

LEGAL PROTECTION FOR THE AUCTION WINNER ON THE OBSTRUCTION IN VACATING MORTGAGE AUCTION OBJECT CAUSED BY THE DEBTOR

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ABSTRACT

In a credit agreement between the customer and the bank, the bank prefers to employ a mortgage security company as the guarantee for the credit agreement. It is caused by considerable price of a land object, moreover, Indonesian Mortgage Law provides certainty and easiness for the creditor to perform an execution. In the case of the debtor's default, the creditor will file execution for auction over the debtor's object of mortgage in the Office of State Property and Auction Services (KPKNL). However, the debtor often obstructs the vacation process of mortgage auction object. The debtor usually obstructs the clearing process of mortgage auction object by filing a lawsuit to the Court. Besides, another problem that often arise is, the debtors refuse to concede the auctioned mortgage object. The present research was a normative legal study. Supreme Court Circular no. 4 of 2014 explains about the mortgage auction by the creditors through an auction company, if the auctioned refuse to vacate the auction object, the execution can be directly proposed to the Chief of Public Court without a lawsuit. In regard to the phenomenon where the debtor obstructs the auction winner to possess the object of mortgage auction by refusing to leave or vacate his property, or committing physical violence either by themselves or by asking other people to do so. It could be categorized as an offense or criminal act. In article 372 of the Indonesian Penal Code, it is stated that any person who with deliberate and unlawfully appropriates property which wholly or partially belongs to another which he has in his possession otherwise than by a crime, shall, being guilty of embezzlement, be punished by a maximum imprisonment of four years or maximum fine of nine hundred rupiahs. The legal protection for the auction winner if the debtor obstructs the process by filing a lawsuit to the Public Court is The Supreme Court Circular no. 4 of 2014, and the legal protection for the auction winner if the debtor obstruct the process by refusing to concede the mortgage is Article 372 of the Indonesian Penal Code.

Keywords: Legal protection, Auction execution, Mortgage Right, KPKNL

INTRODUCTION

In the middle of the developing economy, society' need for funding increases. People who want to advance and develop their business may obtain the funds by guarantee, namely personal guarantee or material guarantee. The existence of guarantee is expected to protect the interest of the party who provides fund, or whose usually called as a creditor. Actually, the Indonesian Civil Code (KUHPer) has provided legal protection for creditors through general guarantee, where article 1131 of KUHPer is attached to the debt agreement between a creditor and a debtor. Article 1131 of Indonesian Civil Code states that all movable and immovable properties of the debtor, either present or future, serve as securities for the personal obligations of the debtor.¹ In praxis, the creditor prefers to choose specific guarantee rather than general guarantee since general guarantee does not have a standing of the preferential creditor, while the specific guarantee does. Preferential creditor means the creditor holds a right to precede the other creditors in taking the debt repayment.

In Indonesia, at the beginning of KUHPer prevails, mortgage worked as the land guarantee for a loan. While, mortgage works as a guarantee on a movable object. Mainly for the land mortgage, the next development was by keeping in prevailing mortgage (regulated in KUHPer) by the law on land, namely law no. 5 of 1960 on Basic Agrarian Law (UUPA).ⁱⁱ It is asserted by article 57 of UUPA, it is read as long as the Act concerning the encumbrance right meant in Article 51 has not yet been established, the provision concerning mortgage mentioned in Civil Code of Indonesia and "Credietverband" meant in S. 1908- 542 as amended by S. 1937-190. The provision of article 57 of UUPA run only for thirty-six years until the issuance of law no. 4 of 1996 on Encumbrance Right (UUHT). By the issuance of UUHT, the mortgage stated in the Civil Code prevails only for security imposition on ship and airplane based on the law on air transport. UUHT is the implementation of article 51 of UUPA UUHT does not revoke the mortgage law in the book two of Indonesian Civil Code, it states that stipulation concerning mortgage is written in KUHPer is no longer prevails as long as it is related to imposition of encumbrance right on the land rights (Article 29 of UUHT).ⁱⁱⁱ

