

## FULFILLING THE RIGHTS OF THE PARTIES IN THE AUCTION EXECUTION IN INDONESIA: A REVIEW

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**Abstract** - Since legal protection is not yet applied, the Office of State Assets and Auction Services as well as the Chairman of District Courts exist. The collateral object of the auction does not meet the requirements for the Mortgage Right auction due to a demand for resistance (*verzet*) from the debtor or from a third party which of course will hinder legal protection and certainty. In addition, lengthy and protracted auction process might exist so that it takes a relatively long time to arrive at the auction for the implementation of the Mortgage Right, which of course affects the results of the sale of the auction to pay off all debt obligations of the debtor. Auction execution of Mortgage Right to repay debtor's debt can also be carried out under the agreement with the creditors' and debtors' approval and covenant without the existence of the third party. What often happens is that the selling price of the object underwriting guarantee is recorded higher than the one through a public auction is.

**Keywords:** mortgage; collateral; auction execution; the rights of the parties

### INTRODUCTION

In Indonesia's economic development, guarantee agency is crucial, especially in case of debtor in the provision of credit to debtor; if a creditor has problem, the collateral encumbered by the Underwriting Right (UR) will be auctioned off to settle the creditor's payment. The rate of return or settlement of the receivables through an auction execution becomes an important factor and determines both the terms of the overall repayment of all debts and the speed and accuracy of the Mortgage Rights (MRs) as the guarantee of legal certainty for all parties in order the auction for the rights to the parties, in this case to the creditors, debtors, guarantor, and auction buyers, can be implemented. One of legal and regulatory instruments in the Indonesian Unitary State which actively pursues development in all fields is related to Institution of Guarantee Rights. Almost approximately 36 years since its entry into force<sup>1</sup>, law on UR (or UUHT) came into force on April 9, 1996.<sup>2</sup> Subekti (1997) argued "... to find a national guarantee legal system... means to look for the framework of all the regulatory instruments governing guarantees in our national law....".

Mortgage is a collateral that is agreed in advance between the creditor and the debtor and must be made in writing. Written credit agreements are intended to guarantee the legal certainty of the agreement and, at the same time, to protect the rights of the parties bound to the credit agreement. If, one day, the credit is defaulted, guarantees that have been encumbered by the UR are immediately auctioned so that legal certainty<sup>3</sup> and legal protection<sup>4</sup> for the parties are immediately covered. The guarantees that exist or are born because of this agreement will lead to special guarantees in the form

<sup>1</sup>See Basic Agrarian Law No. 5 in 1960 and Law No. 4 in 1996 (concerning the Underwriting Right to land along with objects related to land)

<sup>2</sup>Compare Law No. 4 of 1996 concerning MRs on land is mandated by Law No. 5 of 1960 concerning the Basic Regulations on Agrarian Principles (UUPA) in which Article 51 reads: "Underwriting Rights that can be imposed on Ownership Rights, Business Permit, Rights to Build Buildings" and the Articles 25, 33 and 39 are regulated by law having several provisions and is an important breakthrough in the regulation of URs in Indonesia.

<sup>3</sup>The point 8 in paragraph 5 of UUHT No. 4, 1996 stated "by not ignoring legal certainty for the parties concerned must ensure the simplicity of administration of registration of MRs ..."

<sup>4</sup>The point 11 guarantees legal certainty and provides protection to the parties concerned and the UUHT is governed by administrative sanctions that can be sued civilly and/or prosecuted criminal for those who violate or neglect to fulfill the various provisions of the implementation of their respective duties.

of material guarantees namely MRs or Mortgages. Before the entry of UUHT into force, the terms of binding guarantees are regulated in Articles 51 and 57 of the LoGA.<sup>5</sup> It is possible that the rights of the parties are not fulfilled and the disruption of legal protection and the creation of legal certainty might exist, so, the implementation of the auction execution needs to be further studied regarding the background and development of thought that underlies the policy of auction execution and efforts to obtain the highest price, guaranteed, fast, simple, and fair legal certainty in order to guarantee all the interests and rights of the parties. This is based on the argumentation of the politics of citizenship that Indonesia adheres to the principle of the rule of law (*rechtstaat*) and of the equality before the law to be upheld.

### 1. Principle of Auction

In case of a sale of the collateral objects that have been burdened with MRs by auction, the auction applicants or creditors must submit application to the Office of State Assets and Auction Services (KPKNL). Based on the principle of public execution, the creditor has also to submit a written request for auctions going along with documents of tender requirements to the head of the KPKNL to request an auction schedule. The auction applicants must go to the local District Court, and subsequently the Chairperson of the local District Court would coordinate with the Head of the KPKNL to determine the auction schedule, which is based on the principle of public execution that will sell the object of collateral that has been burdened with Mortgage. The auction guaranteeing the legal certainty is carried out quickly with optimal, reasonable, and efficient prices. Usman noted five advantages<sup>6</sup> of sale of goods through the auction. In relation to the auction of objects of Mortgage, Law No. 4 of 1996 concerning URs determines four principles.<sup>7</sup>

<sup>5</sup> Article 51 states: "MRs and Business Rights (BRs) are regulated by law" and Article 57 writes: "Since the law regarding MRs in Article 51 has not yet been formed, what is applicable is the provision regarding the mortgage in the Civil Code and Credietverband in S-1908-542 as amended by S-1937-190".

