

Auction Of The Executed Collateral Object Under Fiduciary Guarantee

Pelaksanaan Lelang Terhadap Objek Jaminan Fidusia yang Telah Di Eksekusi

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Abstract

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This research endeavors to analyze two crucial aspects within the legal framework of Indonesia, primarily in response to Constitutional Court Decision Number 18/PUU-XVII/2019. First, it delves into the coercive power of debtors regarding the surrender of fiduciary guarantee objects and examines the implications of the Constitutional Court's ruling, which allows debtors the choice not to voluntarily relinquish collateral objects, thus introducing ambiguity regarding the obligations outlined in Article 30 of the Fiduciary Guarantee Law. Consequently, this decision extends the execution process, increases costs, dampens the business climate, and diminishes potential Non-Tax State Revenue. Furthermore, creditors are challenged in executing defaults, now necessitating court orders and rendering the once-efficient process laborious. Second, the research navigates the intricacies of conducting auctions for executed fiduciary guarantee objects, elucidating the legal framework governing auctions in Indonesia, where transparency, competition, certainty, accountability, and efficiency are paramount. The study unveils the procedure for initiating auctions, the criteria for prospective participants, and the guiding principles of these auctions. In conclusion, this research calls for comprehensive studies by policymakers prior to any revisions in the Fiduciary Security Law, given the growing diversity of collateral objects and the complexities stemming from Constitutional Court Decision Number 18/PUU-XVII/2019. It underscores the need to modernize movable property security laws to adapt to evolving societal dynamics, consolidate fiduciary security regulations, and streamline the procedures for auctioning executed fiduciary collateral objects.

PENDAHULUAN

Indonesia, as a developing country, regards economic development as an integral part of its national progress, aiming to achieve a just and prosperous society. In order to sustain and further this national development, substantial funding is crucial for development stakeholders, be it the government or the public, individuals or legal entities. Banking and financing institutions serve as channels to meet these funding needs. Both of these institutions provide funds through financing agreements or credit agreements. These agreements are accompanied by collateral agreements by the debtor or other parties as a form of protection for the creditor. One form of collateral granted is a fiduciary guarantee. This fiduciary guarantee is then documented in a fiduciary guarantee deed followed by registration with the Ministry of Law and Human Rights to issue a Fiduciary Guarantee Certificate.

Article 5 paragraph (1) of Law number 42 of 1999 concerning Fiduciary Guarantees (hereinafter referred to as the UJUF) stipulates that the imposition of a fiduciary guarantee is made through a notarial deed. This provision is not without purpose. It is solely to prevent any unintended legal consequences, as a notary is capable of providing legal advice and opinions on any actions to

be taken by the parties involved.¹ Certainly, the clear reason is also about the perfect evidentiary strength of a notarial deed.

The practice of fiduciary in Indonesia has been going on for quite some time. However, its existence in the past was only at the level of jurisprudence. To provide legal certainty for both the trustor and the trustee, the government enacted the Fiduciary Law (UUJF). The general explanation of Article 3 of the UUJF states that it is intended to accommodate the community's needs regarding the regulation of fiduciary guarantees as one of the means to support business activities and to provide legal certainty to interested parties.

One characteristic of Fiduciary Guarantee is the ease of its execution, namely if the trustor breaches the promise as mentioned in the explanation of Article 15 paragraph (3) of the UUJF. However, on January 6, 2020, the Constitutional Court officially issued Constitutional Court Decision number 18/PUU-XVII/2019 (hereinafter referred to as the MK decision). Based on the aforesaid decision, the Constitutional Court provided a specific interpretation of Article 15 paragraph (2) and paragraph (3) of the UUJF. The Constitutional Court requires an agreement on the breach of promise between the debtor and the creditor, as well as the voluntary surrender of the fiduciary collateral object by the debtor to the creditor. If both of these conditions are not met, then the same treatment is determined between the execution of the Fiduciary Guarantee Certificate and the execution of a final and binding court decision.

The terminology of the word "fiduciary" is known in various languages. In Latin, "fiducia" means trust.² The term "fiduciaire eigendom overdracht" (hereinafter referred to as f.e.o) is known in Dutch. Marhainis interprets this term as "trust agreement," or it is also called "transfer of ownership rights in trust."³ According to Marhainis, the term f.e.o often occurs in banking practice when a customer requests a loan from a bank and uses their movable property as collateral to the bank that lends them money, but the property remains in the possession of the owner who borrowed money from the bank. This condition indicates that there are two elements at once in f.e.o, namely the pawn element and the hypothec element. The pawn element is seen from the collateral which is movable property. The hypothec element is evident in the non-transfer of possession of the collateral by the debtor to the creditor.