In a credit agreement between the customer and the bank, the bank prefers to employ a mortgage insurance company as the guarantee on the credit agreement. It is caused by a significant price of a land object, and Indonesian Law on Encumbrance Right provides certainty and easiness for the creditor to perform an execution. For encumbrance right guarantee, there will be a grant deed (APHT) issued by the land deed official (PPAT) as a result of bank's request as the accessoir agreement, which then is registered in land affairs office. One of the purposes of mortgage registration is to allow the creditors to execute the mortgage if the debtors commit default, by registering the mortgage, mortgage certificate holds a same executory strength with the court ruling. In order to have executorial power, or authority to be executed as the court ruling, in the notarial deed, there shall be a heading in the form of words "for the sake of justice in the name of God almighty."^{iv}

Execution of auction following UUHT is by Parate Execution. It is carried out based on the executory title of the mortgage certificate in accordance with the determined procedure in the regulatory legislation. In Indonesian, there is Directorate General of State Assets (DJKN) vertical institution that holds a direct responsibility on the Head of Regional Office which is known as State Assets and Auction Service Office (KPKNL). KPKNL holds its duties in the field of state' assets, valuation, government debt, and auction.

In praxis, In the case of the debtor's default, the creditor will file execution for auction over the debtor's object of mortgage in the Office of State Property and Auction Services (KPKNL). The auction will be done by and/or before the Auctioneer. However, the debtor often obstructs the vacation process of mortgage auction object. The debtor obstructs the clearing process of mortgage auction object by deliberately filing a lawsuit to the Court. The other problems that often arise are, the debtors refuse to concede the auctioned mortgage object.

The obstruction of execution on mortgage auction committed by the debtors obviously harms the auction winner. By such obstruction, it looks like that executorial title of the encumbrance Right has an executorial power that is equal to the court ruling that holds permanent legal force as stated in article 14 paragraph (3) of UUHT. In this case, it can be seen that the auction execution does not have power against the debtor and is easily obstructed by the debtor. To ease the writer in conducting the study, the writer needs to formulate the statement of the problem. The problems that become the writer's focus were how does legal protection for the auction winner work if the debtors obstruct the clearing process of the object of mortgage auction after ruling of KPKNL.

RESEARCH METHOD

The present research was a normative legal study. A study that lies in regulatory legislation or binding legal norms that are relevant to the topic of the discussion. The present study employed a statute approach and conceptual approach.

- a. Statute approach is an approach that is based on the stipulation of prevailing regulatory legislation and is relevant with the issue being discussed.
- b. Conceptual approach is a research approach through concepts, principles, doctrines, and the notions of scholars.