<sup>6</sup> (1) Fair: the auction is conducted transparently and no priorities are given to bidders so equal rights and obligations among participants result in objective auction; (2) Safe: it is witnessed, led and implemented by auction officials as independent and general officials, therefore, auction buyers are basically quite protected; the auction system requires officials to formally examine the validity of the seller and the goods to be sold (subject and object of the auction) and, even, the auction must be announced in advance so as to provide an opportunity for parties who want to object to the sale, therefore, auction sales are safe sales; (3) Fast and efficient: the auction is preceded by an auction announcement, so auction participants can gather on auction day and are determined as buyer and pay in cash; (4) Realistic and fair price: the formation of auction prices basically uses a competitive and transparent bid system; (5) Providing legal certainty: each auction is based on auction treatise that has authentic deed and perfect proof power.

<sup>7</sup> 1) Quick: the article 6 of UUHT reads "if the debtor fails to promise, the first Mortgage Holders (MHs) has the right to sell the Underwriting Right (UR) object on his own through a public auction and to repay his debt from the sale". To creditor the first MHs are given the right to sell the object of collateral that has been encumbered by the Liability through a public auction if the debtor has broken the promise although he/she has been warned in writing.

2) Easy and uncertain: the article 6 of the UUHT gives the holder of the UR the right for execution, so the UR Holder (URH) does not need to obtain approval from the UR provider and to ask for a determination from the local court if he will carry out the auction execution of MR which guarantees the debtor's debt when the debtor fails to promise. The first MH can immediately come and request in writing to the head of the KPKNL to conduct an auction of the Mortgage Object (MO). The right to sell the object of the UR on its own is one embodiment of the priority position owned by the URH, or by the first URH by the reason that there is more than one URH. Concerning MR the article 6 of Law No. 4 of 1996 is a legal basis for the execution implementation where the auction can be directly carried out by the creditor as the MH together with the local KPKNL if the debtor has broken the promise. The point 9 of Law No. 4 of 1996 concerning MRs states that one of the characteristics of the Mortgage is easy and certain in the execution if the debtor fails to promise. The Law No. 4 of 1996 gives holders the URs to execute; in short, the rights for the sake of law are owned by the URHs whether it is promised or not.

3) Simple: concerning URs, point 8 of Law No. 4 of 1994 states that the UR by nature is a follow-up or access to a certain receivable based on a debt agreement or other agreement, then, birth and its existence determined by the existence of receivables are guaranteed repayment. By not ignoring legal certainty for interested parties, the simplicity of registration administration of MRs, in addition to the transfer and deletion of guaranteed receivables, can also be seen in the abolition of such rights due to other reasons made by the creditor concerned to clean up the object of the UR determination of ranking by the Chair of the District Court and to abolish land rights which are used as collateral. The UUHT regulates the registration procedure of MR, recording the transfer and the elimination of MR including deletion.

4) Fair: in UUHT the point 9 is connected with Mortgage Certificate serving as a proof of Mortgage, affixed with the words "For the Sake of Justice Under God the Almighty", which provides the same executory power as court decisions that have permanent legal force. The point 10 facilitates and simplifies the provision implementation of the Act for the interests of the parties concerned. To the Chair of the District Court, certain authorities are given, namely the determination to give power to the creditor to manage the UR object, the determination of matters relating to the application for clearing the UR object and crossing out the UR. Furthermore, the point 11 aims to ensure legal certainty and provides protection to the parties. This UUHT also regulates administrative sanctions imposed on the executors, for violations or negligence in fulfilling various provisions of the implementation of their respective duties. Apart from being subjected to administrative sanctions, if a person meets the required conditions, he/she can be brought in civil law and/or is prosecuted criminal.



Paragraphs (2) and (3) of Article 14 in UUHT is a legal basis for the implementation of the flat execution, where the auction execution is carried out on the basis on the precepts of “Justice Based on God the Almighty” where the auction is based on the request of creditors or holders of MRs. The auction is conducted and led by the Chairperson of the local District Court and the Head of the local KPKNL to auction the collateral object that has been encumbered with URs in accordance with Law No. 4 of 1996 concerning MRs, issued by Minister of Finance Regulation No. 27 / PMK.06 / 2016 dated 19 February 2016 concerning the Guidelines for the Implementation of Auction, Civil Procedure Law if the debtor has defaulted.

## **2. Auction Process and Procedures**

In practice, the process and procedure for auctions through execution or through flat execution refers to the Regulation of the Minister of Finance of the Republic of Indonesia No. 27 / PMK.06 / dated February 19, 2016 which is concerned with Bidding Implementation Guidelines. The Regulation substitutes the Regulation of the Minister of Finance No. 106 / PMK.06 / 2013 jo. Minister of Finance Regulation No. 93 / PMK.06 / 2010 in which the auction procedure is carried out in nine conditions.

### **A. Conducting auctions with a valid auction officer**

The auction execution must be carried out by auction officials appointed by the State, who is knowledgeable for the procedures and implementation of a fair and transparent auction. The article 2 states “Every auction must be carried out by and / or before a Bidding Officer unless otherwise stipulated by Law or Government Regulation”. The paragraph (1) of the Article 9 writes that Auction Officer includes Class I and II of Auction Officers. Paragraph (2) authorizes the Class I Auction Officers to conduct auctions for all types of auctions at the request of the Seller. Auction conducted by a valid Auction Officer is determined by the Law in which the KPKNL is considered as a Class I Auction Officer but a Class II Auction Officer is certified by outside the KPKNL Auction Officer.