Fiduciary collateral has long been known and applied in Roman times. Two forms of fiduciary collateral known are *fidusia cum creditore* and *fidusia cum amico*.⁴ The first form of fiduciary means a promise of trust made with the creditor. The debtor and creditor have agreed to transfer ownership of the debtor's property to the creditor as collateral for the debt, and the creditor will transfer ownership back to the debtor once the debtor's obligation to repay the debt is fulfilled. The second form is a promise of trust made with a friend. In practice, this second form of fiduciary is often used when the owner of an item needs to travel out of town, so they entrust the ownership of the item to their friend with the promise that the item will be returned when the owner returns.

Currently in Indonesia, Law number 42 of 1999 regarding Fiduciary Guarantee is in effect. Article 1 number 2 of the UUJF defines the concept of fiduciary guarantee as "the right of guarantee over movable objects, both tangible and intangible, and immovable objects, especially buildings that cannot be burdened by a mortgage as referred to in Law Number 4 of 1996 concerning Mortgage Rights that remain in the possession of the Grantor of Fiduciary, as collateral for specific debt repayment, which gives priority status to the Fiduciary Receiver against other creditors." In the construction of a fiduciary guarantee, the owner of the object is referred to as the grantor of fiduciary,

¹ Gladys Octavinadya Melati, *Pertanggungjawaban Notaris Dalam Pendaftaran Fidusia Online Terhadap Penerima Fidusia*, Jurnal Repertorium, Edisi 3, 2015, h. 68.

² Subekti dan R. Tjitrosoedibio, *Kamus Hukum*, Pradnya Paramita, Jakarta, 1979, h. 46.

³ Marhainis Abdul Hay, *Hukum Perdata*, Badan Penerbit Yayasan Pembinaan Keluarga UPN Veteran, Jakarta, h. 185.

⁴ Marulak Pardede dkk, *Laporan Akhir Penelitian Hukum tentang Implementasi Jaminan Fidusia dalam Pemberian Kredit di Indonesia*, Jakarta, 2006, h. 21.

and the creditor whose payment is guaranteed by the fiduciary guarantee is referred to as the fiduciary receiver. Both the grantor of fiduciary and the fiduciary receiver can be individuals or corporations.

Article 11 paragraph (1) in conjunction with Article 12 paragraph (1) of the UUJF stipulates that objects encumbered by a Fiduciary Guarantee must be registered through the Fiduciary Registration Office. The Fiduciary Registration Office will also record the Fiduciary Guarantee in the Fiduciary Register Book on that day, which then becomes the birth date of the intended Fiduciary Guarantee. The registration and its registration date play a very important role because it can have significant logical consequences in the future. In the event that no registration is made for the Fiduciary Guarantee, based on the Explanation of Article 27 paragraph (3) of the UUJF, the Fiduciary Guarantee agreement will not have preferential rights both inside and outside bankruptcy and/or liquidation. Meanwhile, according to Article 28 of the UUJF, if there are more than one Fiduciary Guarantee agreements on the same object, priority rights are given to the one that registered first. Rachmadi Usman once stated the purpose and objective of the fiduciary registration system:⁵

- a. Providing legal certainty for parties involved, especially by creating a fiduciary guarantee for creditors;
- b. Granting preferential rights to creditors over other creditors, in relation to the control of the collateral pledged by the grantor of the fiduciary;
- c. Meeting the principle of publicity for other creditors regarding the collateral pledged.

Just like Mortgage Rights, the institution of fiduciary guarantee also has characteristics and nature, including the following

The fiduciary guarantee has an accessory nature, as emphasized in Article 4 of the Fiduciary Guarantee Law.⁶

1. Fiduciary guarantee is a property right as reflected in:
 - a. Article 20, namely the principle of *droit de suite*. The principle of *droit de suite* only applies to non-inventory goods; it does not apply to inventory goods.
 - b. Article 1 paragraph 2, namely the principle of *droit de preference*, stating that the position of the creditor holding the fiduciary guarantee is positioned as a preferred creditor.
 - c. Article 27 paragraph (1) in conjunction with Article 28, which is the principle of priority.
2. Fiduciary guarantee secures existing debts, debts that will arise in the future, and debts that, at the time of execution, can be determined in amount based on the underlying agreement that creates an obligation to fulfill a performance under Article 7 of the Fiduciary Guarantee Law.
3. Fiduciary guarantee can secure more than one debt, as regulated in Article 8 of the Fiduciary Guarantee Law.
4. Execution of fiduciary guarantee is regulated in Article 29 of the Fiduciary Guarantee Law.
5. Fiduciary Receiver as a separate creditor in the event of bankruptcy is regulated in Article 27 paragraph (3).

