpur: International Law Book Services, 1994, p.125.

Some academic measure to be examined, the measurement not only based on local characteristic and condition,²³ nevertheless by examination the external solution. In this legal transplantation Alan Watson concluded in order to response Otto Kahn-Freund:²⁴

- (a). *The transplanting of individual rules or of a large part of a legal system is extremely common;*
- (b). *Transplanting is, in fact, the most fertile source of development. Most changes in most systems are the result of borrowing;*
- (c). *To a truly astounding degree law is rooted in the past;*
- (d). *The transplanting of legal rules is socially easy;*
- (e). *A Voluntary reception or transplant almost always – always in case of a major transplant – involves a change in the law, which can be due to any number of factors, such as climate, economic conditions, religious outlook;*
- (f). *No area of private law can be designated as being extremely resistant to change as a result of foreign influence;*
- (g). *The time of reception is often a time when the provision is looked at closely, hence a time when law can be reformed or made more sophisticated. It thus gives the recipient society a fine opportunity to become a donor in its turn;*
- (h). *Reception is possible and still easy when the receiving society is much less advanced materially and culturally, though changes leading to simplification, even barbarisation, will be great;*
- (i). *Foreign law can be influential even when it is totally misunderstood;*
- (j). *The previous two conclusions, in fact almost all so far, show the importance of authority for transplants and for law in general;*
- (k). *A nation which is inventive in law may be largely free from accepting transplants even at a time when foreign influence is very important in other matters in the society. But this is not always the case;*
- (l). *Law like technology is very much the fruit of human experience;*

²³ David Nelken, “Signaling Conformity: Changing Norms in Japan and China”, Mixed Reception: Culture, International Norms, and Legal Change in East Asia Comment, (Cite as: 27 Mich. J. Int’l L. 933), Michigan Journal of International Law. Copyright © 2006 University of Michigan Law School, (Spring 2006): p.972.

²⁴ Alan Watson, *Legal Transplants: An Approach To Comparative Law*, 2nd Edition. Athens, Georgia: University of Georgia Press, 1993, p. 95-101.

(m). *Peoples develop along their own lines and to show marked cultural progress and inventiveness in one field is no indication that similar progress will be made in others.*

The principle of land purchasing above mentioned than be adopted as positive law under National Land Law. Upon the question above mentioned that how about the legal action in order to transfer the land right does not take in front of the land deed public officer (PPAT) or without land deed, is it valid or not, there are several decisions of Supreme Court. Such decisions obviously stated that the legal action of transferring land right of which does not take in front of the land deed public officer (PPAT) or even not be executed in front of the leader of local village (“kepala desa”) or witness, “is valid”, as long as such legal action of transferring land right followed by occupy action on the land by the buyer.²⁵

Some decisions of Supreme Court concerning to land purchasing:²⁶

- 1) Supreme Court Decision dated 14-03-1973 Nomor: 601/K/Sip/1973 which stated that pre-requirement elaborate in article 19 Government Regulation No. 10 Year of 1961 concerning to Land Registration, upon land purchasing, not determine the validity of such land purchasing but rather as the validity of land purchasing pre-requirement;
- 2) Supreme Court Decision dated 12-06-1975 Nomor 952/K/Sip/1974 which stated that land purchasing is valid if comply with 3 element, there are: (a) “tunai” (cash), (b) “riil (real), and (c) “terang” (openness) as acknowledged by the leader of local village (“kepala desa”). The pre-requirement under article 19 Government Regulation No. 10 Year of 1961 concerning to Land Registration not underestimate the pre-requirement of land purchasing under Civil Law Code (KUHPerdato) and Adat Law, but rather merely as the requirement for Agrarian Officer.
- 3) Supreme Court Decision dated 16-06-1976 Nomor 1082/K/Sip/1976 which stated that: “According to Yurisprudensi Mahkamah Agung (Supreme Court) article 19 Government Regulation No. 10 Year of 1961 concerning to Land Registration, is

²⁵ Maria S.W. Sumardjono, *Kebijakan Pertanahan Antara Regulasi dan Implementasi*, opcit, p. 142-143.

²⁶ Lieke Lianadevi Tukgali, *Fungsi Sosial Hak Atas Tanah Dalam Pengadaan Tanah Untuk Kepentingan Umum*, Jakarta: Penerbit Kertasputih Communication, 2010, p. 288-289.

not merely as administrative decision but also particularity for registration upon transferring of land right at “Kadaster” (registration office).

