Parate Executie Common Law and Civil Law

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Abstract

Parate Executie is a legal action by the creditor (collateral holder) that enables the resale of collateral items via an auction by the Office of State Assets Services and Auctions (KPKNL) instead of court processing. In the case of non-performing loans, the bank can conduct an execution to fulfill the rights violated by the debtor by Parate Executie. The method employed in writing this law journal was normative with a statutory approach. A normative law study is based on legal materials that focus on reading and learning primary and secondary legal materials. Collateral item execution can be conducted using three methods, i.e., Parate Executie, Executorial Titles, and Underhand Sales. The principle underlying Parate Executie is the legal protection principle for the first collateral holder. Parate Executie is adhered to by Common Law countries, such as Indonesia and the Netherlands, which are different from Civil Law countries, such as France.

Keywords: Guarantee Law, Guarantee Execution, Parate Executie

1. Introduction

Banking financial institutions are financial institutions with a significant role in fulfilling the need for funds. A credit facility will always require a guarantee. The need for guarantee and collateral in an approved credit facility is oriented to protect the creditor's interest to allow funds provided to the debtor to be returned according to the predetermined period. The fund owner (the creditor), particularly banking or financing institutions, requires a guarantee for the credit for fund safety and legal certainty (Pujiyono et al., 2018:456-467).

Fundamentally, each person is responsible for their obligations; both movable and immovable objects, if necessary, are sold to pay off their obligations (*schuld* and *haftung* principle). In ensuring the fulfillment of these obligations, the guarantee legal institution provides protection facilities in the credit agreement (M. Bahsan, 2012:120). Debt agreements, often known as credit agreements, are common in society, either with banks or non-bank parties. The credit agreement created by the creditor and debtor is an *obligatoir* agreement, i.e., both parties are equally charged with obligations that create an engagement for both parties (Rose Panjaitan, 2018:286).

There is a contextual relationship between customers and the bank, where customers use bank services or products. This customer-centric behavior requires combining the fulfillment of customer needs and expectations (Pujiyono et al., 2017:71-86). The legal relationship between the bank and customers begins with deliberation to reach a consensus on the contract applied to them. The contract execution is initially intended for the realization of the objectives of the parties. In the execution, not all financing contracts run well. Disputes between customers and the bank are influenced by the imbalanced position of the number of customers and banking and the weak customer position due to the asymmetric banking information system. Regarding bad credit, the bank maintains its liquidity by solving the issues (Dewi Nurul Musjtari et al., 2018:175).

When a debtor defaults, the debtor guarantee should be executed by the creditor. According to the Indonesian Dictionary (KBBI), execution is the implementation of a judge's decision and a judicial sentence or the sale of parental assets because it is based on participation. There are three executions of mortgage rights regulated in the Mortgage Law: 1) *Parate Executie*, i.e., execution by own power that must be agreed in the previous agreement; 2) Executorial Title based on the decree "In the name of Justice based on Belief in the One and Only God" contained in the Chief Justice *Grosse* based on Article 224 HIR/258 RBg; and 3) Underhand Sales, i.e., execution of sales under the hands of the mortgage object regulated in Article 20 paragraph (2) and paragraph (3) of Law No. 4 of 1996 on Mortgage Rights on Land and Objects related to Land.

The definition of *Parate Executie* in the Mortgage Law is unclear, triggering several interpretations in its implementation. *Parate Executie*, according to Subekti, runs alone or takes what is rightfully their own, meaning that without the right of an aid judge, it is aimed at security in the form of an asset to sell the asset itself then.

Tartib argues that *Parate Executie* is a legal action by the creditor (collateral holders such as liens and mortgages) that enables the resale of collateral items via an auction by the Office of State Assets Services and Auctions (KPKNL) instead of court processings (Ikhwan Ikhsan, Busyra Azheri, Rembrandt, International Journal of Multicultural and Multireligious Understanding Vol. 6 Issue 5: 315).
As a country implementing Civil Law, Indonesia and the Netherlands implement the *Parate Executie* system as an execution selection in handling credit issues that will harm the creditor. However, it will be intriguing if Common Law countries, e.g., France, also apply the same execution system. It is worth noting how France deals with non-performing loans, and France's Common Law offers execution options for credit guarantees. In this case, the researcher was interested in comparing executions in Civil Law countries, e.g., Indonesia and the Netherlands, and Common Law countries, e.g., France, particularly regarding *Parate Executie*.

2. Literature Reviews

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3. Research Methods

The study method employed in this study was normative, using the *statutory approach*. A normative law study is a *library-based* study that focuses on reading and scrutinizing primary and secondary legal materials (Peter Mahmud Marzuki, 2014:34). The statutory approach reviews a problem from the applicable positive law viewpoint (Suwadi, 2022). In this study, the author used literature materials providing guidelines or explanations regarding the study's main discussion, such as the Civil Code, laws related to the subject matter, law books, research results, scientific works of scholars, and opinions of legal experts.