Parate Execution Concept in Security Law

Execution, fundamentally, is the effort made by the prevailing party in a judgment to obtain what is rightfully theirs with the assistance of legal authority, compelling the losing party to carry out the judgment.⁷ Execution means that the defeated party is unwilling to voluntarily comply with the judgment, thus the *a quo* judgment must be enforced upon them with the assistance of legal force.⁸

Execution according to Article 195 of the Revised Dutch East Indies Regulation or the Updated Indonesian Regulation (hereinafter referred to as HIR) is the enforcement of a court decision that has gained legal force or is associated with an act with an execution title falling under the category of formal civil law. The title referred to in this case is a statement that reads "For Justice Based on the

⁵ Rachmadi Usman, *Hukum Jaminan Keperdataan*. Sinar Grafika, Jakarta, 2008, h. 200.

⁶ Usanti, Trisadini Prasastinah dan Leonora Bakarbesy, *Hukum Jaminan*, Cetakan ke-4, Revka Petra Media, Surabaya, 2016, h.118-119.

⁷ Subekti, *Hukum Acara Perdata*, Bina Cipta, Bandung, 1989, h. 128.

⁸ Nur Adi Kumaladewi, *Eksekusi Kendaraan Bermotor Sebagai Jaminan Fidusia yang Berada pada Pihak Ketiga*, Jurnal Repertorium, Volume II No. 2, 2015, h. 68.

Almighty God". This title is crucial because its absence can affect the executory power of a decision or an act. Article 224 of HIR places acts that include this title on par with a judge's decision, allowing them to be enforced in the same manner as a decision that has gained legal force. This provision was adopted in Article 15 paragraph (1) in conjunction with paragraph (2) of the Fiduciary Guarantee Law (UUJF), which stipulates that the inclusion of the phrase "For Justice Based on the Almighty God" in a Fiduciary Guarantee Certificate grants it the same executory power as a decision that has gained legal force.

An executory title is a convenience granted by the law to the creditor as the fiduciary receiver. The creditor possesses what is known as the right to repossess, which is the authority to take the object of the fiduciary guarantee from the debtor, who is the grantor of the fiduciary, if the debtor is unwilling to surrender the collateral object.⁹ This is actually an advantage provided by the Fiduciary Guarantee Law to creditors or fiduciary recipients. The executory power in the Fiduciary Guarantee Certificate grants the right to the fiduciary recipient to sell the object of the fiduciary guarantee if the debtor or grantor of the fiduciary has breached the agreement. Etymologically, the term "parate" comes from the Dutch word "paraat," which means always ready.¹⁰ Exactly, it means the right to collect outstanding debts by selling the pledged item is always readily available to the creditor. This is termed by the Hoogerrechtschof van Nederlands Indie (HGH), as quoted by Teddy Anggoro from Sudikno Mertokusumo, as the "right to seek repayment without a court decision".¹¹

Research Question

1. How is the execution carried out following the decision of the Constitutional Court number 18/PUU-XVII/2019 on the fiduciary guarantee object?
2. How is the auction of the executed fiduciary guarantee object conducted?

Research Purposes

1. To analyze the coercive power of the debtor in accordance with Article 30 of the Fiduciary Guarantee Law for surrendering the fiduciary guarantee object after the Constitutional Court Decision number 18/PUU-XVII/2019.
2. To analyze the procedure for conducting an auction of the executed fiduciary guarantee object.

Research Benefits

Theoretical Benefits

This research is expected to be beneficial in providing information as a means for the development of theories in the field of civil law and special security law, particularly regarding Fiduciary Guarantee, the execution of Fiduciary Guarantee, and the implementation of auctions for executed fiduciary guarantee objects.

Practical Benefits

The findings of this research are expected to provide input for practitioners, particularly regarding the legal basis of the Obligor's obligations and the execution of Fiduciary Guarantee in Indonesia post the Constitutional Court Decision number 18/PUU-XVII/2019, as well as the implementation of auctions for fiduciary guarantee objects.

