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## NOTARY LEGALITY RELATED TO THE LEGALITY OF AUTHORITY IN IMPLEMENTING BANKRUPTCY AUCTION

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### ABSTRACT

The capacity of the notary in recording the minutes of auction is only limited to the implementation of the auction which is carried out on a non-voluntary basis. Minister of Finance Regulation Number 189/PMK.06/2017 concerning Class II Auction Officers position notaries as class II auction officials only having the authority to carry out voluntary non-execution auctions. This means that other types of auctions are not the work domain of class II auction officials. So that the capacity and capability of the notary cannot touch the bankruptcy auction process. Based on this, problems arise, namely regarding the legality of the position of a Notary in the implementation of a bankruptcy auction after the debtor is declared bankrupt and the legal validity of recording a bankruptcy auction that does not involve a Notary. Based on these problems, notaries actually have legal legality to carry out legal actions for bankruptcy auctions as stipulated in Article 185 paragraph (1) of the KPKPU Law that all objects must be sold in public in accordance with the procedures specified in the legislation. The procedure for traded assets in the management of bankruptcy assets is actually inseparable from the involvement of a notary in the bankruptcy auction process against a debtor who is declared bankrupt because the notary is the only public official who is given the authority to take legal actions to make an authentic deed regarding all acts and or an agreement according to the provisions of the applicable laws and regulations as stipulated in Article 15 paragraph (1) of the UUJN. Based on this, notaries need to have stronger authority to be able to be involved in execution auctions, especially those related to bankruptcy auctions. Strengthening the authority of a notary as a bankruptcy auction official is because a notary is a legal profession that is considered the most capable of forming an authentic deed of legal action on bankruptcy assets. Therefore, if the notary's authority is added to be able to be directly involved in the bankruptcy auction, it will greatly assist the process of completing the implementation of the bankruptcy estate.

**Keywords:** Notary, Bankrupt Debtor, Bankruptcy Auction

## INTRODUCTION

Notaries as public officials are authorized to make authentic deeds and other authorities based on Article 1 paragraph (1) of Law Number 02 of 2014 concerning Amendments to Law Number 30 of 2004 concerning Notary Positions (hereinafter referred to as UUJN). In the case of other authorities, based on Article 7, Vendu Instnctie (hereinafter referred to as VI) may be appointed as Class II Auction Officer. Auction is known as an agreement that includes buying and selling both in Civil Law and in Common Law.<sup>1</sup> Herodotus writes that auctions began around 500 BC in Babylon, now various commodities such as tobacco, fish, flowers, securities, and most importantly, auctions are used to transfer assets from public ownership to private ownership, as a phenomenon worldwide for more than two decades.<sup>2</sup>

We can find the basis for the regulation of Auctions in the Regulation of the Minister of Finance Number 27/PMK.06/2016 concerning Instructions for Implementation of Auctions CHAPTER 1 General Provisions Article 1 paragraph (1), Auctions are sales of goods that are open to the public with a written and/or verbal price offer which increases or decreases to reach the highest price, which is preceded by the Announcement of the Auction. In the regulation, article 2 also explains that, in this case every auction must be carried out by and/or before the Auction Officer unless otherwise stipulated by Law or Government Regulation.

Based on the description above, it can be seen that the elements of an auction or public sale, namely the method of buying and selling goods, are carried out openly to the public, written and/or verbal price offers that increase or decrease to reach the highest price, previously held an auction announcement in mass media and for a certain period of time, it is carried out in front of an auction official or auction hall.<sup>3</sup>