DISCUSSION

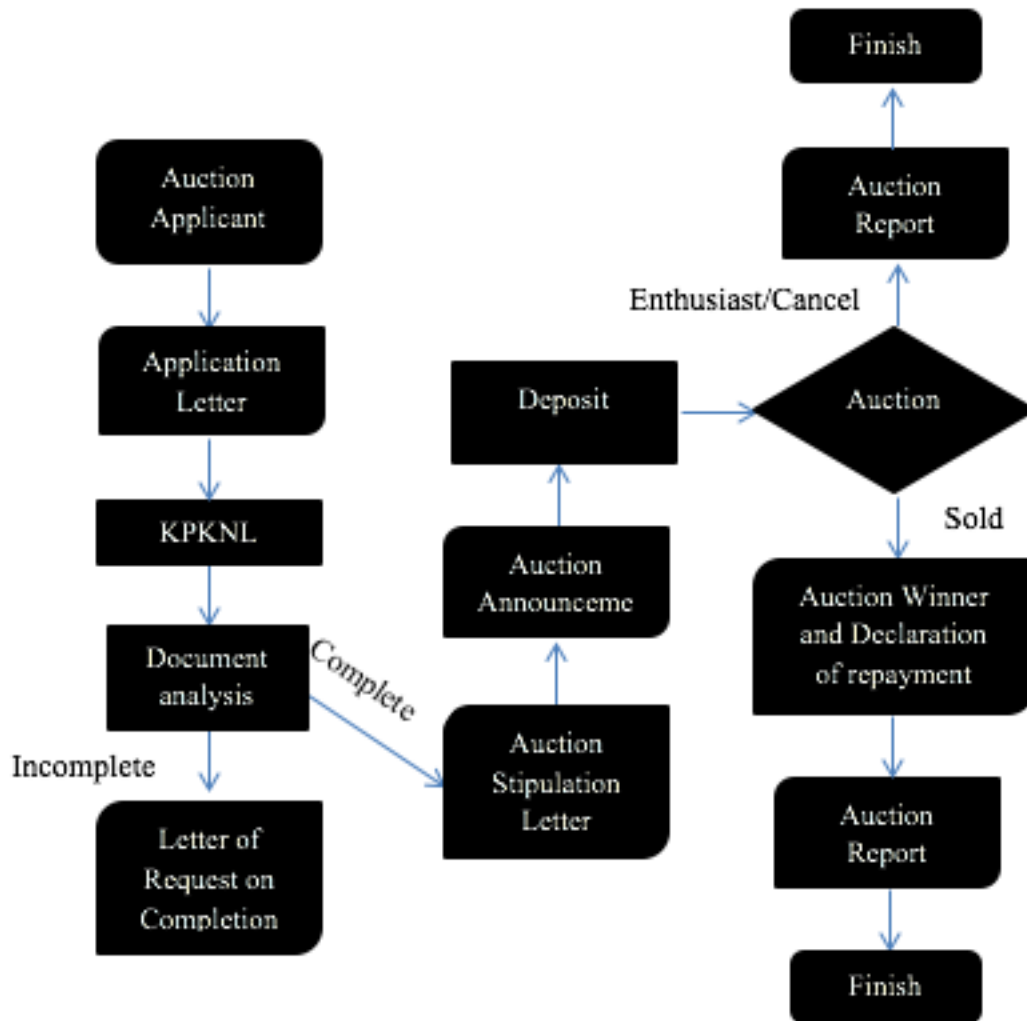
STANDING, TASK, AND FUNCTION OF KPKNL

Article 29 of Minister of Finance Regulation no. 135/PMK.01/2006 on The Organization and Working Procedure of the Vertical agency of Directorate General of State Assets explains about KPKNL. It is explained that KPKNL is a vertical institution of DJKN that is under and is responsible directly to the Head of Regional Office. Vertical agency refers to the unit of departments or non-department governmental institution that possess pertinent working environment.

Article 30 of Minister of Finance Regulation no. 135/PMK.01/2006 on the Organization and Working Procedure of Vertical Agency of Directorate General of State Assets explains that KPKNL holds its duties in the field of state' assets, valuation, government debt, and auction. In carrying out the duties stated in article 30, KPKNL performs the function regulated in article 32 of Minister of Finance Regulation no. 135/PMK.01/2006 on the Organization and Working Procedure of Vertical Agency of Directorate General of State Assets, namely:

- a. Stocktaking, Administration, Utilization, and Safekeeping on the State assets;
- b. Registration, verification, and analysis on considering the request of transfer or deletion on state assets;
- c. Document receipt registration, stipulation, billing, guarantee object management, execution, Wealth inspection on the debt guarantor.
- d. Preparing the material for consideration on the request of remission of time , and/or amount of debt, the proposal on prevention of debt guarantor, and preparing the data for proposal on removing government's receivables;
- e. Performing Valuation;
- f. Performing Auction;
- g. Providing information about state' assets, valuation, government debt, and auction;
- h. Performing stipulation and government's receivables as well as inspecting the ability to guarantee debtor and guarantee execution;
- i. Performing inspection on the debt' guarantor's guarantee object and other wealth;
- j. Performing guidance to Auctioneers;
- k. Stocktaking, safekeeping, and utilization of collateral;
- l. Providing legal consideration and assistance in managing government debt and auction;
- m. Verifying and bookkeeping the payment of government debt and auction revenue;
- n. Performing KPKNL administration.

Figure 1: Auction Procedure in KPKNL Surakarta



From the figure above, it could be concluded that the auction procedure is always started by auction application filed by the auction applicant, in this case usually the bank requests to execute the debtor's mortgage. The auction applicant files a written application to KPKNL. The auction applicant shall immediately complete its auction application letter with the documents/ proof of right and authority in selling such property through auction. Besides, the applicant may determine the requirement of the auction as long as it does not contradict the prevailing regulation.

After KPKNL studies the application letter along with the complementary document and obtains the legality of the subject and the object of the auction, KPKNL determines the place and date of the auction, if the document analysis is not complete, KPKNL will issue the letter of request for the complement. After issuing the letter of auction, the auction is announced in newspapers. The announcement in newspapers aims to gather the prospective bidder. The sale must be preceded by the announcement done by the auction applicant.