METODE

Research Type

The research type used in this study is legal research. According to Peter Machmud Marzuki, legal research aims to discover the coherence of truth, which is whether legal rules are in

⁹ Benny Krestian Heriawanto, *Pelaksanaan Objek Jaminan Fidusia Berdasarkan Title Eksekutorial*, Jurnal Legality, Vol. 27, No. 1, 2019, h. 62.

¹⁰ Moh. Novri Patamangi, *Tinjauan Hukum tentang Parate Eksekusi Hak Tanggungan Kredit Bank*, Jurnal Ilmu Hukum Legal Opinion, Edisi 2 Volume 3, 2015, h. 1.

¹¹ Teddy Anggoro, *Parate Eksekusi: Hak Kreditor, yang Menderogasi Hukum Formil (Suatu Pemahaman Dasar dan Mendalam)*, Jurnal Hukum dan Pembangunan, No. 4, 2007, h. 552.

accordance with legal norms, whether norms in the form of commands or prohibitions are in accordance with legal principles, and whether a person's actions are in accordance with legal norms or principles. Legal research is a process to find legal rules, legal principles, and legal doctrines that are useful in answering legal issues faced.¹²

Research Type

The type of legal research used in this study is doctrinal research.

Problem Approach

The problem approach used in this legal research includes the legislative approach (statute approach), conceptual approach, and case approach. The legislative approach involves examining all laws and regulations related to the legal issues being addressed.¹³ The conceptual approach involves studying viewpoints and doctrines within legal science. Researchers will discover ideas that give rise to legal definitions, legal concepts, and legal principles relevant to the issue at hand.¹⁴ The case approach involves examining relevant cases, specifically those outlined in Constitutional Court Decision number 18/PUU-XVII/2019.

Techniques for Collecting and Processing Legal Materials

The method employed for gathering legal materials in this research is through a literature review. This includes collecting and classifying both primary and secondary legal materials through library research, which supports the fulfillment of pre-existing legal materials. The procedure for collecting legal materials involves reading and sorting through legal regulations that are relevant to the legal issue. Additionally, it also connects with secondary legal materials such as legal papers, newspapers, and legal literature related to the researched legal issue.

Legal Analysis

All obtained legal materials, whether primary or secondary, are sorted and classified based on the research problem formulation. Primary legal sources will be interpreted according to legal interpretation techniques. Sudikno Mertokusumo and A. Pitlo state that interpretation or clarification is one of the legal discovery methods that provides a clear explanation of legal texts, so that the scope of the rule can be determined in relation to specific events¹⁵. The interpretation employed in this research is a systematic interpretation, which involves interpreting the law as part of the entire legal system by connecting it with other laws. This method is carried out by linking the Fiduciary Guarantee Law with other laws and relevant regulations.

RESULTS AND DISCUSSION

Results

Execution Post Constitutional Court Decision Number 18/PUU-XVII/2019 Regarding Fiduciary Guarantee Objects

The Fiduciary Guarantee has a characteristic that facilitates its execution, namely when the Grantor of Fiduciary breaches the agreement, as mentioned in the explanation of Article 15 paragraph (3) of the Fiduciary Guarantee Law (UUJF). However, on January 6, 2020, the Constitutional Court officially issued Constitutional Court Decision number 18/PUU-XVII/2019. Based on the a quo decision, the Constitutional Court provides a specific interpretation of Article 15 paragraphs (2) and (3) of the UUJF. The Constitutional Court requires an agreement regarding the

¹² Peter Mahmud Marzuki, *Penelitian Hukum*, Cet. 12, Kencana Prenadamedia Group, Jakarta, 2016, h. 47.

¹³ *Ibid.*, h. 133.

¹⁴ *Ibid.*, h. 136.

¹⁵ Sudikno Mertokusumo dan A. Pitlo, *Bab-Bab Tentang Penemuan Hukum*, Citra Aditya Bakti, Bandung, 1993, h. 13.

breach of agreement between the debtor and the creditor, as well as the voluntary surrender of the fiduciary collateral object by the debtor to the creditor. In case both of these conditions are not met, the same treatment is established between the execution of the Fiduciary Guarantee Certificate and the execution of a court decision that has gained legal force.

The Constitutional Court's decision actually creates a new legal issue. The decision opens up an opportunity for debtors who are unwilling to voluntarily surrender the fiduciary collateral object. This means that debtors have the option to either voluntarily or unwillingly surrender the fiduciary collateral object. Consequently, debtors can refuse to surrender the fiduciary collateral object before a court decision is made. This situation contradicts the clear and implicit norms established in the UUJF. Post the Constitutional Court Decision, if the debtor is unwilling, normatively, the creditor must go through all legal mechanisms and procedures, including filing a lawsuit in court, in order to execute the fiduciary guarantee.