### **B. Participation of only one participant for the minutes of auction to be published**

Auction can only be attended by one participant who meet the requirements based on the auction announcement and auction minutes published. If there are no bidders then the auction will continue and are explained in the minutes of the auction (consider paragraphs (1) to (3) of Article 3)<sup>8</sup>.

### **C. No cancelation for auctions meeting the conditions**

The auction execution of MR that have met the applicable provisions as mandated by UUHT No. 4 of 1996 and Minister of Finance Regulation No. 27 / PMK.06 / 2016 dated February 19 of 2016 concerning the instructions for conducting the auction cannot be canceled. Article 4 clarifies that the auctions that have been carried out in accordance with applicable regulations cannot be canceled. In principle, the MR auction must be carried out in accordance with the MR Law No. 4 of 1996 and Minister of Finance Regulation No: 27 / PMK.06 / 2016 dated February 19 of 2016 concerning Bidding Implementation Guidelines; therefore, the process must be perfect so that it cannot be canceled.

### **D. Auction announcement in advance**

Before the auction is carried out, it is preceded by an auction announcement that is open to the public and can be read by the general public based on the provisions of the circulation of newspapers. Announcement of auctions can be done one time with leaflets posted on the notice board at the local District Court office and / or at the local KPKNL office and through the local newspaper for once, or through newspapers twice in which the second notice is published fifteen days after the first. The auction announcement is regulated in paragraph (1) of Article 51 elucidating that the auction must be preceded by the auction announcement made by the Seller, while paragraph (2) explicates that the seller must submit proof of auction announcement in accordance with the provisions to the Bidding

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<sup>8</sup>Paragraph (1) of Article 3 states that the Auction is carried out even though it is attended by only one tender participant; paragraph (2) describes that for each auction, auction minutes are made; paragraph (3) illustrates that in case of no Bidders, the auction shall continue to be carried out and Auction Minutes shall be made. Bidders can be participated by only one auction participant provided that the tender participant has fulfilled all the requirements to become an auction participant and is likely to be appointed and determined as the auction winner.

Officer. The auction announcement must contain twelve information.<sup>9</sup> Auction Officer conducts the auction by bidding via email.

Auctions announcement is issued on KPKNL working days, except for Auction of Confiscated Objects in the form of perishable / damaged/ expired items, including fish resulting from fishery crime, and Mandatory Non-Execution Auctions in the form of perishable / expired items. The announcement is published in a district or city daily newspaper where the goods are located. In case daily newspaper is available, the announcement will be issued in newspaper published in the nearest city or district or in the provincial capital. The said daily newspaper must meet circulation requirement.<sup>10</sup>

Announcement for auction execution for immovable goods which are sold together with movable goods is carried out with three conditions.<sup>11</sup> The announcement for movable goods is published once in a daily paper for six calendar days prior to the auction, except for the auction of confiscated objects.<sup>12</sup> Announcement of re-auction for the auction execution will apply in two conditions.<sup>13</sup> The auction execution of MR must be announced in advance in the mass media having a wide scope and which is easily seen and accessed by public as described above. If the auction is not publicly announced to the general public and if there is no announcement, then the auction process is imperfect and can be canceled. In the announcement all information about the auction must be decomposed completely.

### E. Determining location and time of the auction

The auction venue can be office of local District Court or of local KPKNL or can also be the place where MR object is located and where the auction must be in the KPKNL working area or the Class II Auction Officer's office. The auction time is determined by three requirements.<sup>14</sup> The approval letter must be attached to the tender request letter. The venue must be within the KPKNL working area or under the Class II auction official position where the auction object is located. In the auction announcement of the UR, the location must be stated completely and clearly, as well as the day, date, time, limit value, security deposit, etc.

### F. Providing SKT / SKPT for auction of immovable property

<sup>9</sup>The information amplifies (a) the identity of the Seller, (b) day, date, time and place of the auction being held, (c) type and quantity of goods, (d) location, land area, type of land rights, and the presence or absence of buildings, specifically for immovable property in the form of land and / or buildings, (e) specifications of goods, specifically for movable property, (f) time and place of *aanwijzing* which is conducted by the seller, (g) Bid auction guarantee includes the amount, time period, method and place of deposit and hence, bid auction is guaranteed, (h) Limit value, except for timber auction and other forest products from first hand and voluntary non-execution auction for movable property, (i) how to bid, (j) the period of time for auction payment obligations by the buyer, (k) the KPKNL domain address or the Auction Hall conducting the auction by bidding through the internet, or the KPKNL email address or the Auction Hall or Class, and (l) additional terms from the Seller (if any).

<sup>10</sup> Three requirements include (a) a minimum of 5,000 copies for daily newspaper published in the city of district, (b) a minimum of 15,000 copies for the one circulated in the provincial capital, or (c) a minimum of 20,000 copies for paper published in the national capital."

<sup>11</sup>The conditions comprise of (a) announcements are made twice in which each period is intermittent in fifteen calendar days and the gap between the first and the second announcement does not fall on a holiday, (b) the first announcement can be made through leaflets, patches that are easy to read by the public, and / or through electronic media including the internet; however, if desired by the seller, it can be made through a daily newspaper, and (c) the second one must appear in a daily newspaper in at least fourteen calendar days before the auction.