Once the auction is announced, the applicant must make a deposit to KPKNL's bank account. The deposit shall be received at maximum 1 (one) business day before the auction. Deposit is imposed to the bidder following the amount determined by the seller, 20% (twenty percent) of the limit value at minimum, or 50% (fifty percent) of limit value at maximum. The provision on the amount of deposit of auction bid is stated in article 38 of Minister of Finance Regulation no. 27/PMK.06/2016 on Auction Guideline. Bid deposit is the requirement before performing an auction. It aims to make the bidder feels attached since the deposit is non-refundable if the bidder selected as the buyer is default, so the participant who is not seriously joining the auction can be minimized.

The auction will be performed by the Auctioneer from KPKNL. Auctioneer is an individual authorized by law to perform an auction. Every auction (based on article 1a *Vendu Reglement* and article 2 of Minister of Finance regulation no.27/PMK.06/2016) shall be performed by and/or before the Auctioneer unless stated otherwise by law or governmental regulation. The auction is still held although there is only 1 (one) bidder, and in an auction, the auctioneer can be assisted by an

auction guide. The bid is written and is inserted into the envelope and is submitted during the auction. If there is a same amount among the bidders, the bidders will bid orally.

The bidder/ its authorized person must attend the auction by performing registration first. For the bidder who authorizes other parties, they shall make a notarial letter of authorization. The registered bidder must bid at least the same with the limit value. If it is less than the value limit, they will be blacklisted. If the highest bid in the auction has satisfied the seller's determined limit value, the object is released, and the auctioneer will declare the highest bidder as the auction winner/buyer. However, if the highest bid has not met value the seller determines, the auctioneer will declare that the object of the auction is kept or the winners not selected, unless the seller agrees to release the object.

If the object of auction has been sold, the winner shall complete the repayment no longer than 3 (three) business day since the auction day, and if the payment is not paid off during the specified period of time, the deposit is taken by the state and is submitted to the State's General Treasury. Basically, the buyer pays the amount of auction in cash. However, if the buyer uses cheque, the cheque is cleared and the clearance result considered as good by the bank. The auctioneer must submit the money as the result of the auction to the seller's bank account within 1x 24 hours since the buyer complete the payment. If the applicant/ the goods holder is a governmental agency, the result of the auction is submitted to the state treasury. Then, KPKNL submits the document and the auction report excerpt as the proof for title transfer and so forth.

LEGAL PROTECTION FOR THE AUCTION WINNER ON THE OBSTRUCTION OF AUCTION OBJECT VACATION

Protection is originated from the work "to protect" In the Great Dictionary of Indonesia (KBBI), protection refers to a place to protect, behavior or anything that protects.^v Protection refers to the act of protecting or the condition of being protected. Protect means to stand up for the interests, to guard, to keep.^{vi}

Legal protection can be defined as protection the law provides or protection through legal institution and medium. In addition, in legal enforcement, legal works as the protection of human's interest.^{vii} According to Setiono, legal protection is an action or attempt to protect society from the ruler's arbitrariness to realize peace and order that makes human being possible to relish their dignity as a human.^{viii} Legal protection is one of the most important elements of a state of law. It is considered important since, in the establishment of a state, the law will be established to regulate its citizen.

In KBBI, guarantee refers to a property used as security. The term, guarantee itself means security for a loan. In article 1 no. 1 of UUHT, it is stated that Encumbrance Right on land and land-related objects, hereinafter referred to as Encumbrance Right, shall be the security right under which a land title is placed as stipulated in Law No. 5/1960 on the Basic Agrarian Law, with or without other objects forming united with the land, for particular creditor over other creditors; According to Rachmadi Usman., Encumbrance right is a material guarantee institution over a right over land for a certain debt repayment, that provides standing prioritized to a particular creditor as the holder of encumbrance Right toward other creditors. The guarantee that is provided, a right to be prioritized on precede the other creditors (Encumbrance Right Holder).^{ix}

Execution, according to KBBI, is the implementation of Judge' ruling, implementation of physical punishment or selling a person's property based on a seizure. According to UUHT, there are three types of execution of encumbrance rights, namely:

a. Executorial title

An execution based on a heading in the form of words "For The Sake Of Justice In The Name Of God Almighty" that is performed through the procedure by using parate executie institution in accordance with the civil code procedure. This type of execution holds executorial power equals to the court ruling that possesses permanent legal force.