On the other hand, one must not reject the existence of Article 30 of the UUJF, which determines the obligation of the grantor to surrender the object of the fiduciary guarantee for the purpose of execution. Constitutional Court Decision number 18/PUU-XVII/2019 actually creates uncertainty about whether the debtor actually has an obligation to surrender the fiduciary collateral object to the fiduciary recipient. Creditors adhere firmly to Article 30 of the UUJF and consider a debtor who breaches the agreement still has an obligation to surrender the collateral object. Creditors will try various means to take physical possession of the collateral object. Normatively, creditors actually have the right to repossess if the debtor is unwilling to voluntarily surrender the fiduciary collateral object.¹⁶ The right to repossess grants the creditor the authority to retrieve the fiduciary collateral object from the grantor of the fiduciary. However, the issue arises in its practical implementation, where debt collectors are often utilized by creditors. Debtors who persistently refuse to surrender the fiduciary collateral object will face debt collectors.

The provision of credit is closely tied to the principle of collateral, also known as security. Security is crucial in safeguarding the bank's credit, and security measures are often taken by banks due to the inherent risks associated with lending (degree of risk). For a bank to extend credit, the presence of collateral is necessary.

Collateral is a guarantee provided by the debtor and/or a third party to the creditor because the creditor has an interest in ensuring that the debtor fulfills their obligations in an agreement.¹⁷ There are two types of guarantees in Civil Law, namely property guarantees and personal guarantees.¹⁸ Property guarantees are guarantees in the form of an absolute right to a certain object, which have the following characteristics: they have a priority principle, meaning that a right that arises first will take precedence over a right that arises later, can be maintained against anyone, follows the property wherever it is, has a direct relationship with a specific object of the debtor, has a preference, and can be contested.¹⁹

Fiduciary guarantees are property guarantees often chosen by banks to protect themselves as creditors in case of a breach of contract, allowing for direct seizure or parate execution. One of the characteristics of a fiduciary guarantee is the ease of execution in case the fiduciary giver breaches the contract. Before Constitutional Court Decision No. 18/PUU-XVII/2019, Article 15 paragraph (2) of the Fiduciary Law stated that the fiduciary guarantee certificate had the same executory power as a legally binding court decision. Furthermore, the Fiduciary Law also defined that the executory power could be implemented directly without going through the courts, and it was final and binding on the parties to carry out the decision. This direct executory power without going through the courts is what is meant by the institution of parate execution. However, after the Constitutional

¹⁶ M. Yahya Harahap, *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata*, Edisi Kedua, Sinar Grafika, Jakarta, 2009, h. 215.

¹⁷ Hasanuddin Rahman, *Op. cit.*, h.162.

¹⁸ Sri Soedewi Masjchoen Sofwan, S.H., *Hukum Jaminan di Indonesia*, Yogyakarta, Liberty Offset, 2003, h.46.

¹⁹*Ibid*, h.47.

Court's decision, Article 15 paragraph (2) of the Fiduciary Law, insofar as the phrase "executory power" and the phrase "the same as a legally binding court decision," are in conflict with the Constitution of the Republic of Indonesia Year 1945 and do not have legal binding power as long as it is not interpreted "in the case of fiduciary guarantees where there is no agreement on a breach of contract (wanprestasi) and the debtor objects to voluntarily surrender the object that serves as a fiduciary guarantee, then all legal mechanisms and procedures for executing the Fiduciary Guarantee Certificate must be carried out and apply in the same way as the execution of a legally binding court decision. The Constitutional Court's decision has several implications, including:²⁰

1. The execution process becomes longer.
2. High costs, making it inefficient.
3. Lack of support for the business climate.
4. Reduced potential for Non-Tax State Revenue.

The Constitutional Court's decision has made it difficult for creditors, as the collateral recipients, to execute in case of default by the guarantor. Previously, the Financial Services Authority (hereinafter referred to as OJK) had issued a legal product, Financial Services Authority Regulation of the Republic of Indonesia Number 35/POJK.05/2018 Regarding the Financing Business (hereinafter referred to as "POJK 35 Year 2018"). POJK 35 Year 2018 explicitly regulates Financing Companies in conducting collections or even executing collateral when the debtor has defaulted. The implementation of parate execution against a defaulting debtor cannot be carried out by the creditor immediately. Instead, the creditor must first prove that the debtor has defaulted, the debtor has been given a warning letter, and the financing company has a fiduciary guarantee certificate that must be registered within 1 (one) month from the date of the financing agreement, as stipulated in Article 50 paragraph (1) of POJK 35 Year 2018.