<sup>12</sup>The confiscated objects include (a) damaged / rotten or dangerous items or if the cost of storing the goods is too expensive, it can be executed in less than six calendar days but not less than two working days, and (b) fish and the like resulting from a fishery crime can be done in less than six calendar days but may not be less than one calendar day.

<sup>13</sup>Firstly, the auction of immovable or movable goods sold together with immovable property is implemented by (1) announcement of repeated auctions conducted once through daily newspaper at least seven calendar days prior to the auction if the time for the repeated auction does not exceed sixty calendar days since the last auction, or (2) announcement of re-auction shall be carried out 2x15 days, if the re-auction time is done more than sixty calendar days since the last auction; secondly, for the auction for movable goods, the announcement for re-auction is executed at least in six calendar days prior to the auction, except for seized goods which are easily damaged or rotten can be administered in less than six calendar days but may not be less than in two day's work and because of criminal offense, the auction execution can be performed in less than six days but may not be less than one calendar day.

<sup>14</sup>The auction time is decided by the Head of KPKNL or by Class II Auction Officer and is executed on KPKNL working hours and days except it is beyond the working hours and days, namely against (a) auction of the confiscated objects execution in the form of perishable / damaged / expired items, including fish resulting from fisheries and criminal acts, with the provisions that KPKNL must notify the Head of the Regional Office at the latest before the auction, (b) Mandatory Non-Execution Auctions in the form of perishable / expired goods, provided that the KPKNL must notify the Head of the Regional Office at the latest before the auction, and (c) Voluntary Non-Execution Auctions can be carried out with the written approval of the head of the local Regional Office. Request for approval of the auction outside of working hours and days is submitted by the seller.



The auction with the object of Mortgage Property (MP) and immovable property in the form of land and buildings must be complemented with a land certificate (SKT) or a land registration certificate (SKPT) from the local land office. To ensure the validity of ownership of auction objects, specifically the MR object of the land, the building must be fitted out with a SKT or SKPT from the local Land Office so that legal certainty exists.

### **G. Existence of guaranteed bid auction**

To guarantee the bidders' certainty and earnestness there must be guaranteed bidding and the guarantee can be in the form of cash of at least 20% and a maximum of 50% of the limit value of at least fifty billion rupiah. In each auction, bidders must deposit guaranteed bidding and the form of auction bid guarantee which is determined by the Seller in the form of bidding security deposit or bank guarantee bid auction with a guaranteed bidding value of at least fifty billion rupiahs. In addition to depositing or submitting a bid auction guarantee as described above, the bidder must show a Taxpayer Identification Number because of four reasons.<sup>15</sup>

Auction bid guarantee in the form of a bank guarantee is submitted by the bidders to the Treasurer at the KPKNL, at the Auction Hall, or at Class II Auction Officer no later than five working days prior to the auction date. Bank guarantees are accepted as guarantees of auction bids if (a) they are issued by a Bank having the status of a State-Owned Enterprise, (b) the time limit for bank guarantee claims is still valid up to thirty calendar days from the date of auction, and (c) the issuing bank waives its special rights, the issuing Bank will pay the recipient of the bank guarantee the required amount in the auction announcement for the default purchaser, and the issuing Bank will pay the recipient of the bank guarantee the required amount in auction announcement no later than five working days since the claim is received."

A bid security deposit with a maximum amount of twenty million rupiah can be deposited directly to the Treasurer at the KPKNL, at Class I Auction Officer, at Auction Hall or Class II Auction Officer no later than before the auction begins. In an auction bid in the presence of an auction participant, the auction bid security deposit amounting to more than twenty million rupiah must be deposited through the Treasury account for the receipt of the KPKNL, the Auction Hall account or a special account in the name of the Class II Auction officer no later than one working day before the auction must be effective in the account. In an auction bid with no presence of an auction participant, the auction bid security deposit must be more than twenty million rupiahs and deposited through the Treasury account receiving the KPKNL, the Auction Hall account or a special account in the name of Class II Auction Officer no later than one calendar day before the auction must be effective in the account.

The amount of the guaranteed bid auction is determined by the seller at least 20% of the limit value and at most 50% of the limit value. The guaranteed bid auction deposit is returned to fill to bidders that are not authorized or not appointed as a buyer, unless transaction fees imposed by the banking will be borne by bidders. The auction bid guarantee in the form of a bank guarantee is returned to bidders who are not authorized as buyers no later than one working day since the return request is received by KPKNL or the Auction Hall or Class II Auction Officer.

Each auction must be accompanied by a deposit guarantee to prove the seriousness and ability of bidders if the auction is designated and determined as the winner of the auction. The minimal security deposit is 20% of the limit price and a maximum of 50% of the limit price that can be deposited directly into KPKNL in cash according to the maximum limit price of two hundred million rupiahs and through a state-owned bank if the auction price is above two hundred million rupiah and if the auction limit value reaches at least fifty billion rupiah, it must be complemented by a bank guarantee issued by a state-owned bank. This is intended for legal certainty and for realization of the payment of auction price in cash.

### **H. Compulsory auction tender by bidders**

Each auction participant must submit a bid price orally, then in writing, and verbally if the auction price has not reached the minimal limit price; a written bid is made by bidders present. Written bids without the presence of bidders are made via e-mail, postal mail, internet both openly and closely.