Regarding Auction Officers Article 1 point 1 of Law Number 02 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary (UUJN) which states that a Notary is a Public Official authorized to make authentic deeds and other authorities as referred to in Article 15 paragraph (2) letter g of the Law on Notary Positions. Make a deed of auction minutes. Public officials are state organs that function to serve the general public in the field of civil law, especially the making of authentic deeds as stated in article 1868 of the Civil Code (hereinafter referred to as the Civil Code). The position of the Notary as a Public Official, in the sense that the authority that is in the Notary has never been given to other officials in making authentic deeds and other authorities, then the authority becomes the authority of the Notary. In the course of the auction, the Auction Officer makes an authentic deed, namely the Minutes of Auction, which is a legal product of the Auction Official with the same status as an authentic deed because it meets the requirements as an authentic deed as regulated in Article 1868 of the Civil Code. An authentic deed has perfect proof. The perfection of the notary deed as evidence, then the deed must be seen as it is, no need to be assessed or interpreted differently, other than what is written in the deed.<sup>4</sup>

The perfection of authentic deeds is also contained in Article 1870 of the Civil Code which states that "For interested parties and their heirs or for people who have rights from them, an authentic deed provides perfect evidence of what is contained in it. From these regulations, an

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<sup>1</sup> Purnama Tioria Sianturi, 2013, *Perlindungan Hukum Terhadap Pembeli barang Jaminan Tidak Bergerak Melalui Lelang*, Bandung: CV. Mandar Maju, h. 1

<sup>2</sup> Vijay Krishna, 2002, *Auction Theory*, Florida USA: Academic Press, h. 1

<sup>3</sup> Habib Ajie, 2008, *Hukum Notaris Indonesia*, Bandung: PT. Refika Aditama, h. 24

<sup>4</sup> *Ibid*, h. 121

authentic deed is a deed whose proof is perfect. The authority of a Notary is stated in Law Number 02 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of a Notary. Article 15 paragraph (2) letter g states that a Notary is authorized to make a Minutes of Auction Deed. The regulation provides flexibility over the authority of the Notary in carrying out his position as a General Officer where the Notary can make a Minutes of Auction Deed.

In the background of the problem, it has been explained that the capacity and capability of a notary cannot touch the bankruptcy auction process. Based on this, problems arise, namely regarding the legality of the position of a Notary in the implementation of a bankruptcy auction after the debtor is declared bankrupt and the legal validity of recording a bankruptcy auction that does not involve a Notary. the authority of the Notary as the Auction Officer who is authorized to make an authentic deed in the implementation of the auction, the Minutes of the auction as a legal product of the Auction Official whose status is the same as the authentic deed. But in practice not all Notaries can exercise this authority, because only auction officials can exercise this authority.

Based on the description of the background, there are problems that the writer will examine, namely, first, how is the legality of the position of a Notary in the implementation of a bankruptcy auction after the debtor is declared bankrupt? And secondly, how is the legal validity of the recording of a bankruptcy auction that does not involve a notary?

## METHOD

The legal research method is the way scientists work, one of which is marked by the use of methods. Literally, at first, the method is defined as a path that must be taken into an investigation or research that takes place according to a certain plan.<sup>5</sup> The legal research method is a systematic way of conducting research. The research method used in this paper uses a normative juridical method.

The approach used by the author from several of the above approaches is used to build legal arguments to solve the problems in this research. The statutory approach is an approach that is carried out by examining all laws and regulations related to the legal issues being handled. This statutory approach, for example, is carried out by studying the consistency/compatibility between the Constitution and the Law, or between one law and another and this conceptual approach departs from the views and doctrines that have developed. in law. The views or doctrine will clarify ideas by providing legal understandings, legal concepts, and legal principles that are relevant to the problem.

## DISCUSSION

### **The legality of the position of a Notary in the implementation of a bankruptcy auction after the debtor is declared bankrupt**

The position of a notary has an ethical responsibility to help the public settle their civil cases easily and without obstacles. The notary's expertise in carrying out his duties certainly has an impact on a good image for his organization.<sup>6</sup> Notaries must always be subject to and comply with the principles and provisions that apply while carrying out their duties and obligations. The authority possessed by a notary in general can be known in Article 15 paragraph (1) of the UUJN which states that "a notary can make an authentic deed regarding all acts and or agreements