The Constitutional Court's decision on January 6, 2020, already warned against arbitrary actions, physical threats, or psychological threats committed by creditors or their representatives. The Constitutional Court did not prohibit the withdrawal of fiduciary guarantees if the debtor defaults. The Court stated that if the debtor does not voluntarily surrender the fiduciary collateral, the creditor must file an execution request with the court. What creditors have been using as a basis all this time is Article 30 of the Fiduciary Law, which mandates direct execution in the execution process. In the explanation of Article 30 of the Fiduciary Law is what creditors have used to take the object of the fiduciary guarantee with the assistance of law enforcement officers. This article grants the creditor the authority to choose to use law enforcement officers in executing or to use the services of a debt collector to assist if there is resistance from the debtor. This is done to facilitate the retrieval of the object of the fiduciary guarantee, as long as the debtor is proven to have committed default by not fulfilling their debt obligations. Creditors can also protect themselves if the debtor does not surrender the collateral object, in which case the creditor can request the assistance of the police in accordance with the Chief of the Indonesian National Police Regulation Number 8 Year 2011 Regarding the Security of Fiduciary Guarantee Execution (hereinafter referred to as Perkapolri Number 8 Year 2011). The execution of fiduciary guarantee objects falls under civil law, so it is not easy to involve the police in assisting with the execution of these objects. Therefore, in case of resistance from the debtor, the creditor can request the assistance of the police, guided by Perkapolri Number 8 Year 2011.²¹

²⁰ A. Yudha Hernoko, "Quo Vadis Perlindungan Hukum Bagi Kreditor Pemegang Jaminan Fidusia Pasca Putusan Mahkamah Konstitusi No. 18/PUU-XVII/2019: Problematikan Aturan atau Penerapan?", dalam *Jaminan Fidusia Pasca Putusan Mahkamah Konstitusi*, Bahan Presentasi Seminar, Fakultas Hukum Universitas Airlangga, Surabaya, 18 Februari 2020.

²¹ Sonip Kaligis, *Efektivitas Pasa 30 Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia (Suatu penelitian Pasal 30 Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia di Kabupaten Kediri)*, Universitas Brawijaya, h. 13, diakses melalui <https://media.neliti.com/media/publications/118191-ID-efektivitas-pasal-30-undang-undang-nomor.pdf>.

Discussion

Implementation of Auctions of Executed Fiduciary Collateral

Public sales through auctions have been regulated by law in Indonesia since 1908, with the enactment of *Vendu Reglement* (Auction Regulation Stbl. 1908 number 189) and *Vendu Instructie* (Auction Instruction Stbl. 1908 number 190), which are still in effect to this day based on Article II of the Transitional Provisions of the 1945 Constitution.²² The definition of an auction according to *Vendu Reglement* in *Staatblad* 1908 Number 189 states:

"Public sales are auctions or sales of goods conducted to the public with increasing or decreasing bid prices or with the submission of prices in sealed envelopes, or to individuals who are invited or previously notified about the auction or sale, or are allowed to participate and have the opportunity to bid on the offered price or submit the price in sealed envelopes."

The implementation of auctions is also regulated by the Ministry of Finance of the Republic of Indonesia Regulation Number 27/PMK.06/2016 regarding Implementation Guidelines for Auctions. According to Article 1, number 1 of the Ministry of Finance Regulation of the Republic of Indonesia Number 27/PMK.06/2016 regarding Implementation Guidelines for Auctions, it is defined as:

"An auction is a sale of goods that is open to the public with written and/or oral bids that increase or decrease to achieve the highest price, preceded by an Auction Announcement."

The advantages of selling through auctions are as follows:²³

1. Fair, as auctions are open, transparent, and objective, allowing for social control during the process.
2. Secure, as auctions are witnessed, led, and/or carried out by a professional and independent auctioneer appointed by the government.
3. Fast, as auctions are preceded by auction announcements, allowing participants or potential buyers to gather on a predetermined day, and transactions can occur immediately, usually in cash.
4. Achieving fair prices, as the competitive and transparent bidding system determines the limit or minimum price, which is set by the auction applicant/owner of the goods. Interested parties compete by making increasing bids, and the winner is the one with the highest bid.
5. Legal certainty, as the auctioneer creates an authentic act called the "Risalah Lelang" regarding the auction. With the *Risalah Lelang*, the buyer can assert their rights and use it for ownership transfer.