4. Results and Discussion

The bank, as the creditor, wishes for a guarantee or collateral to replace loan payment if the debtor defaults. Not all credits are running and ending well. A non-performing loan is when a customer fails to complete the credit promptly within the predetermined period. In preventing debtor's default, the bank often struggles to acquire its credit settlement. If one uses a lawsuit through the Court, it requires a lot of time and costs, even though the law practice is known for the principle of being simple, fast, and affordable. Global banking history has inherited an

effective way of eradicating non-performing loans, i.e., *Parate Executie* or execute the collateral (*auction*) itself without the intervention of the Court (Bachtiar Sibarani, 2001:22).

According to Sri Soedewi Masjchoen Sofyan, *Parate Executie* is an execution carried out without having an Executorial Title (Grosse Notary Deed, judge's decision). *Parate Executie* (Direct Execution) guarantees the mortgage rights holders to sell on their power to exercise their rights directly without going through a judge's decision or Notary Deed Grosse (Sri Soedewi Masjchoen Sofyan, 1980:32). The term *Parate Executie* is not expressed in statutory regulations. However, it is implied in Article 6 concerning the promise referred to in Article 11 paragraph (2) letter e of Law No. 4 of 1996 on Mortgage Rights on Land and Objects related to Land.

One of the facilities or characteristics of the Mortgage Law (UUHT) is that the execution is straightforward and certain when the debtors default. It can be carried out if the mortgagee fails to fulfill the obligations as agreed as stated in the General Explanation of Number 9 UUHT. The right of the first mortgage holder, as referred to above, has also been reaffirmed in Article 20 paragraph (1) UUHT.

The existence of *Parate Executie* in the execution guarantee institution can be in the form of real execution, i.e., carrying out concrete execution actions not regulated in detail in the law, such as punishment in the form of vacating the land/ building by forcing the defendant to leave the land/ building. Execution can be in the payment of a sum of money, which essentially sells the debtor's valuables in which the proceeds from the sale are given to the creditor. Regarding guarantee institutions, the execution is the payment of a sum of money. When the debtor does not have cash at all, the execution takes the form of property. The embodiment of changing a property into cash to settle the debtor's agreement with creditors is challenging and complex since it requires orderly and detailed terms and procedures to avoid misuse that harms the debtor and the creditor (M. Yahya Harahap, 2005:4).

Before the execution, a *warning* or *aanmaning* is required. It is a formal requirement for all executions, both for real execution or money payment. If the warning expires, the Head of the District Court will issue a decree containing an order to the Registrar or Bailiff to carry out the execution confiscation as stipulated in Article 197 paragraph (1) HIR or Article 208 paragraph (1) RBg (M. Yahya Harahap, 2005:36).

Execution confiscation is an advanced stage of a warning in the execution process of paying an amount of money. Application for the execution of money payment is realized through various ways of executing collateral objects, including collateral objects that can be executed through *Parate Executie*. The principle underlying *Parate Executie* as a means to accelerate the creditor receivables settlement is the legal protection principle for the holder of the first guarantee right. The embodiment of the legal protection principle is reflected in the *Parate Executie* implementation, i.e., the convenience, speed, and affordability of obtaining receivables compared to execution based on an Executorial Title. It relates to the procedure for selling the collateral rights objects on its authority, without prior confiscation of guarantees and confiscation of execution and court fiat.

Before the auction announcement is issued, the debtor can settle the debt, costs, and interest (Article 20 paragraph (5) UUHT and its explanation). Although the auction has been announced, if the debtor pays the debt with all fees and interest, the auction will be terminated (Retnowulan Sutantio and Iskandar Oeripkartawanita, 1986:18). After all the auction application requirements are met, the State Property and Auction Service Office (KPKNL) conducts an auction for mortgage objects in general, where the proceeds are used to pay off the debtor's debt, which the remainder (if any) will be returned to the debtor. If the auction sale proceeds are insufficient to settle the debtor's debt, the debtor's obligations are not merely canceled. The debtor's debt remains an obligation that must be paid. However, debt fulfillment is guaranteed by a general guarantee as stipulated in Articles 1131 and 1132 BW instead of a special material guarantee (Khoidin, 2005: 28).

The procedure for carrying out executions using the Executorial Title with the instructions "In the name of Justice based on Belief in the One and Only God" and based on Article 224 HIR/258 RBg is much different and far more complicated than implementing *Parate Executie*. Hence, it is inappropriate if *Parate Executie* is equated with execution using Executive Title. Although both must be carried out through an auction, *Parate Executie* is formed for the convenience, speed, and certainty of creditors in obtaining payment of their debts.

