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Implementation of Actio Pauliana in the Construction Services Contract for the Construction of the National Strategic Project Sgar Mempawah

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Abstract: The purpose of this study is to determine the implementation of actio pauliana by the parties in the event of default on the contract and what legal protection can be given to the contractor when actio pauliana executed /performed. This study is a normative-Empirical Legal Research, which combines aspects of normative jurisprudence with empirical jurisprudence. Normative aspects include the study of legislation and legal literature related to actio pauliana and construction services law. The results of the study show that the application of actio pauliana must also take into account the legal protection of third parties, especially contractors in good faith. The law recognizes that a buyer in good faith remains entitled to legal protection in order to obtain his rights to the goods he legally purchased. If the buyer is unable to obtain the goods he has purchased as a result of the cancellation of the legal act through actio pauliana, they are entitled to claim damages. It is also important to note that not all legal acts can be annulled through the actio pauliana. Legal acts committed in the interests of the company, not in personal interests, may be excluded from cancellation. This suggests that the law also takes into account the context and purpose of the legal act committed.

Keyword: Legal Protection, Creditors, Actio pauliana.

INTRODUCTION

Infrastructure development is one of Indonesia's national development priorities to encourage economic growth and equitable development. One of the national strategic projects being implemented is the construction of the Smelter Grade Alumina Refinery (SGAR) in Mempawah, West Kalimantan. This project has a very large investment value and involves many parties in its implementation, including construction service contractors.'

In this context, the construction of the Smelter Grade Alumina Refinery (SGAR) in Mempawah, West Kalimantan, is one of the national strategic projects that has received special attention. This SGAR project has high strategic value because:

Supporting the 'downstreaming' of the mining industry, especially bauxite, so as to increase the added value of domestic commodities.

2. Potentially reducing alumina import dependency and strengthening Indonesia's position in the global supply chain of the aluminium industry.
3. Can be a driver of the local and regional economy in West Kalimantan through job creation and new business opportunities.'

The investment in the SGAR Mempawah project is huge, estimated at billions of US dollars. The scale of this investment reflects the complexity and breadth of the project's scope, which includes the construction of processing plants, supporting facilities, as well as the development of related infrastructure such as ports and power grids. Given the magnitude and complexity of the project, the contractors involved are typically large companies with considerable technical and financial capabilities, often involving consortia between national and international contractors to combine expertise and resources.

As such, the SGAR Mempawah project is not just the construction of a plant, but a strategic effort to improve the competitiveness of the national industry, drive regional economic growth, and strengthen Indonesia's position in the global value chain of the aluminium industry. In the implementation of construction service contracts for large-scale projects such as SGAR Mempawah, there is a risk of default or bankruptcy on the part of the contractor which can harm the employer. One of the legal protection efforts that can be taken is through the application of the principle of *actio pauliana*. This principle allows the cancellation of the debtor's legal actions that are detrimental to the interests of creditors, including the transfer of assets, which were carried out before the bankruptcy verdict.

In this situation, *actio pauliana* can be implemented to protect the rights of creditors who are harmed by the debtor's irresponsible actions. Through this mechanism, creditors can request the court to cancel the agreement entered into by the debtor if it is proven that the action is detrimental to the interests of the creditors. The implementation of *actio pauliana* in construction service contracts is important because the construction industry often involves multiple parties and complex contracts. When one party attempts to evade obligations in an unfair manner, creditors have recourse to defend their rights through this legal avenue. '

However, the application of *actio pauliana* in construction service contracts of national strategic projects has its own complexities given the special characteristics of such projects. 'There is a potential conflict of interest between creditor protection efforts and the sustainability of projects that have strategic value for the country. On the other hand, the application of *actio pauliana* must also consider the principles of construction services law.

Therefore, an in-depth study is needed regarding the implementation of *actio pauliana* in the context of construction service contracts for national strategic projects, especially SGAR Mempawah. This study is important to provide legal certainty for the parties and ensure the continuity of the project without neglecting legal protection for creditors. This study aims to analyse the implementation of *actio pauliana* in the construction service contract of SGAR Mempawah and formulate an ideal implementation model by considering the special characteristics of national strategic projects.'