<sup>15</sup>Firstly, the goods auctioned are in the form of land and / or buildings, secondly, the goods are in the form of land and / or buildings with a minimum limit value of one hundred million rupiah, and thirdly, the auction is conducted by bidding through the internet, or fourthly, the auction is executed by bidding via electronic mail (e-mail).



Bidding price bids can be done at an inclusive price, meaning the bid price includes the buyer's auction fee or at an exclusive price where the bid price does not include the buyer's auction fee. Furthermore, bidder's bids are at least the same as the limit price and the bids that have been submitted cannot be changed. The sale of auction object consisting of several parcels of land and buildings can be offered in one package. If bid price is the same from several bidders, then the auction winner is determined by the KPKNL or auction official with an oral bid rising or rising based on the tender participant's approval or the bid winner can also be determined by drawing.

Bidding is executed in verbal (increasing or decreasing), in written, or in verbal written proceeding, with a note that the highest bid has not yet reached the limit value. Auction bid in writing shall be made without the presence of the bidder. Bidding in writing without the presence of the bidder is made by e-mail, post office, or by open and closed bidding. Bidding via e-mail or internet as referred to in Permenkeu No.27 / PMK.06 / 2016 Article 64 paragraph (3) may be submitted more than one time for each item and the highest bid value is considered valid and binding. Bidding offered by KPKNL can be done at inclusive or exclusive auction prices. Inclusive auction price is conducted at the bid price including the buyer's auction fee and exclusive one is conducted at the bid price not including the buyer's auction fee.

Each auction participant must make an offer with at least the same as the limit value in the case of auction with the declared limit value. Bids that have been submitted by bidders cannot be changed or canceled by bidders, except the auctions in written bidding without the presence of bidders via the closed bidding internet and made before the Head of Auction Minutes. In case that there are several bidders submitting the highest bid verbally decrease or in writing in which the same value has reached or exceeded the limit value in the auction using the Limit Value, the Auction Officer has the right to authorize the buyer by making a further offer only for bidders who submit the same bid verbally or in written based on the approval of the relevant bidders, or by making a draw among bidders who submit the same bid if the provisions referred to in letter a cannot be implemented.

The sale of auction objects consisting of several parcels of land or land and buildings, or apartment units can be offered in one package for efficiency and effectiveness, based on the consideration of the Seller; the sale is stated in the application letter. The sale of the auction object can be only carried out as long as it is still within the KPKNL working area or the position of the Class II Auction Officer who conducts the auction. For a person or legal entity to become an auction participant, he must submit the bid price at the time the auction is entered in a sealed envelope. At present in accordance with the times, the auction system can also be done by e-mail, post, internet, both openly and closedly. When the auction is held, and if the bid has not reached the limit price, the auction officer can ask all bidders to raise their bid prices verbally and up or down or covertly enclosed in an envelope, which, of course, can create healthy competition that the end result will get the highest price.

#### **I. Auction prices are paid by the seller and buyer**

Auction prices are paid by the seller and buyer to the state treasury; the seller's income tax is 2.5% of the total prices but the seller only pays auction tax about 1.5% according to PP No. 1 of 2013. Buyer's auction fees is about 2% plus 5% of the acquisition cost of land and buildings (BPHTB) of the total auction price and reduced to sixty millions rupiah according to PP No. 34 of 2016. Auction cancellation requested by the seller is subject to fees paid by him but if the auction is cancelled due to a court decision then it is not subject to duties.

Cancellations of planned auction proposed by seller are subject to auction fees which are determined according to Government Regulations on types and tariffs of Non-Tax State Revenues by Ministry of Finance, except for the auction of State / Regional Property. Auction fees canceled on the request of the seller should be paid by the seller. Canceled auction fees are not imposed on auction cancellation by a decision from a judicial institution or cancellation by the Bidding Officer. In auction conduction there are costs that must be borne by both the seller as the applicant of the auction and by the buyer in accordance with applicable regulations. These costs are in the form of auction fees which constitute Non-Tax State Revenue (PNBP) and Income Tax (PPh) and also the Cost of Land and Building Assets (BPHTB).

#### **Sanctions for default bid buyers**



The auction buyers are defaulted, then the security deposit is deposited in the state treasury, preceded by a letter of decision from auction official to cancel the appointment as a buyer. The security deposit from the auction buyer is 50% deposited into the state treasury and another 50% to the owner of the goods if the auction is non-voluntary execution. If the buyer of the Bank Guarantee is default, he can be availed with a letter stating the default. Furthermore, the buyer of the default auction will be included in the blacklist and then longer permitted to participate as an auction participant.<sup>16</sup> In casethat the buyer with a bid auction guarantee from Bank Guarantee does not pay off the auction payment obligations in accordance with the provisions (Default), the Head of the KPKNL or the leader of the Auction Hall or Class II Auction Officer submits a claim to the Bank Guarantee by a letter stating the Bid Buyer has been Default.

The stipulation of auction fees is regulated in PP Number 1 of 2013 dated January 2, 2013 concerning the types and rates of non-tax state revenues that apply to the Ministry of Finance in Appendix in Point IV<sup>17</sup> of the Directorate General of State Assets. In addition to auction fees as mentioned above, the tax costs are charged to the seller and buyer of the auction as stipulated in Government Regulation Number 34 of 2016; the seller is subject to PPH Tax of 2.5% of the auction value and the buyer is subject to the Customs Obligation Tax on Land and Buildings (BPHTB) of 5% multiplied by the Sales Value of Tax Object less than sixty million rupiahs.