Execution of the Parate Clause generally seeks to give the secured creditor the right to dispose of the hypothesized property through the private sale without going through the usual Court proceedings when the debtor defaults on payment obligations under the credit agreement. The validity of the Parate Executie Clause has been debated since the Roman-Dutch era (Krause "The History of *Parate Executie*" 1924 41 SALJ 20), while functioning also featured in modern South African case law and literature. A constitutional dimension has been added to (and has revived) the controversy based on the right of access to the palace guaranteed in section 34 of the Constitution of the Republic of South Africa, 1996 (The Constitution). There is a significant difference depending on whether a movable or immovable mortgage is involved. It needs to be distinguished between the *Parate Executie* Clause included in the bond and agreements after the debtor defaults if the debtor authorizes the creditor to sell the property without having to go through the court process (Anonymous, *Parate Executie* Clause in Mortgage Bond Versus Post-Default Authority to Sell: 175).

Parate Executie is known by the Dutch term "*Beding Van Eigenmachtige Verkoop*", which translates to "Promise to sell under one's authority". Historically, when the *Burgerlijk Wetboek* was being codified, there

were two templates for encumbered object seizures. The Dutch, as legislators, could copy from the *Code Civil Des Français* (Napoleon Code), which allows summary executions, or the German practice, which only allows executions to take place under a judge's order. Motivated by a perceived need for short executions in the interests of both creditors and debtors, Dutch lawmakers voted for the former over the latter, hoping it would spur credit creation to lower-income borrowers. For immovable property, the sale must be explicitly agreed upon (Antonius Nicholas Budi, Journal of Law and Justice: 262-263). Under Dutch law, the pawnbroker has the right of immediate execution (*Parate Executie*); i.e., if a default (*verzuim*) occurs by the debtor, the pawnbroker is authorized to sell the collateral without having to obtain enforcement rights. If an undisclosed lien has been made on a claim (*vordering op naam*) against a third-party debtor, the undisclosed lien can only be exercised after the third-party debtor is notified.

Contrary to the Netherlands, France, as a country that adheres to Civil Law, will first take preliminary actions. A pre-action letter to the defendant is usually the creditor's first step to recovering the debt. It is an informal procedure. Creditors can issue letters asking debtors to pay their debts within a predetermined period. The case is not closed if the plaintiff does not submit a pre-action letter. In practice, almost every claim is preceded by a pre-action letter. There are no sanctions under French law if the parties fail to determine the steps to settle them outside the Court. The judge can only advise the party to settle before hearing the case. If mediation is required, either by law (for claims less than EUR 5,000 or disputes related to environmental disputes) or contract, failure to mediate may result in termination of the action.

According to Article 721-3 of the Criminal Code, the Commercial Court has jurisdiction over litigation between traders (including commercial companies). Therefore, it can preside over the recovery of commercial trade debts. Otherwise, the Court competent to adjudicate accounts payable is the Court regardless of the amount owed. *Injoction de payer* (a procedure ordering the debtor to pay a specified amount of money arising from the contract) must be brought before the Chairman of the Commercial Court if it concerns a dispute between traders, including commercial corporations (Article 1406 KUHAP).

Pursuant to Articles 835 and 873 of the Criminal Procedure Code, the president of the Court of Justice or the president of the Commercial Court (for trade debts) has jurisdiction over the *provisi référé* process. In particular cases, the parties may issue a petition to the *juge de l'execution* (the judge in charge of enforcement proceedings) for an order of the Special Court to enforce the debt. *Juge de l'execution* has jurisdiction after the plaintiff gets a decree on merit and demands an additional order. In some cases, the plaintiff can immediately submit a request before the *juge de l'execution*. For instance, for the direct confiscation of goods that the debtor must deliver.

Based on Articles 1231-1 and 1231-6 of the Indonesian Civil Code, if the contract or agreement between the parties does not specify, the late payment interest will start when the creditor sends a pre-action letter. The interest rate is set by law. Article L313-2 of the French Monetary and Financial Act provides that the minister in charge of the economy determines specific late payment interest rates (Article L313-2, French Monetary and Financial Code). In 2020, the tariff was 0.87% for corporates and 3.15% for merchants. The parties in the contract or agreement can determine the interest rate for different late payments (e.g., Cass com June 11 of 1991, No 89-11727).

5. Conclusion

Collateral object executions can be conducted through three methods, i.e., *Parate Executie*, Executorial Title, and Underhand Sales. *Parate Executie* is an execution excluded from the Civil Procedure Code, in which the implementation violates the rules in the Civil Procedure Law as execution through an Executorial Title. The principle underlying *Parate Executie* is the legal protection principle for the holder of the first mortgage right. The embodiment of the legal protection principle is reflected in the *Parate Executie* implementation, i.e., the ease, speed, and affordability of obtaining creditor receivables, the sale of collateral rights objects on their authority, without prior confiscation of collateral and execution seizures and court fiat.

In contrast to the Netherlands and Indonesia, as Civil Law countries that apply *Parate Executie* in dealing with non-performing loans where the creditor can execute without the Court intervention, France, as a Common Law country, implements no sanctions under French law if the parties fail to determine the steps taken to settle it out of Court. The judge can only advise the party to settle before hearing the case. Creditors in France can take the first step by giving warning letters to defaulted debtors before the Court steps can be implemented.

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