<sup>5</sup> Johny Ibrahim, 2006, *Teori dan Metodologi Penelitian Hukum Normatif*, Malang: Bayu Publlishing, h. 26

<sup>6</sup> R. Soegondo Notodisoerjo, 2005, *Hukum Notariat di Indonesia Cet kedua*, Jakarta: Rajawali Pers, h. 43

according to the provisions of the applicable laws and regulations.<sup>7</sup> Based on the code of ethics, a Notary must be able to carry out his obligations in accordance with what is stated in his code of ethics. The code of ethics acts like a guideline that must be obeyed by every notary. The essence of the regulation on the notary code of ethics basically regulates the procedures for implementing the notary's obligations to establish good relations with clients, fellow notaries and also other parties who have an interest in the civil sector. One of the scopes of civil law regulates the implementation of auctions, where a notary official has the authority as a class II auction official.

In connection with the issue of bankruptcy, bankruptcy law actually provides legal certainty to answer the problems experienced by people who have dependents in the form of debts to creditors. Bankruptcy law seeks to provide solutions so that the rights owned by creditors are not lost even though the debtor no longer has the ability to pay them.<sup>8</sup> A declaration of bankruptcy against a debtor can only be made if using a court route. Therefore, only through a judge's decision can expressly declare the debtor to be bankrupt. The legal consequences arising from the bankruptcy decision by the judge in the court cause the debtor to no longer have the right to regulate and manage his bankrupt assets. The bankruptcy settlement process will be carried out by a specially appointed curator through a court decision. The settlement of the bankruptcy is entirely the responsibility of the curator in accordance with the specified time limit<sup>9</sup>.

Basically, the provisions regarding the mechanism for selling bankruptcy assets are contained in Article 185 of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (hereinafter referred to as the KPKPU Law) confirms that a. All objects must be sold in public in accordance with the procedures specified in the legislation; b. In the event that the sale in public as referred to in paragraph (1) is not achieved, the sale under the hands can be carried out with the permission of the supervisory judge. Based on these provisions, it can be seen that the auction of assets that have been declared bankrupt can be carried out in two ways. The first method is to be sold in public through an offer process which is carried out either orally or in writing which has previously been collected by people who are interested in obtaining the bankruptcy estate. The second way that can be done is by selling under the hands, this can be done if the first method is deadlocked. The next condition that must be met is the approval of the panel of supervisory judges who have decided on the bankruptcy of the assets by considering that the sale under the hands can generate a high price. The mechanism regarding the private auction process by the curator who has obtained permission from the panel of supervisory judges has not been regulated in detail through the KPKPU Law, this is what then causes many differences in the model of the underhand auction carried out by the curator.<sup>10</sup>

In the Bankruptcy Law, it emphasizes the legality of the curator to record bankruptcy assets, which can be done under the hands<sup>11</sup>. The process of recording the auction under the hands must pay attention to the basic aspects contained in the Bankruptcy Law. These principles aim to avoid recording the auction under the hands of all forms of abuse of the rights and authority of one party who has bad faith. So that in the process of recording the auction under the

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<sup>7</sup> Habib Adjie, *op.cit*, hlm. 78

<sup>8</sup> Zainal Asikin, 2004, *Hukum Kepailitan dan Penundaan Pembayaran di Indonesia*, Cetakan ketiga, Surabaya: Bina Ilmu, h. 21

<sup>9</sup> Amanda Maylaksita, 2019, "Problematik Interpretasi Pengaturan Kepailitan Terhadap Jabatan Notaris di Indonesia", *Jurnal Lex Renaissance*, 4(1), h. 131

<sup>10</sup> Syamsudin M Sinaga, 2012, *Hukum Kepailitan indonesia*, Jakarta: Tata Nusa, h. 42

<sup>11</sup> Lihat Pasal 100 ayat (2) UU KPKPU

hand, it does not have a detrimental impact on either party<sup>12</sup>. Seeing the reality of the importance of protecting the rights and obligations of the parties, it is necessary to have an authentic record of the bankruptcy assets. Based on UUJN the authority to form authentic deeds regarding all agreements related to civil matters is the authority of a notary<sup>13</sup>. As explained in Article 15 letter g that a notary has the authority to make a deed of auction minutes.