The participant who has been determined as the winner of the auction by the auction official, he is given a maximum time of working days to pay off all obligations in accordance with applicable auction conditions. If within five working days the winner does not pay off all obligations, he will be canceled as the winner and his name will be included in the blacklist, in which, consequently, he is no longer permitted as an auction participant. The security deposit that has been deposited in the state treasury by the winner of the auction will subsequently be forfeited, which 50% will later be deposited to the state treasury and the other 50% will become the property of the owner of the goods or seller.

### 3. Fulfillment of the Rights of the Parties in Execution of Mortgage Rights

To get a permanent legal decision requires a long time, money, and energy and to speed up the legal certainty of the execution, the law provides three legal bases<sup>18</sup> for execution guarantees. The auction of the MR object, when the debtor is stuck, must be carried out maximally both by the process to refer to the applicable provisions, and by the proceeds of the auction sale to create legal protection against the parties. In principle, the parties of the auction should be involved maximally to obtain maximum auction results. The key to success of the auction, so that the creation of an optimal auction price exists, is in the hands of the seller. Conducting auction announcements and providing equal opportunities and convenience for auction enthusiasts to become bidders as well as good auction location choices (easily accessible by bidders) become important things done by the Seller. Meanwhile, in conducting the auction, the seller is responsible for the validity of the compensation for losses arising from the invalidity of the goods and tender requirements document (Listiani, 2007).

### 4. Elements of Underwriting Rights

Five main elements of MR are that MR is collateral rights for paying off debts, that the exists guaranteed debts of certain or certain amounts, that objects of MR are land rights in accordance with the LoGA (namely Ownership Rights, Building Use Rights and Use Rights), that MR can be imposed on land and objects related to the land or only the land, and that Mortgage gives preferential rights or precedence to certain creditors to other creditors.

<sup>16</sup>In case that the buyer does not pay off the auction payment obligation in accordance with the provisions (default), the auction bid security is deposited entirely to the State Treasury within one working day after the cancellation of the appointment of the buyer by the Bidding Officer in the type of execution auction and Mandatory Non-Execution Auction, or the security may also deposited in the amount of 50% to the State Treasury within one working day after the cancellation of the appointment of the buyer by the Auction Officer, and another 50% belongs to the owner of the goods in the type of Voluntary Non-Execution Auction organized by the KPKNL.

<sup>17</sup>Point IV describes that Seller Auction Fees, number 2 in Execution Auction other than Goods Deprived of State, cover the Immovable Property of 1.5% of the Principal Auction and that Buyer Auction Fees, number 2 in Execution Auction other than goods seized for the State, include Immovable Property of 2% of the Principal Auction.

<sup>18</sup>The bases include (a) Article 224 HIR / Article 258 RB refers to phrase "For the sake of Justice based on God the Almighty" which has the same power as the judge's decision, (b) Article 14 of Law No. 4 of 1996 concerning MR confirms that the Mortgage Certificate contains the principle "For the sake of justice based on God the Almighty" which has the same executorial power as a court decision which has obtained permanent legal force (*inkracht van gewijsde*), and (c) Article 6 of Law No. 4 of 1996 concerning MR confirms on his own power through a public auction and to repay his receivables from sale process.

### Stages of underwriting right

The legal act of granting (encumbering) the URs is carried out in three phases.<sup>19</sup> After the Land Office (LO) receives registration from PPAT within 7 days after the APHT is signed, the LO makes a Land Rights Book or Underwriting Certificate and records it in the land rights book which is the object of URs and copies the note on the relevant land rights certificate. The APHT has been registered and proves the existence of URs, the LO will issue a Mortgage Right Certificate (MRC) in which the Certificate of Underwriting of Justice declares a phrase like “for the sake of justice under God the almighty” that is equated with a court decision that has permanent legal force (*inkracht van gewisjde*). The contents of Article 13 of the UUHT can mean that what is registered with the LO is the Deed of Granting Mortgage accompanied by land certificates and other letters as evidence of the object of Mortgage and identity, and the parties of creditors and debtors or the owner of the guarantee and confirms that the land certificate with guaranteed MRs has been burdened.

### Characteristics of mortgage right

Sjahdeini(1999) argued twelve characteristics<sup>20</sup> of the UR as a guarantee right regulated in the UUHT. Such characteristics, if examined carefully, contain fairness, legal certainty, and legal protection for related parties in case of a bad credit or the credit is paid in full by the debtor or guarantor.

