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Legal Protection for Third Parties in Good Faith on *Actio Pauliana* Litigation in Bankruptcy Proceedings

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Abstract
Actio Pauliana in bankruptcy, as stipulated under Law Number 37 of 2004, empowers the Curator to seek the annulment of transactions undertaken by the bankrupt debtor, causing harm to the bankrupt estate. *Actio Pauliana* requires proof that a third party, the debtor's transaction partner is proven to not have acted in good faith, as outlined in the law. However, the legislation lacks clarity on the criteria safeguarding third parties in good faith against *Actio Pauliana* claims. This research employs a doctrinal research method involving a statute, conceptual, case, and comparative approach. The novelty of this research expounds upon and elucidates the need for amendments to Law Number 37 of 2004, particularly concerning the criteria protecting third parties in good faith. These criteria could be differentiated based on the third parties' position in bankruptcy and the nature of the objects constituting the bankrupt estate, including tangible and intangible movable objects, unregistered objects, immovable objects, and/or registered objects. Furthermore, proposed improvements to the law include refining provisions related to creditors' right to file *Actio Pauliana* lawsuits, affirming a one-year period rather than a deadline, and addressing timelines within *Actio Pauliana* lawsuits. *Actio Pauliana* claims should only be submitted after the debtor's bankruptcy declaration, excluding the Suspension of Debt Payment Obligations (PKPU) process. In conclusion, the research proposes possible solutions, such as the issuance of a Regulation (Perma) or a Circular Letter (SEMA) by the Supreme Court, containing the essential improvements to Law Number 37 of 2004.
Keywords: *Actio Pauliana*; Insolvency; Cancellation Claims; Good Faith Buyers.

Introduction

Bankruptcy shall be defined as the act of seizure of a bankrupt debtor's assets carried out by a curator under the supervision of a supervising judge, in the

interest of its creditors.[1] As stipulated in Article 21 of Law Number 37 of 2004 regarding Bankruptcy and Suspension of Debt Payment Obligations (hereinafter referred to as "**Bankruptcy Law**"), bankruptcy covers all the debtor's assets at the time of declaring bankruptcy, including those acquired during the process. This seizure applies not only to assets factually owned by the debtor at the time of the bankruptcy declaration but also to assets acquired before and after the declaration, regulated in Article 25 of the Bankruptcy Law. It extends to assets transferred to third parties before the declaration, provided they meet specific criteria detailed in the Bankruptcy Law. To avoid this, bankrupt debtors sometimes take steps to protect their assets from becoming part of the estate managed by the curator. These actions can involve transferring ownership to third parties through various means, such as gifts, sales, or other transfers, even if these assets should rightfully be part of the bankrupt estate upon the debtor's declaration of bankruptcy by the Commercial Court. Consequently, this diminishes the estate's value, impacting creditors by reducing available funds for repayment.[2]

The bankrupt estate, also known as the bankrupt assets or *boedel pailit*, comprises the debtor's wealth declared bankrupt by a competent commercial court's decision, managed and controlled by a curator.[3] To safeguard the bankrupt estate and the interests of creditors, Article 41 of the Bankruptcy Law regulates an *actio pauliana* in bankruptcy, enabling the curator to file actions to annul any actions by the bankrupt debtor that harm the estate and/or creditors' interests.[4] The prerequisites for filing an actio pauliana involve legal actions by the bankrupt debtor that detrimentally affect creditors' interests before the declaration of bankruptcy. It requires the demonstration of the debtor's awareness, or should-have-known

[1] I Dewa Agung Deandra Juniarta, 'Kewenangan Penagdilan Niaga Indonesia Dalam Eksekusi Aset Debitor Pailit Yang Berada Di Luar Negeri' (2019) 7 Kertha Semaya.[5].

[2] Pane,[et.,al.], *Kepailitan Dan Transfer Aset Secara Melawan Hukum* (Pusat Pengkajian Hukum 2004).[160].

[3] Bendesa Gede Mas Indriyanigraha Arjaya, [*et.,al.*], 'Penetapan Boedel Pailit Dan Pengeluaran Benda Dari Boedel Pailit (Analisis Yuridis Terhadap Putusan Nomor: 5/Pdt.Sus. Gugatan Lain-Lain/2017/PN.Niaga.Sby Jo. No. 2/Pdt.Sus.Pailit/2017/PN.Niaga.Sby)' (2014) 2 Kertha Semaya.[6].