Based on these provisions, it can be seen that the only legal profession that can make authentic auction minutes is a notary. The enactment of the Law on Notary Positions resulted in the expansion of regulations regarding the position of a notary. The expansion of these regulations has led to an increase in the authority of notaries, especially regarding the appointment of notaries as second-class auction officials. This expansion of authority is finally enshrined in the Minister of Finance Regulation Number 189/PMK/2017 concerning second-class Auction Officers, which states that one of the notaries who can be appointed as class II auction officials is a notary.<sup>14</sup> Based on these regulations, the legality of a notary as an auction official has a strong legal position. However, there are problems encountered related to the authority of a notary as a class II auction officer. This problem is caused by the limited scope of authority of class II auction officials. Class II auction officials based on Article 35 PMK Number 189/PMK/2017 are only limited to voluntary non-execution auctions. Based on the regulation in Article 1 paragraph (2), voluntary non-execution is defined as an auction of goods belonging to the private sector, individuals or legal entities and business entities conducting voluntary auctions.

The main problem related to the authority of a notary as a class II auction officer actually lies in the range of his authority who cannot record the minutes of the trial in bankruptcy cases. This is because the bankruptcy auction is included in the execution auction section. According to Article 1 of PMK Number 93/PMK.06/2010 concerning Instructions for Implementation of Auctions, execution auctions are auctions carried out based on court decisions/decision, other documents that are equivalent to that and, to implement the provisions in the laws and regulations. The authority to carry out execution auctions lies in the hands of class I auction officials, as stipulated in Article 8 paragraph (2), Class I Auction Officers are authorized to carry out all types of auctions at the request of the seller/owner of the goods. Based on this, it can be seen that the notary as a second-class auction official does not have sufficient authority to record the problems of the bankruptcy auction.

The capacity of the notary in recording the minutes of auction is only limited to the implementation of the auction which is carried out on a non-voluntary basis. This provision is in accordance with Article 35 paragraph (2) of PMK Number 189/PMK.06/2017, namely Class II Auction Officers are limited to Voluntary Non-execution Auctions including but not limited to:

- a. Auction of goods belonging to State/Regional Owned Enterprises (BUMN/D) in the form of a limited liability company
- b. Auction of bank assets in liquidation unless otherwise stipulated by laws and regulations.
- c. Auction of goods belonging to Foreign Country Representatives, and
- d. Auction of goods belonging to individuals or private business entities.

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<sup>12</sup> Lilik Mulyadi, 2013, *Perkara Kepailitan dan Penundaan Pembayaran Utang (PKPU)*, Bandung: PT Alumni Bandung, h. 78

<sup>13</sup> Lihat Pasal 15 ayat (1) UUJN

<sup>14</sup> Lihat Pasal 13 Peraturan Menteri Keuangan Nomor 189/PMK/2017 tentang Pejabat Lelang kelas dua

This means that the provision states that the authority of a notary as a class II auction official is very limited. This is in contrast to the authority possessed by class I auction officials who contain employees of the Directorate General of State Assets. The advantage of Class I Auction Officers is that they are able to carry out all types of auctions, from execution auctions, mandatory non-execution auctions to voluntary non-execution auctions. So that a notary as a class II auction official is only waiting for an application from the Auction Hall and or seller to conduct an auction. This limited authority ultimately causes the notary to be unable to record the bankruptcy auction which will be carried out after there is a court decision. This causes notaries to be directly involved if the auction is carried out in public through policies that will be made by the curator. However, even though the notary cannot directly participate in the auction process in public, there is still a gap where the notary can still record the minutes of the bankruptcy auction.