### Definition of mortgage right and auction execution

The Article 1 number 1 of Law No. 4 of 1996 describes MR<sup>21</sup> as the right over land along with objects related to land and this is the guarantee rights that are charged to land rights, as referred to in Law Number 5 of 1960 concerning Basic Regulations Agraria (LoGA). According to Regulation of the Minister of Finance of the Republic of Indonesia Number 27 / PMK.06 / 2016 dated February 19, 2016 concerning Guidelines for Conducting Auction in Article 1 Point 4, the auction execution is described as an auction to carry out a court decision or stipulation, other documents equivalent to that, and / or implementation of the provisions in the legislation. Auction execution is written in UUHT No. 4 of 1996 in Article 6 giving the right to UR to sell MR with its own power. This is based on the Mortgage Giver’s (MG) promise that, if the debtor fails to promise, then the UR holder has the right to sell his UR

<sup>19</sup>The first phase refers to making a credit agreement and is preceded by making a principal agreement in the form of a credit agreement or a loan agreement or other agreements. This is in accordance with the nature of the accessors and the MRs, and with the granting of which must be valid and which is a follow-up to the principal agreement, namely a credit agreement or loan agreement or other agreement that creates a debt. So, to provide MRs as a payment of certain debts must be formulated in advance in a credit agreement or debt agreement. The promise to give the MR as a guarantee of paying off certain debts must be formulated in a credit agreement or debt agreement. In loan agreement, only a promise to give the MR as a guarantee of paying off certain debts while the agreement to grant the Mortgage will be carried out with a separate deed called the Mortgage Granting Deed (APHT) made by the Land Drafting Officer. The second phase is concerned with making the Deed of Underwriting Right (APHT) and refers to the Imposition of UR which is marked by the making of APHT by PPAT, which is signed by the creditor as the recipient of the UR and the owner of the guaranteed land rights (debtor or owner of the collateral but not the debtor). Paragraph (2) of Article 10 of the UUHT confirms that granting the UR is carried out by making a Deed of Granting URs by PPAT in accordance with the applicable laws and regulations. The third stage is related to the registration of APHT at the Land Office, and this third stage is marked by the registration of APHT to Local Land Office. This is in accordance with Article 13 paragraph (1) of the UUHT which confirms the granting of MRs must be registered at the Land Office.

<sup>20</sup> 1. The UR gives preferential rights (*droit de preference*) or a position that is prioritized to certain creditors to other creditors, 2. the MR cannot be divided, 3. mortgage has *droit de suite nature*, 4. the UR has the nature of accessor, 5. Mortgage guarantees the debt that already exists or will exist, 6. The MR can guarantee more than one debt, 7. the UR can be imposed on land rights only, 8. the UR can be imposed on the right to the land along with the objects above and below the ground, 9. the UR contains the right to pay off debts from the sale of collateral and does not give rights to the creditor to have collateral objects, 10. the UR has an executive producer, 11. the Mortgage has special nature and publicity, and 12. the Mortgage object in the form of land rights as referred to in the LoGA includes Property Rights, Building Use Rights and Business Use Rights (Sjahdeini, 1999).

<sup>21</sup>In addition to article 6 as mentioned above, the authority to sell MR objects is also regulated in Article 14 paragraph (2) and (3) wherein the Certificate of MR is a “For Justice based on God the Almighty” which has an executive power such as a court decision with legal force permanent. Based on Article 6 and Article 14 of the UUHT, the UR holder or creditor can apply for or carry out an auction execution of the UR if the debtor or the Underwriter has defaulted on his credit. Collateral is defined as a credit agreement that serves as a tool for payment of debts. Mortgage refers to a person who owns a piece of real property and has ownership interest as a deed. A property owner who borrows money from creditors may use this interest as a collateral for repayment of the loan. This type of collateral arrangement, known as a mortgage, is a two-party instrument. The owner-debtor is the mortgagor and the creditor is the mortgagee (Henry R., 2004).





object through an auction without requiring further approval from the UR provider and to take the settlement of the receivables.

The essence is that someone who has a right stated in a deed can borrow money from the creditor by using that right as a guarantee for repayment of his debt. Mortgage refers to a collateral arrangement where a property owner borrows money from a creditor using a deed as a collateral for repayment of the loan (Henry R., 2004). Mortgage might refer to the purported conveyance of property as security for the repayment of a debt. This condition of the instrument is that, if the debt is paid according to the terms of the note, the conveyance is then void. Both real and personal property may be mortgaged. Usually in order to indicate the type of property involved, the conveyance of personal property to secure a debt is called Chattel Mortgage (The Encyclopedia Americana). Gerner (1999) mentioned six aspects of mortgage.<sup>22</sup>

In case of execution Danbury (2004) has defined four aspects.<sup>23</sup> Executorial title contained in the Underwriting Certificate is referred to in paragraph (2) of Article 14, in which the object of the UR is sold through a public auction according to the procedure specified in the legislation for paying off the UR holder's receivables with prior rights over other creditors. Based on the agreement between the giver and the holder of the UR, the sale of the UR object can be carried out under the hand if the highest price can be obtained to benefit all parties, as stipulated in UUHT Article 20 paragraph (2). The sale as referred to in paragraph (2) can only be carried out after one month since after written notice is issued by the giver and/or the UR holder to the parties concerned and it is announced at least in two newspapers circulating in the area and/or in local media, and no parties express objections.

Paragraph (4) in Article 20 regulates that every promise to carry out the execution of the Mortgage in a manner contrary to the provisions in paragraphs (1), (2), and (3) is null and void. Before the auction announcement is issued, the sale as referred to in paragraph (1) can be avoided by paying off the debt guaranteed by the UR along with the execution costs that have been incurred. According to Article 1131 of the Civil Code, all assets of a debtor, both in the form of movable objects, can guarantee for all his debt agreements. Problems arise when there are several creditors and it turns out that the debtor is bankrupt and their assets must be liquidated. Of course, each creditor feels he has the right to the debtor's assets as collateral for their respective receivables. According to Article 1132 of the Civil Code, the assets of the debtor are jointly collateral for all creditors who give debts to the debtors concerned with the payment in balanced or proportional manner according to the ratio of the amount of their respective receivables.