b. Execution on Self-Authority

This kind of execution shall be previously agreed within the agreement. According to article 20 paragraph (1) letter (a) jo. Article 6 of UUHT, in the event of Debtor's default, the holder of first Encumbrance Right may sell by virtue of his own authority the Encumbrance Right object in a public auction and collect the settlement of his receivables from the proceeds of such sale.

c. Private Execution

Private execution of encumbrance rights object is regulated in article 20 paragraph (2) and (3) of UUHT. This article essentially about agreements between the grantor and the holder of encumbrance right on the private sale on the encumbrance rights object will obtain the highest price that will benefit all parties. A private sale can only be carried out after 1 (one) month since it is informed in written form by the encumbrance Right holder to the concerned parties and is announced in 2 (two) newspaper of the region and no party states objection.

Article 1 no. 22 of The Minister of Finance Regulation no.27/PMK.06/2016 on the Auction Procedure, a buyer is a person or legal body or a company proposing the highest bidder and is authorized as auction winner by the Auctioneer. It can be concluded that the auction winner is the one who holds the right to possess an auction object. After the auction has been performed and the auction winner has been determined, the Class I auctioneer will issue auction Report as an authentic deed. The auction winner will have the auction Report excerpt. A report is the statement of a meeting arranged in order and is accounted by the maker and or by the meeting itself, so it binds as a legal document of an event/ phenomenon stated in it. The auction report excerpt the auction winner obtains as the buyer from KPKNL has possessed powerful legal force and strong evidentiary force. The auction winner obtains auction report excerpt as the sale and purchases deed which is used for title transfer or auction report grosse as necessary. In addition, heading in the encumbrance rights certificate has possessed executorial power and permanent legal force.

The problem that often arises in the form of obstruction of the clearing process of auction object committed by the debtor. The debtor obstructs the process by filing a lawsuit to the Public Court. The debtors file the lawsuit for they offended by the auction of their land and house although, in fact, the debtor is in default, besides, to protract the process of auction object clearing although they realize that they will not win the lawsuit. Supreme Court Circular no. 4 of 2014 explains about the mortgage auction by the creditors themselves through an auction company, if the auctioned refuse to vacate the object of the auction, the execution can be directly proposed to the Chief of Public Court without a lawsuit. It means that in order to propose an execution for clearing, the auction winner does not need to file a civil lawsuit to the occupant of the auction object, auction winner can directly request execution for clearing to the Public Court. If the debtor/ the grantor of encumbrance Rights files a lawsuit to the auction winner and the creditor holder of encumbrance Right as the auction applicant, and even if the creditor is found guilty, auction report cannot be annulled. So, there is no reason for the Public Court to postpone the execution for clearing.^x

Such conclusion can be drawn from the Supreme Court Circular no. 1068 K/Pdt/2008 21 January 2009, where the main problem of this issue is legal protection for the auction winner who buys a land parcel through an auction process. Several years after the auction is performed, the ruling that becomes the legal basis of auction stated by the court has no binding legal force. Based on this ruling, the plaintiff on the first level request cancellation on the auction that has been performed perfectly. The first level Court rules such claim "unacceptable" for *nebis in idem*. If it is accepted, it will lead to legal uncertainty and confusion on the legal status of dispute object ownership. The ruling was then annulled by the Appeal Level Court. However, it was corrected by the Supreme Court who states that the auction that has been performed cannot be annulled and the auction buyer's right shall be protected.

The cassation case in the Supreme Court of the Republic of Indonesia no. 1068 K/Pdt/2008 was ruled by the supreme judge, with the conclusion that:

- a. Annulment of an auction that has been performed based on the permanent legal force- decree is not possible;
- b. The auction buyer of the object in dispute based on the minutes of auction and auction report that is based on the decree with permanent legal force is an auction buyer with virtue, and because of it, he should be protected.
- c. If in the future there is a decree contradicting the decree with permanent legal force, and state that the decree with permanent legal force is not binding, such decree cannot be used as a reason to cancel the auction, what can be done is to ask compensation for the object in dispute to the Auction Applicant.