METHOD

This research uses a normative-empirical legal research method with a qualitative approach. This method was chosen to analyse the implementation of *actio pauliana* in the context of positive law as well as the practice of its application in construction service contracts, especially in the national strategic project of SGAR Mempawah. This research is a normative-empirical legal research, which combines normative juridical aspects with empirical juridical aspects. The normative aspect includes a study of legislation and legal literature related to *actio pauliana* and construction services law. While the empirical aspect includes the analysis of the application of *actio pauliana* in the practice of construction service contract of SGAR Mempawah project. The approaches used in this research include statutory approach and

conceptual approach. The data in this research are Primary Data: obtained through interviews with relevant parties, such as SGAR Mempawah project officials, construction law practitioners, and academics. And Secondary Data: includes primary legal materials (laws and regulations), secondary legal materials (books, journals, scientific articles), and tertiary legal materials (legal dictionaries, encyclopedias). The data collection techniques used include: Literature study, in-depth interview, non-participant observation. Through this research method, it is expected that a comprehensive understanding of the implementation of actio pauliana in the construction services contract of the national strategic project SGAR Mempawah can be obtained, and recommendations can be formulated to optimise its application in the future.'

RESULTS AND DISCUSSION

Implementation of Actio pauliana by Parties in the Event of Contract Default

The implementation of Actio pauliana when there is a default on the contract is a legal remedy that can be done by the creditor to protect its interests. Actio pauliana is basically the right given to the creditor to cancel the debtor's legal actions that are considered detrimental to the creditor's interests. In the context of default on contracts, Actio pauliana can be implemented by creditors if the debtor commits legal actions that result in a reduction in the debtor's assets so as to reduce the guarantee of debt repayment to creditors. Some forms of Actio pauliana implementation in this situation include:

1. Cancellation "of asset transfer, Creditors can file a lawsuit for the cancellation of the transfer of assets made by the debtor to a third party, if the transfer is considered detrimental to the creditor. For example, the debtor sells assets at a price far below market value.

2. Cancellation of grants, The granting of grants by the debtor to other parties can be cancelled through Actio pauliana if it is proven to be detrimental to the interests of creditors in debt repayment.

3. Cancellation of guarantees, the granting of guarantees by the debtor to other creditors after a default has occurred can be cancelled if it is detrimental to the original creditor.

4. Cancellation of release of rights, The release of rights to an asset or bill by the debtor may be cancelled if it is proven to be detrimental to the creditor."

In implementing Actio pauliana, the creditor must be able to prove several things:

1. The existence of legal acts of the debtor that are detrimental to the creditor

2. The act is not obliged to be performed by the debtor

3. The debtor knows or reasonably should know that the act is detrimental to the creditor

4. The third party who benefited from the debtor's action also knew or should have known about it.

The court will assess the implementation of Actio pauliana by considering several important aspects:

1. Evidence of the debtor's legal actions, the Court will examine evidence that shows the existence of the debtor's legal actions that harm the creditor, such as asset transfer documents, sale and purchase agreements, or proof of fund transfers.

2. The timing of the legal action, the legal action must be carried out within 1 year before the bankruptcy verdict is pronounced, in accordance with the provisions of Article 41 of the Bankruptcy Law.

3. The element of loss to creditors, it must be proven that the legal action results in loss to creditors, for example by reducing the bankruptcy assets that can be used for debt repayment.

4. Knowledge of the debtor and third parties, the Court will assess whether the debtor and third parties knew or should have known that the act was detrimental to creditors.

5. Good faith of the third party, If the third party can prove good faith in the acquisition of assets, then this will be taken into consideration by the court.

If the Actio pauliana lawsuit is granted by the court, then the consequences are:

1. The debtor's legal action is declared null and void.
2. Assets that have been transferred must be returned to the bankruptcy estate.
3. The return of these assets will increase the bankruptcy estate which can be used to pay off debts to creditors.
4. The third party to whom the asset is transferred must return the asset and its proceeds.
5. If the assets cannot be returned in their original form, the third party must provide compensation.
6. The return of assets or compensation will become part of the bankruptcy estate which is managed by the curator for the benefit of creditors.
7. Creditors have a greater opportunity to obtain repayment of their debts from the increased bankruptcy assets.

Thus, the successful implementation of Actio pauliana can restore the bankruptcy estate and provide protection for the interests of creditors in the bankruptcy process. The implementation of Actio pauliana in the context of bankruptcy law in Indonesia has two important aspects that need to be considered, namely time limits and protection of good faith third parties.

The time limit for the implementation of Actio pauliana is set at 5 years before the bankruptcy judgement is pronounced. The establishment of this time limit has several important objectives. Firstly, it provides legal certainty for transactions that have occurred over a long period of time. Second, it prevents the tracing of transactions too far back in time, which can lead to difficulties in proof and potential injustice. Third, it maintains a balance between the interests of creditors to obtain repayment of their debts and the public interest in maintaining the stability of economic transactions.