[4] Sutan Remy Syahdeini, *Hukum Kepeilitan* (Grafiti 2022).[362].

stance, about the potential harm caused to the creditors during the actions, along with proving that the involved parties were aware or should have been aware of the resulting harm to the creditor. Additionally, the act in question should not be mandated by any agreements or laws.

The concept of *actio pauliana* within bankruptcy proceedings was exemplified in the case of Turman M. Panggabean and others (Curator Team of PT Metro Batavia) against Yudiawan Tansari and others.[5] The situation arose when the debtor, facing bankruptcy, transferred assets to a third party that fell within the scope of the bankrupt estate. As a response, the curator took legal action by filing a lawsuit in the Commercial Court seeking to nullify this transaction. The curator alleged that the bankrupt individual's actions were driven by bad faith or unlawful conduct, causing detriment to the creditors' interests. However, the Commercial Court in Central Jakarta, in its Decision Number 01/Pdt.Sus-Actio Pauliana/2014/PN.Niaga.Jkt Pst, rejected the curator's claim pertaining to *actio pauliana*. Their decision rested on the premise that the third party involved in the asset transfer was entirely unaware that their actions could have adverse effects on the creditors. According to the provisions outlined in Article 49(3) of the Bankruptcy Law, the panel of judges determined that the third party, functioning as the purchaser of the assets from the bankrupt estate, had acted in good faith. Consequently, the court deemed them deserving of legal protection since they were oblivious to the potential harm their actions could cause to the creditors and did not gain anything from their actions. This legal interpretation underscored the significance of the third party's lack of knowledge about the ramifications of their involvement in the transaction. The ruling emphasized the crucial element of good faith and lack of compensation received by the third party as pivotal factors in determining their legal protection under bankruptcy laws.

[5] Turman M. Panggabean, dkk (Tim Kurator PT Metro Batavia) melawan Yudiawan Tansari, dkk, 'Putusan Pailit Pengadilan Niaga pada Pengadilan Negeri Jakarta Pusat Nomor 77/ Pdt.Sus-Pailit/2012/PN.Niaga Jkt Pst; Putusan Actio Pauliana Pengadilan Niaga pada Pengadilan Negeri Jakarta Pusat Nomor 01/Pdt.Sus-Actio Pauliana/2014/PN.Niaga Jkt Pst, 11 Agustus 2014; Mahkamah Agung Republik Indonesia Nomor 388 K/Pdt.Sus/Pailit/2014; Mahkamah Agung Republik Indonesia Nomor 84 PK/Pdt.Sus-Pailit/2015'.

In another scenario, the legal dispute between Balai Harta Peninggalan Semarang and Wijiati and others[6] centered around an attempt to invalidate a sales agreement made by the bankrupt debtor regarding a property within the bankrupt estate, sold at a price below its market value. The Curator instigated this legal action against Soeharsono, the bankrupt debtor. However, the Commercial Court at the District Court of Semarang, in its Decision Number 01/AP/2007/PN.Niaga.Smg dated May 21, 2007, dismissed the claim. The court's rationale was rooted in Article 41 of Bankruptcy Law, stating that the sale between the Bankrupt Debtor and the First Defendant couldn't be voided as it transpired prior to the Bankrupt Debtor's official declaration of bankruptcy. Additionally, the Plaintiff failed to substantiate that both the Bankrupt Debtor and the First Defendant, as well as the Second and Third Defendants, were aware or ought to have been aware that the sale would be detrimental to the creditors.

These judgments illustrate the ambiguity in determining whether an *actio pauliana* claim can be granted, especially in establishing the good faith of a third party acquiring or controlling the bankrupt estate (*boedel pailit)* from the bankrupt debtor. Even when it is proven that the bankrupt debtor's actions caused creditor harm by reducing the bankrupt estate's value, court decisions can differ. Some judgments grant *actio pauliana* claims by the curator despite no evidence of bad faith from the third party, while others deny such claims, despite indications of the bankrupt debtor's bad faith in transferring assets that would become part of the bankrupt estate. This discrepancy highlights a legal void in defining the criteria for a third party as acting in good faith under Article 49(3) of the Bankruptcy Law. Thus, in determining the good faith of a third party and their legal protection, the Judges should examine each case individually, considering the third party's role in the transactions executed by the debtor in transferring ownership or control of their assets, potentially avoiding inconsistent judicial decisions.