Besides, the debtors obstruct the clearing process of auction object is by refusing to hand over the auction object to the auction winner. Obstructing other person's right, especially using physical violence, can be categorized as a criminal act. Some regulatory legislation regulates it, one of them is article 372 of Indonesian penal code. That article read : any person who with deliberate and unlawfully appropriates property which wholly or partially belongs to another which he has in his possession otherwise than by crime, shall, being guilty of embezzlement, be punished by a maximum imprisonment of four years or maximum fine of nine hundred rupiahs. The elements of the article are:

- a. Any person refers to the criminal actor, where the actor is the legal subject who is capable of accounting his behavior physically or psychologically.
- b. With Deliberate, what is meant by deliberate shall involve all subjective element of this article;
 - 1) If the element "with deliberate" is associated with the element "unlawfully appropriates" or *Zich Toeiegenen*, the action of "unlawfully appropriates" the actor commits shall be with deliberate and had been committed, for instance, the goods have been sold, exchanged, or personally used.
 - 2) If the element "With Deliberate" is associated with "unlawful" or *Wederrechtelijk*, it means that the actor shall know that his *Zich Toeiegenen* violates the other people' rights.
 - 3) If element "with deliberate" is associated with the element "wholly or partially belongs to other," it means that the actor must know that the object belongs to other people either partially or wholly.
 - 4) If element "with deliberate" is associated with the element " which he has in his possession otherwise than by a crime," it means that the actor must know that the goods he possesses are obtained not by crime.
- c. Element "Unlawfully Appropriates" (*Zich Wederrechtelijk Toeiegenen*), shows the actors unlawful natures of behavior done by the actor.
- d. The element of " Property" means that the appropriates for himself unlawfully shall refer to " visible and movable properties."
- e. The element " wholly or partially belongs to another" means that not every visible and movable property can be used as the object of embezzlement, accordingly, such property shall satisfy the requirement belongs to another from the actor himself.
- f. The element of "he has in his possession otherwise than by a crime" means not every property under a person' possession because of crime, for instance, because of a rental agreement, borrowing, and so forth. It can be said that someone is possessing a property if he has really possessed that property, so, there is nothing to do if he wants to do something with that property.

From the elements of the article above, it can be concluded that if debtors obstruct the clearing process of auction object by refusing to hand over the auction object to the auction winner, it meets the element of article 372 of Indonesian Penal Code. First, it meets the element of " any person," in this case, the legal subject is the debtor itself. Second, it meets the element of "with deliberate," the debtors deliberately refuse to hand over the encumbrance rights object to the auction winner and realize that such action violates other people' right. Third, it meets element " unlawfully appropriates," the debtor's action obviously violates the law. Fourth, it meets element "a property," which in this case is the land and the building above it. Fifth, it meets element "wholly or partially belongs to another," the object has been legally possessed by the auction winner based on the auction report deed issued by KPKNL. Sixth, it meets element "he has in his possession otherwise than by a crime, the object may be in the debtor's possession for it is used as a mortgage in a credit agreement.

CONCLUSION

Legal protection for the auction winner if the debtor obstructs the process by filing a lawsuit to the Public Court is based on the Supreme Court Circular no 4 of 2014. If the debtor files a lawsuit to the auction winner, the execution of clearing process is still able to be requested to the Chief of Public Court without a lawsuit and no need to wait for the ruling of the lawsuit the debtor files. The Decree of Supreme Court of Republic of Indonesia no.1068 K/Pdt/2008 21 January 2009 where the Supreme Court held that the auction that has been performed could not be cancelled and the auction winner's right shall be protected.

Legal protection for the auction winner if the debtor obstructs by refusing to hand over the encumbrance Right auction object is article 372 of Indonesian Penal Code which is read any person who with deliberate and unlawfully appropriates property which wholly or partially belongs to another which he has in his possession otherwise than by a crime, shall, being guilty of embezzlement, be punished by a maximum imprisonment of four years or maximum fine of nine hundred rupiahs.

SUGGESTION

- a. The auction winner shall understand the risk of buying an object (especially immovable object) through auction, which prone to problems in the clearing process of auction object.
- b. For the debtors, if it is found guilty, the debtors are suggested to adhere and follow the procedure regulated in regulatory legislation, to avoid more serious sanction.
- c. Since the legal protection security for the auction winner is minimum, it is necessary to establish new regulatory legislation or revise the existing regulatory legislation to provide more legal protection to the auction winner on the auction object.

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^v Budiono, *Kamus Besar Bahasa Indonesia*, Karya Agung, Surabaya, 2005, pp. 320.

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