The calculation of this 5-year time limit is done by counting backwards from the date the bankruptcy verdict is pronounced. All legal acts performed by the debtor within this timeframe can be the object of cancellation through Actio pauliana. However, there are exceptions to this time limit. If it can be proven that the legal act was done in bad faith or there is an element of fraud, then the 5-year time limit can be ignored.

Another important aspect in the implementation of Actio pauliana is the protection of good faith third parties. Third parties are considered to be in good faith if they do not know that the legal actions they take with the debtor can harm the creditor, and the transaction is carried out at arm's length transaction. The form of protection given to good faith third parties includes respect for the rights they have obtained and exemption from the obligation to return the assets they have received.

In terms of proving good faith, the burden of proof is placed on the third party. The third party must be able to prove that it had no knowledge of the debtor's financial condition that could potentially harm the creditor. However, there are exceptions to this protection. If there is evidence of collusion between the debtor and the third party, or if the third party is someone close to the debtor, then the level of proof of good faith required will be higher.

With the time limit and the protection of good faith third parties, the implementation of Actio pauliana becomes more balanced. On the one hand, it provides legal certainty for transactions that have taken place over a long period of time. On the other hand, it still opens the opportunity to cancel transactions that harm creditors within a certain time limit. This balance is important to maintain trust in economic transactions while protecting the interests of creditors in the bankruptcy process.'

Thus, it can be concluded that the implementation of Actio pauliana is an important legal instrument in protecting the interests of creditors when there is a default on the contract. However, its application requires caution and in-depth consideration of various legal and practical aspects. The main purpose of Actio pauliana is to undo the debtor's legal actions that harm the creditor's interests. This is done by returning the assets that have been transferred into

the bankruptcy estate, so as to restore the position of the aggrieved creditor. Thus, Actio pauliana functions as a protection mechanism for creditors against debtor actions that may reduce their ability to repay debts.

In its application, Actio pauliana has conditions that must be met. Firstly, there must be a debtor's legal action that harms the creditor. Second, the act is not an obligation that must be performed by the debtor. Third, both the debtor and the third party involved know or should know that the act is detrimental to the creditor. Fourth, the act was committed within a certain period of time before the bankruptcy verdict, generally within one year.

Nonetheless, there are limitations to the application of Actio pauliana. This legal instrument cannot be used to cancel actions that the debtor is obliged to do based on an agreement or law. In addition, its application must take into account the protection of good faith third parties. There is also a time limit for filing Actio pauliana, which is generally five years prior to the bankruptcy judgement.

The procedure for filing Actio pauliana is done by the curator to the Commercial Court. In this process, the curator must be able to prove the elements of Actio pauliana as stated in the terms of its application. The court will then assess the evidence submitted to decide whether the Actio pauliana can be granted or not. If the Actio pauliana is granted by the court, there will be several legal consequences that arise. The debtor's legal actions that harm the creditor will be cancelled. Assets that have been transferred must be returned to the bankruptcy estate. In this case, third parties who previously received the transfer of assets may change their status to concurrent creditors.'

In 'applying Actio pauliana, there are several important considerations that must be considered. There must be a balance between the interests of creditors and the stability of the transaction in general. The protection of good faith third parties must also be guaranteed. In addition, the application of Actio pauliana must still maintain legal certainty for transactions that have long occurred. The main challenge in applying Actio pauliana lies in the proof process. Proving the element of 'knowing or ought to know' that an act is detrimental to the creditor is often not easy. Determining the fair value of a transaction can also be contentious. In addition, identifying an adverse transaction among other normal transactions also requires rigour and in-depth understanding.

By considering all the above aspects, the application of Actio pauliana must be done carefully and proportionally. The aim is to achieve a balance between protecting the interests of creditors and maintaining legal certainty in business transactions in general. With the right approach, Actio pauliana can be an effective legal instrument in protecting the interests of creditors without causing unnecessary shocks in the business world.

Legal Protection Efforts That Can Be Provided to Contractor Parties When Actio pauliana Is Executed / Performed

Actio pauliana is 'an important legal instrument in bankruptcy that authorises the curator to cancel the legal acts of a bankrupt debtor that are considered detrimental to the interests of creditors. Actio pauliana is a legal attempt to cancel transactions or legal acts of the debtor carried out before the declaration of bankruptcy, which are considered detrimental to the interests of creditors. The purpose of Actio pauliana is to protect the interests of creditors by recovering bankruptcy assets that are reduced due to the debtor's harmful actions.

The legal basis of Actio pauliana is basically regulated in Articles 41-49 of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. The party that can file is the Curator as the party authorised to manage and clear the bankruptcy estate. Actio pauliana can be filed against legal acts committed within 1 year before the bankruptcy declaration.