Auctioning is a process of buying and selling through direct bidding. The highest bidder with the highest offer gets the item sold. The current development of internet technology allows various physical services to be provided online. According to Article 64, paragraph (3) of the Ministry of Finance Regulation of the Republic of Indonesia Number 27/PMK.06/2016 regarding Implementation Guidelines for Auctions:

"Written bids without the presence of Auction Participants are carried out through:

- a. Electronic mail (email);
- b. Postal mail; or
- c. The internet, either in an open bidding or closed bidding manner."

The legal basis for auctioning fiduciary collateral movable property is stipulated in Article 29, paragraph (1), letter b of the Fiduciary Law, which states that "the sale of Objects that are subject to Fiduciary Collateral under the authority of the Fiduciary Receiver is conducted through a public auction, and the payment of the debt is taken from the proceeds of the sale." Public sales or auctions must be conducted by or in the presence of an Auction Official, meeting the following criteria:

- a. Auction is a method of selling conducted at a predetermined time and place.
- b. It is carried out by announcing it in advance to gather interested participants in the auction.
- c. It is done through bidding or setting a specific price, either by oral or written competitive bids.
- d. The participant who submits the highest bid will be declared the winner/buyer.

²² Purnama Tioria Sianturi, *Perlindungan Hukum Terhadap Pembeli Barang Jaminan Tidak Bergerak Melalui Lelang Edisi Revisi*, Mandar Maju, Bandung, 2008, hlm. 27

²³ F.X Sutardjo, *Penjualan Secara Lelang : Perjalanannya Saat ini, Tantangan dan Prospeknya ke Depan*, Jakarta, 2007, hal.15

The principles used in auctions are reflected in the understanding of the auction itself. Some of the principles that can be mentioned are as follows:

- a. The Principle of Publicity or Transparency means that every auction must be preceded by an announcement, whether in the form of advertisements, brochures, or invitations. Besides attracting as many auction participants as possible, the auction announcement is also intended to provide social control as a form of public protection. This principle is crucial in shaping auctions as transparent sales. Therefore, this principle is also called the transparency principle.
- b. The Principle of Competition means that auction participants compete, and the participant with the highest bid that meets or exceeds the limit price will be declared the winner.
- c. The Principle of Certainty means that the independence of the Auction Officer should be able to ensure that the highest bidder declared the winner of the auction, who has fulfilled their obligations, will receive the goods along with the documents.
- d. The Principle of Accountability means that the auction's execution can be accounted for because the government, through the Auction Officer, is responsible for overseeing the auction and creating an authentic document called the Auction Record, which functions as a bill of sale. The Auction Officer must be independent, meaning not influenced or biased toward anyone, so this principle can also be called the independence principle.
- e. The Principle of Efficiency means that since the auction is held at a specific time and place, and the transaction occurs immediately, it results in cost and time efficiency because the goods can quickly be converted into money.

Execution of Fiduciary Auction is an auction of fiduciary objects because the debtor defaults, as regulated in the UUJF (Fiduciary Security Law). In a fiduciary execution, the creditor does not need to request execution approval from the Chairman of the District Court if they intend to sell the collateralized credit goods bound by fiduciary, in case of debtor default.

Anyone interested in selling goods at an auction must submit a written request to the Auction Office where the goods to be auctioned are located. The auction applicant can submit a verbal or telephone request, which must immediately be followed by a written request. In principle, the auction request cannot be rejected by the Auction Office, except if the request does not meet the auction regulations. Once the auction request is received by the Auction Office, the auction applicant must promptly complete their auction request with documents or evidence of their rights and authority to sell the goods at auction. Additionally, the selling auction applicant can set auction sale conditions, provided that these conditions do not contradict the applicable auction regulations. After the auction office examines the auction request and its completeness and is convinced of the legality of the auction subject and the legality of the auction object, the Auction Office will determine the auction time and location, taking into account the wishes of the auction applicant. Immediately after the auction time and location are determined by the Office of State Property and Auction Services, the auction applicant, as the seller, announces the auction in newspapers and other media.

Prospective auction participants are required to deposit a certain amount of security money into the State Property and Auction Services' account under the following conditions:

- a. The security money will be counted towards the purchase price if the bidder is selected as the buyer.
- b. The security money will be refunded promptly if the bidder is not selected as the buyer.
- c. The security money will become the property of the seller if the auction winner defaults, meaning they cannot fulfill their auction payment obligations on time.