However, the land purchasing institution under National Land Law transformed from Adat Law. As explanation above mentioned, land purchasing under Adat Law is the legal action of transfer of right, it means that land purchasing which is executed with the Adat Law conception that are (a) “tunai” (cash), (b) “riil (real), and (c) “terang” (openness), so that at that time the right of land (ownership) had already transferred from the seller to the buyer. In the real situation, at the time of payment event if “cash advance” payment (“panjar”), accordingly at the time, the land right had already transferred from the seller to the buyer. In the real situation, the “cash advance” payment (“panjar”) is Land Law System, and the balance of payment is under the debt agreement (credit agreement).

In this circumstances, under National Land Law, such land purchasing constitute of legal action upon transferring of land right. It means having issued the land purchasing deed by land deed officer (PPAT) at the same time transferred the ownership of land from the seller to the buyer. For the reason that, hence the registration of land by the authority merely a declarative decision by means to firm to public that transferring right action upon land had already done.

The other issue that government try to transplant both the Western Law and Adat Law conception is about the development of Apartment and Condominium especially in the metropolitan city. The concept of strata title for the development of such Apartment and Condominium originally transplanted from Western Law but adjusted and adapted or synchronized with Adat Law. The strata title conception which stated under Law No. 20 Year of 2011 concerning to Strata Title (Flats Law), in the implementation still face several legal problem for instance how about the purchasing of the right of strata title of which the Apartment and Condominium under-construction or not yet be developed by the developer, or how about of the “cash advance” payment (“panjar”) or “indent” upon strata title purchasing?

As the question of the above mentioned, and for the case related to land purchasing, government does not give the explanation or elaboration under positive law (UUPA) concerning to conception that are (a) “tunai” (cash), (b) “riil (real), and (c) “terang” (openness). This, of course, arising a legal uncertainty for the society whose enter in to the land purchasing agreement. In this circumstances, government should take effort to solve the problem by taking legal transplant.

Academically, as Otto Kahn-Freund says that the laws should suit with the society of which the laws is made.

For the solution of the problem of sale and purchase as mentioned above of which the transaction is not fulfill the conception of Adat Law that are (a) “tunai” (cash), (b) “riil (real), and (c) “terang” (openness), the Notary Public issued the document what we call it PPJB as Pre-Agreement before actual transaction in cash with signing the Deed what we call it AJB. The functions of PPJB as a preliminary agreement from which the main or main agreement will be issued at a later date. Thus, PPJB is classified as an obligatory agreement where the seller agrees to give the house being sold to the buyer. However, legally PPJB does not cause a transfer of rights between the seller and the buyer because PPJB is only an agreement of which to transfer a right, transfer must be carried out.²⁷

According to Indonesian Agrarian Law of which based on Adat Law, PPJB as Pre-Agreement of Sale and Purchas of “Land and Building” including Apartment, should be implemented as follows:

- 1) PPJB is the supporting agreement, could be in oral agreement of written agreement or issued by Notary Public as Authentic Deed.
- 2) Verification and validation of Certificate of Land and Building or Strata Title, refer to Article 97 PMNA/ KBPN No. 16 Year 2001 concerning 3rd ammandement PMNA/KPBN No. 3 Year 1997.
- 3) Stated the Clause of Power of Attorney from the seller to the buyer according to Article 1813 Indonesian Civil Law Code.
- 4) The reason to issue the PPJB: Payment of the sale and purchase price of the land is carried out in stages, The land certificate to be sold is still in the process of being transferred to the seller's name, The land certificate to be sold is being pledged at a bank, The land certificate to be sold is in the process of being transferred to the heir's name, Letters related to the terms of the sale and purchase process are being processed, The land certificate to be sold is in the process of being certified at the Land Office, The land certificate is still in the process of being splitting,

²⁷ Dewi Kurnia Putri, Amin Purnawan, *Perbedaan Perjanjian Pengikatan Jual Beli Lunas dengan Perjanjian Pengikatan Jual Beli Tidak Lunas*, Jurnal Akta, Vol. 4, No. 4, Desember 2017, p. 632.

The construction of the Apartment and its certificate have not been completed, The location of the land being sold is in the work area of the PPAT (Land Deed Officials) which is not the work area of the relevant PPAT notary.