In filing, the Curator must prove the element of loss and knowledge of the debtor and third parties. If the lawsuit is granted, the legal action is declared null and void and the transferred assets must be returned to the bankruptcy estate. Good faith third parties are still protected and can file claims as concurrent creditors. It is difficult to prove the element of loss and knowledge of the debtor and third parties. Thus, *actio pauliana* is an important instrument to recover bankruptcy assets and protect the interests of creditors, but its application requires careful proof from the curator.

Legal protection can be interpreted as an effort to protect the government or authorities with a number of existing regulations. In short, legal protection is the function of the law itself; providing protection. Legal protection is an effort to protect the government or authorities with a number of existing regulations. In terminology, legal protection can be interpreted from a combination of two definitions, namely 'protection' and 'law'. KBBI defines protection as the act or thing that protects. Then, law can be defined as rules or customs that are officially considered binding, confirmed by the ruler or government.

In terms of legal protection against Contractors or Creditors in the Implementation of *Actio pauliana*, there are several things that become legal protection:

1. Filing of 'Objection or Resistance' The contractor has the right to file an objection or resistance to the *actio pauliana* lawsuit filed by the curator. In the opposition, the contractor may submit evidence and legal arguments to refute the curator's arguments.
2. Negotiation with the Curator, the contractor can negotiate with the curator to reach a win-win solution agreement. For example, by offering certain compensation so that the transaction is not cancelled completely.
3. Asset Protection, Contractors need to protect assets related to transactions that may be cancelled. For example, by segregating the assets or properly documenting their origins.
4. Get legal assistance, Get assistance from bankruptcy law experts to provide legal assistance and consultation in the face of an *actio pauliana* lawsuit.
5. Proving Economic Value, Proving that the transaction provides economic value to the bankruptcy debtor, so that it is not actually detrimental to the bankruptcy estate.
6. Filing Legal Remedies, If the *actio pauliana* lawsuit is granted, the contractor can still file legal remedies such as cassation or judicial review

To 'minimise the negative impact of *actio pauliana* and protect its legal interests, SGAR MEMPAWAH's contractors need to apply some legal safeguards. The key in this case is the proof of good faith and the economic value of the transaction. Proving good faith is an important aspect that contractors must consider. It includes several elements:

Honesty' in dealings, without any element of deception or concealment of information. The contractor must be able to demonstrate that all relevant information has been disclosed openly.

2. Ignorance of defects in the transfer of rights acquired. The contractor needs to prove that it was not aware of any legal issues related to the assets being transacted.
3. Care and prudence in conducting the transaction, including checking the legal status of the assets being transacted. The contractor must demonstrate that adequate due diligence has been conducted.
4. Compliance with legal procedures and documents in accordance with laws and regulations. The entire transaction process must be able to be proven to have followed the applicable legal provisions.

In addition, proving the economic value of the transaction is also a crucial factor. The contractor needs to show that:

1. Transactions are conducted at prevailing market prices. This can be proven through independent valuation or market comparison data.

2. There are reasonable commercial considerations in determining the price and terms of the transaction. The contractor must be able to explain the basis of the business considerations used.

3. The transaction provides economic benefits to the bankruptcy debtor, not disadvantages. It needs to be proven that the transaction is profitable for both parties.

4. Use of a recognised valuation method to determine the fair value of the transaction. The valuation method used must be professionally accountable.

By proving these two aspects, the contractor can strengthen its position that the transaction was carried out in the normal course of business and at arm's length, without any indication of collusion or conspiracy to harm creditors. The contractor can also show that it did not know or should not have known that the transaction could harm creditors.

This proof is crucial because *actio pauliana* can only be enforced if it is proven that there is an element of detriment to creditors and the knowledge of the transacting party. The law tends to protect parties who transact in good faith and provide reasonable economic value, even in the context of insolvency. Courts also generally provide protection to third parties who deal in good faith.

By applying these measures and being able to conclusively prove the good faith and economic value of the transaction, the SGAR MEMPAWAH contractor can minimise the risk of cancellation of the transaction through *actio pauliana*. This will help better protect the contractor's legal interests in the face of a potential *actio pauliana* lawsuit.

CONCLUSION

The application of *actio pauliana* must also consider legal protection for third parties, especially good faith contractors. The law recognises that good faith purchasers are still entitled to legal protection to obtain their rights to the goods they have legally purchased. If buyers are unable to obtain the goods they purchased as a result of the cancellation of a legal action through *actio pauliana*, they are entitled to claim damages. It is also important to note that not all legal acts can be cancelled through *actio pauliana*. Legal acts performed for the benefit of the company, rather than for personal gain, may be exempted from cancellation. This shows that the law also considers the context and purpose of the legal acts performed.

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