Besides Article 1132 of the Civil Code, the Article 1133 of the Civil Code gives the right to take precedence for a particular creditor against other creditors arising from privileges, liens, and mortgages. The order of precedence from three rights mentioned in Article 1133 of the Civil Code, the Article 1134 of the Civil Code places the mortgage and mortgage higher than the privileges, except in case where the law determines otherwise. The provision of guarantee rights by law, such as Mortgage, is to give certain creditors a place to take precedence over other creditors. That is also the purpose of the existence of the Underwriting which is regulated by the UUHT.

To anticipate if debtor is default may refer to the ease of carrying out the sale of collateral objects in public. For this purpose, the rules in the guarantee law have prepared several weapons that can be used by the Bank as a creditor, namely the Execution Pirate, in which sales are based on the means of

<sup>22</sup> Mortgage may refer to 1) a conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and will become void upon payment or performance according to the stipulated terms, 2) a lien against property that is granted to secure an obligation (such as a debt) and that is extinguished upon payment or performance according to stipulated terms, 3) an instrument (such as deed or contract) specifying the terms of such a transaction, 4) loosely, the loan of which such a transaction is based, 5) the mortgage's rights conferred by such a transaction, and 6) loosely, any real property security transaction, including a deed of trust.

<sup>23</sup> 1) The act of carrying out or putting into effect (as a court order) <execution of a court decree>, 2) validation of a written instrument, such as a contract or will, by fulfilling the necessary legal requirements <delivery of the goods completed the contract's execution>, 3) judicial enforcement of a money judgement, usually by seizing and selling the judgment's debtor property <even if the plaintiff receives a judgement against the foreign debtor, execution is unlikely>, and 4) a court order directing a sheriff or other officer to enforce a judgement seizing or selling the judgement debtor's property (the court issued the execution authorizing seizure of the car) also term write of execution, judgement execution, general execution.



executive power as well as sales under the hand (Moch Isnaeni). from all the problems, in principle, the execution must be carried out through public sales or through actions (Article 1 paragraph (1) of the UUHT). The rationale is expected that through an open auction, a low bid can be expected to entice other bidders to try to get the auction object by increasing the bid price. This is a manifestation of the protection of the law to the guarantor. To protect the principle, legislator feels he needs to include paragraph (4) in Article 20. In reality, there are times when what is imagined and expected is different; at present people are reluctant to take part in auctions, to become buyers in an auction execution, or at least they are only interested in participating; if there is a hope of getting auctioned for goods at low prices. In addition, the costs incurred for auction conduction are also not cheap (J. Satrio, 2004).

### CONCLUSION

Setting the rights of the parties in Law No. 4 of 1996 concerning Mortgage Rights and Objects Related to Land have not fully provided legal protection to the parties, namely creditors, debtors, guarantors, buyers in good faith. There are provisions that are “explicit” and that “do not explicitly” provide legal protection. In the auction execution, if Underwriting Right has fulfilled the requirements, for instance, the debtor has broken the promise, the creditor has given a warning letter I, II, and III, the credit agreement and the Deed of Underwriting Right (APHT) have been jointly signed between the creditor and the debtor and together or not with the guarantor (guarantee owner) in front of Notary / PPAT, the guarantee certificate has been submitted by the debtor to the creditor, the Certificate of Mortgage has been issued by the local Land Office, so no longer any reason can postpone the auction execution of the MRs either by execution or by fiat execution. Legal protection regulated in Law No. 4 of 1996 concerning MRs and Land Related Items proves to provide legal protection in the forms of legal certainty to the parties concerned, to get repayments given to creditors from the auction results, and to cultivate the sale value of the guaranteed rights. Not only does the auction execution of MRs pay off debtor’s debts, but also is it carried out under creditors’ and debtors’ agreement. The UR under the collateral object is higher than that of the selling price through a public auction is.


1. Legal certainty if the land security object is accompanied or not along with objects related to the land that has been encumbered with rights Dependents immediately conduct a Mortgage Rights auction if the debtor has been negligent and breach of contract; 2. Creditors get repayment payments from the auction results of the execution of the Mortgage Right, the debtor repays all debts to the creditor and is willing and promises that the collateral objects that has been encumbered by the Underwriting Right can be auctioned, the guarantor is willing and responsible only to the selling price of the collateral object to repay the debtor’s debt, the auction buyer in good faith obtains legal protection to control, operate, possess the object of the Underwriting Guarantee that he has purchased by accepting voluntarily from the debtor or requesting an execution of evacuation through the local District Court; 3. The sale value of the Guaranteed Rights object must be cultivated and refer to the applicable provisions and the speed of the auction process to get the highest price. If the selling value of the Underwriting Right object is greater than the amount of debt, the rest is returned to the debtor, if the selling value of the Underwriting Right object is equal to the amount of debt, then the credit or loan is declared in full, if the selling value of the Underwriting Right object is less than the total debt, then the remaining debt can civil suit through the Court. In addition to the auction execution of Mortgage Rights to pay off debtor’s debts, it can also be carried out under the agreement of the creditors and debtor’s agreement and agreement. Underwriting right under the collateral object is higher than the selling price through a public auction.

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