### **Legal Validity of Bankruptcy Auction Records That Don't Involve a Notary**

Notaries as authentic deed makers are considered as functionaries in society so that until now they are still respected in the midst of people's lives. Notaries are considered as someone who can be relied on so that they become the foundation for the community to ask for legal considerations. This condition has the consequence that everything written by a notary is a legally strong document<sup>15</sup>. In line with this opinion, Gandasubrata stated that notaries are included in law enforcement elements who are appointed directly by the government. In carrying out its duties, a notary is always required to include various provisions in an authentic deed so that it has complete evidence before the law.<sup>16</sup> Based on this statement, the notary has an important role in making an authentic deed. This is because all aspects related to civil relations require the assistance of a notary to be included in the authentic deed. Including the matter of recording bankruptcy auction underhand.

An underhand auction can be carried out if the public auction does not get satisfactory results. The curator may ask the panel of supervisory judges to grant permission to sell bankrupt assets privately. In addition to the permit granted by the panel of supervisory judges, two other important aspects must be considered. The first aspect is that the sale of bankruptcy assets must pay attention to the lowest price limit for these assets in the market. That is, at least the sale under the hand is able to cover the debts owed by the debtor to the creditor. So that no party feels aggrieved by the sale of the bankrupt property privately. The second aspect is that selling under the hands requires a deed that is legally made before a notary official. Bearing in mind, matters relating to all forms of acts, views and agreements of a civil nature can only be made authentically by a notary<sup>17</sup>. Based on these provisions, the curator needs to involve a notary to record the sale of assets that have been bankrupt privately.

Basically, the entire bankruptcy law has the aim of providing time and opportunity for the parties to sort out and choose the rights of each asset against debtors who do not have sufficient value.<sup>18</sup>. Bankruptcy is an effort to ensure that every creditor gets what he is entitled to even if the debtor is unable to pay his debts. Indeed, with these considerations in mind the existence of the concept of bankruptcy has an urgency to regulate the mechanism for distributing asset rights

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<sup>15</sup> Tan Thong Kie, 2000, *Buku I studi Notariat Serba Serbi Praktek Notaris, Cetakan 2*, Jakarta: Ichtiar Baru Van Hoeve, h. 157

<sup>16</sup> H.R. Purwoto dan S. 2001, Gandasubrata, *Renungan Hukum*, IKAHl Cabang Mahakamah Agung RI, h. 484

<sup>17</sup> Lihat Pasal 15 ayat (1) Undang Undang Nomor 30 Tahun 2004 Tentang Jabatan Notaris

<sup>18</sup> Adrian Sutedi, 2009, *Hukum Kepailitan*, Bogor: Ghia Indonesia, h. 28

fairly to creditors for bankruptcy experienced by debtors<sup>19</sup>. Therefore, the essence of the existence of an institution that is authorized to regulate bankruptcy matters is to provide guarantees to creditors that debtors will not cheat and run away from their responsibility to pay off all their debts. The institution that regulates the settlement of bankruptcy also serves as protection to the debtor from all forms of potential execution of assets by creditors without going through a court decision.<sup>20</sup>

In matters relating to the authority to record the deed of sale of bankrupt assets, the notary has the obligation to submit it directly in front of the interested parties. This is a direct mandate given by UUJN to a notary as stated in Article 16 paragraph (1) letter l, namely that the notary has the obligation to read the deed before the appearer with at least two witnesses and signed at that time by the appearer, the witness, and notary. The reading of the deed carried out by the notary is an effort to inaugurate the reader and the party who signed the authentic deed. G.H.S. Lumbun Tobing is of the opinion that if the deed is read by the notary concerned himself, then the parties have assurance and confidence that the deed is in accordance with what the parties really want.<sup>21</sup>

Based on these considerations, the reading of the authentic deed directly in front of the parties who have an interest in the sale of bankruptcy assets carried out under the hands has the essence that the contents of the deed are truly understandable by the parties. So that reading the deed before the parties is an effort to clarify the intent and purpose of the contents of the deed and provide access to information on the laws and regulations relating to the agreement. That way, the parties have the opportunity to evaluate and provide feedback if the deed is deemed not to be in accordance with what the parties want. Therefore, the sale of bankruptcy assets under the hands requires the presence of a notary and various interested parties. This not only aims to provide legal understanding by a notary, but also has an important meaning so that the parties who wish to sell the bankruptcy estate understand and that there is no multi-interpretation of the authentic deed.