- 5) Sale and Purchase of Flats (Apartment) refer to Article 43 of Flat Law: The process of buying and selling a Flat (Apartment) before the construction of the Flat (Apartment) is completed can be done through a PPJB made before a Notary, and the PPJB is after fulfilling the requirements for certainty of (a) Land ownership status, (b) Ownership of IMB (Permit to Build), (c). Availability of infrastructure and public utilities, (d) Construction of at least 20%, (e) Something agreed upon.
- 6) Registration of PPJB at Land Office according to Article 90 Government Regulation No. 18 Year 2021 concerning Hak Pengelolaan (management right), Land Rights, Flat and Land Registration.

D. CONCLUSION

Practically, the developer's apartment sales marketing department carries out sales strategies using the Pre-Project Selling system. The system namely promotion or marketing carried out before construction of the apartment, and they offers are in the form of illustrations, drawings or designs. This concept is not inline with the principles of conception of Indonesian law on preliminary sales and purchase stated that land rights transaction is "terang, riil dan tunai" ("transparent, real and cash"). The transaction should be in front of Notary Public by issuing a fair Pre-Agreement (Perjanjian Pengikatan Jual Beli_PPJB).

REFERENCES

BOOK

- Chand, Hari. 1994. *Modern Jurisprudence*, Kuala Lumpur: International Law Book Services.
- Hutagalung, Arie S.. 2005. *Tebaran Pemikiran Seputar Masalah Hukum Tanah*, Jakarta: Lembaga Pemberdayaan Hukum Indonesia.
- Kadir, Abdul. 1990. *Hukum Perdata Indonesia*. Bandung: Citra Aditya Bakti,
- Santoso, Urip. 2014. *Hukum Perusmahan*. Jakarta: Kencana Prenada Media Group.
- Sumardjono, Maria S.W.. 2009. *Kebijakan Pertanahan Antara Regulasi dan Implementasi*, Jakarta: PT. Kompas Media Nusantara.
- Sumardjono, Maria S.W.. 2009. *Tanah Dalam Perspektif Hak Ekonomi Sosial Dan Budaya*. Jakarta: PT. Kompas Media Nusantara.
- Tukgali, Lieke Lianadevi. 2010. *Fungsi Sosial Hak Atas Tanah Dalam Pengadaan Tanah Untuk Kepentingan Umum*. Jakarta: Penerbit Kertasputih Communication.
- Watson, Alan. 1993. *Legal Transplants: An Approach To Comparative Law*, 2nd Edition. Athens, Georgia: University of Georgia Press.

ARTICLES

- Arie S. Hutagalung, “Dinamika Pengaturan Rumah Susun atau Apartmen”, *Jurnal Hukum dan Pembangunan*, Volume 34, Nomor 4, 2004.
- Berlian Septiani, Iwan Erar Joesoef, Suherman, “Buy Back Guarantee between Developer and Creditors: Study of Apartment Sale and Purchase Pre-Agreement Based on the Pre-Project Selling System”, *International Journal of Social and Human Research*, Volume 07 Issue 05, May 2024.
- David Nelken, “Signaling Conformity: Changing Norms in Japan and China”, Mixed Reception: Culture, International Norms, and Legal Change in East Asia Comment, (Cite as: 27 Mich. J. Int’l L. 933), *Michigan Journal of International Law*. Copyright © 2006 University of Michigan Law School, (Spring 2006): 972.
- Dewi Kurnia Putri, Amin Purnawan. “Perbedaan Perjanjian Pengikatan Jual Beli Lunas dengan Perjanjian Pengikatan Jual Beli Tidak Lunas”. *Jurnal Akta*, Vol. 4, No. 4, Desember 2017.

Mistelis, Loukas A. “Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations”, Reproduced with permission of 34 International Lawyer 1055-1069 (Pace Law School Institute of International Commercial Law - Last updated February 13, 2001). (2000). Mistelis, “Regulatory Aspect”, 1066.

Wibowo Turnady, Hak Milik Atas Satuan Rumah Susun, <http://jurnalhukum.com/hak-milik-atas-satuan-rumah-susun/>, diakses 13 September 2024.

<https://propertiindonesia.id/post/penjualan-apartemen-hingga-semester-i-2024-diproeksi-masih-melambat>