The auction is open, so in principle, anyone can participate as long as they are not excluded as outlined above. At the designated time, the auction is carried out and led by an Auction Officer from the Office of State Property and Auction Services. If the highest bid in the auction meets the seller's expectations, the goods will be released, and the Auction Officer will declare the highest bidder as the auction winner. However, if the highest bidder fails to reach the desired selling price (or the predetermined price limit), the Auction Officer will decide to withhold the auction object (or not declare a winner), unless the seller agrees to release the item.

An auction request can be submitted by the auction applicant, in this case, the fiduciary recipient or creditor, who can request the State Property and Auction Services Office to conduct an auction based on a Fiduciary Security Deed with executive power, where the deed's header contains the words "IN THE NAME OF JUSTICE BASED ON THE SUPREME DIVINITY." The procedure for auctioning fiduciary collateral is as follows:

- a. There is a default by the lessee, so the lessor seizes the fiduciary motor vehicle.
- b. The lessor or auction applicant submits an auction request to the Office of State Property and Auction Services, and the Office of State Property and Auction Services will check the related documents or letters. In the case of fiduciary collateral items, there must be a copied and legalized Fiduciary Security Deed. After that, the Office of State Property and Auction Services will approve the auction because the documents or letters are complete and determine the auction time, place, and security money (if necessary).
- c. The auction applicant or lessor announces to provide an opportunity for interested individuals to become auction participants.
- d. Individuals interested in becoming auction participants inquire about the auction object and the completeness of the documents from the Office of State Property and Auction Services. Individuals who will become auction participants will only deal directly with the Office of State Property and Auction Services, not with the auction applicant. Once the Office of State Property and Auction Services decides the auction winner and the goods have been sold, the buyer must pay the auction price and auction fees to the State Treasury in cash. The buyer will then receive all related documents and the Auction Record.
- e. The Office of State Property and Auction Services hands over the auction proceeds to the seller or auction applicant after deducting the auction fees. The Auction Officer must deposit the auction proceeds with the seller within 24 hours after receiving the funds from the buyer.
- f. The Office of State Property and Auction Services delivers the auction fees from the seller and buyer to the State Treasury.
- g. The buyer goes to the Motor Vehicle Registration Office (SAMSAT) with all the related documents for the ownership transfer process.

Fiduciary execution is a convenience provided by the Fiduciary Security Law to the Fiduciary Recipient in executing the collection of their receivables. The authority to carry out a fiduciary execution is a conditional authority, which is exercised when the debtor defaults.²⁴ This conditional authority is appropriate for the creditor's interests because as long as all obligations are fulfilled by the debtor properly and as they should be, the creditor does not need execution. In practice, creditor's rights still face bureaucratic obstacles in conducting fiduciary executions because they must first obtain an execution order from the Chairman of the District Court, even though this is already regulated in the Fiduciary Security Deed. Similarly, the Auction Office, if it wants to conduct a public auction at the request of the auction applicant, must go through an order and be led by the Chairman of the District Court.

CLOSING

1. Following the Constitutional Court Decision Number 18/PUU-XVII/2019, creditors can no longer directly use the default argument to execute fiduciary objects. This contradicts Article 30 of the Fiduciary Security Law because execution performed by creditors themselves should be based on an agreement with the debtor or an execution request through the district court. The direct delivery of the collateral object when there is a default to the creditor is no longer mandatory but voluntary if both parties agree to a default and the debtor consents to the delivery of the fiduciary collateral object to the creditor.

²⁴ Tan Kamello, *Hukum Jaminan Fidusia Suatu Kebutuhan Yang Didambakan*, Alumni, Bandung, 2014, h.198.

2. After the Constitutional Court Decision Number 18/PUU-XVII/2019, there is no longer a fiduciary execution, and the execution of the collateral object must be based on an agreement between the debtor and creditor. Therefore, after this Constitutional Court Decision, the auction process becomes more complicated because it requires a court decision due to the voluntary nature of the execution process. Creditors can no longer easily execute fiduciary collateral objects.

Recommendation

1. It is expected that lawmakers conduct thorough studies before revising the Fiduciary Security Law. This is crucial because the diversity of collateral objects for fiduciary loans is increasing, especially after the Constitutional Court Decision Number 18/PUU-XVII/2019, which complicates the position of creditors as property rights holders.
2. There is a need to renew and improve the movable property security law to keep up with the developments and dynamics of society, including consolidating regulations related to fiduciary security and the procedure for auctioning executed fiduciary collateral objects.

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