Reading the deed is the responsibility of the public to convey it to the appearers. The reading of the deed implies that the authenticity of the deed is there from the beginning to the end of the words contained in the deed<sup>22</sup>. The concern is that if the notary does not read out the deed in the process of selling the bankruptcy estate by the curator, it can be considered as giving false information. Therefore, to prevent unwanted things, a notary needs to be present at the time of the illegal sale of the bankruptcy estate. The goal is to at least read out the beginning and end of the authentic deed. Basically, the reading of the deed is the civil responsibility of the notary to the parties. This responsibility gives birth to an understanding that the notary profession has a role to provide guidance to the public regarding the moral truth of the deed. So that the reading of the deed before the parties when they want to carry out the sale of the bankruptcy estate is a must for the notary, in other words, the notary must attend the process of implementing the sale of the bankruptcy estate. This provision can be excluded, if the parties have agreed that the notary does not need to read out the contents of the authentic deed of private sale of the bankruptcy estate. However, to be able to carry out this, the conditions that must be fulfilled are

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<sup>19</sup> M. Hadi Subhan, 2001 *Hukum Kepailitan Cet.2*, Bandung: Prenada Media Grup, h. 8

<sup>20</sup> Adrian Sutedi, *Op. Cit.*, hlm. 10

<sup>21</sup> G.H.S Lumbun Tobing, 2002, *Peraturan Jabatan Notaris Cet. kedua*, Jakarta: Erlangga, h. 201

<sup>22</sup> Muhammad Tiantanik, 2018, "Tanggung Jawab Perata Notaris Terhadap Akta Yang Dibacakan Oleh Staf Notaris di Hadapan Penghadap", *Jurnal Lentera Hukum*, (5)1, h. 163

that the parties have been able to understand and understand the contents of the authentic deed from the beginning to the end of the word.

## CONCLUSION

The legality of the position of a Notary in the implementation of a bankruptcy auction after the debtor is declared bankrupt, in fact, a notary has the right to carry out a legal action in the implementation of an auction of the object of bankruptcy as the authority possessed by a notary in general can be known in Article 15 paragraph (1) UUJN which states that a notary can make an authentic deed regarding all actions and or agreements according to the provisions of the applicable laws and regulations. The authority to make an authentic deed in the legal act of implementing an official auction who is only given the authority is a notary.

The legal validity of the recording of bankruptcy auctions that do not involve a notary is actually legally valid considering the authority of a notary based on the law on the position of a notary as a public official who is given the right to make an authentic deed in carrying out legal actions in the case of bankruptcy as regulated in the provisions of the public official who is authorized to make an authentic deed and other authorities as referred to in Article 15 paragraph (2) letter g of the Law on Notary Positions. Make a deed of auction minutes. Public officials are state organs that function to serve the general public in the field of civil law, especially the making of authentic deeds.

Suggestions from the author that in carrying out their authority as class II auction officials, notaries need to have stronger authority to be able to be involved in execution auctions, especially those related to bankruptcy auctions. The purpose of strengthening the authority of a notary as a class II auction official is as a form of law enforcement efforts in Indonesia. So that the authority of the notary to get justice considering that the public official who is given the authority to carry out legal actions to make an authentic deed in the implementation of the auction is a notary.

Notaries are legal professions that are considered most capable of forming authentic deeds for all forms of agreements, deeds and provisions related to civil matters. Therefore, if the notary's authority is added to be able to be directly involved in the bankruptcy auction, it will greatly assist the process of completing the implementation of the bankruptcy estate.

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