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[6] Balai Harta Peninggalan Semarang melawan Wijiati dan kawan-kawan, 'Putusan Pengadilan Niaga pada Pengadilan Negeri Semarang Nomor 01/AP/2007/PN.Niaga.Smg tertanggal 21 Mei 2007; Putusan Mahkamah Agung pada tingkat Kasasi Nomor 017 K/N/2007 tanggal 27 Juli 2007; Putusan Mahkamah Agung pada tingkat Peninjauan Kembali Nomor 018 PK/Pdt.Sus/2007'. accessed on 08 January 2008.

The role of third parties in bankruptcy varies depending on the types of legal acts the debtor can undertake regarding their assets. Generally, Books I to IV of Indonesian Civil Code (hereinafter referred to as "**ICC**") or *Burgerlijke Wetboek* governs good faith in several provisions. For instance, Book II BW specifically addresses good faith and its relation to possession in some of its articles. Book III BW, Article 1341 BW, addresses third parties acting in good faith in an *actio pauliana* claim generally. Furthermore, concerning civil cases involving land rights transactions, the Supreme Court through Circular Letter of the Supreme Court Number 4 of 2016 regarding the Enforcement of the Results of the Supreme Court's Plenary Meeting in 2016 as Guidelines for the Implementation of Court Duties (hereinafter referred to as "**SEMA No. 4/2016**") has provided regulations, albeit limited, about the criteria for a *bona fide* purchaser concerning land rights transactions. However, in the bankruptcy process, the role of third parties extends beyond being buyers of bankrupt estates; they can also be recipients of gifts, pledges, lessees, service users, new creditors, and more. Similarly, bankrupt estates encompass not only land rights but movable tangible, movable intangible, immovable, registered, and unregistered property, each having distinct characteristics that cannot be equated. Hence, determining the good faith of a third party should be separately considered based on the third party's position and the nature of the bankrupt estate property involved in the transaction between the third party and the bankrupt debtor, an area not specifically addressed in the Bankruptcy Law.

This legal gap contradicts one of the purposes of the Bankruptcy Law, which aims to protect creditors' interests. From an economic standpoint, providing legal protection to bona fide third parties would enhance both local and foreign confidence in investing in Indonesia, potentially increasing investor interest.[7] This research aims to further elaborate on the criteria defining a third party in bankruptcy as acting in good faith, deserving legal protection, without disregarding the primary

[7] Syahdeini (n 4).[37].

goal of the Bankruptcy Law, which is to protect creditors from bankrupt debtors. Based on this, the primary legal issue explored in this study revolves around the *ratio legis* of *actio pauliana* in bankruptcy cases and the *ratio decidendi* of *actio pauliana* in judicial practice. Additionally, it delves into formulating legal protection for *bona fide* third parties in *actio pauliana* claims within bankruptcy cases. This research aims to bridge the gap between legal protection for creditors and ensuring fair treatment for *bona fide* third parties in bankruptcy proceedings and endeavors to provide insights and potential recommendations for developing a more robust legal framework that balances creditor protection with the fair treatment of third parties, ultimately fostering a more transparent and investor-friendly business landscape in Indonesia.

Characteristics of *Actio Pauliana* Within and Beyond the Context of Bankruptcy Law

Based on etymological standpoint, *actio pauliana* originates from the Roman language, where "action" means "action" or "act." Meanwhile, "pauliana" signifies "not required and harming creditors." In some literature, it is mentioned that the term "pauliana" is derived from the name of a Roman legal expert named "Paulus," who is considered the creator of *actio pauliana*.[8] In Black's Law Dictionary, *actio pauliana* is essentially being defined as an action to rescind a transaction (such as alienation of property) that an insolvent debtor made to deceive the debtor's creditors; this action was brought against the debtor or the third party who benefited from the transactions.[9]

The existence of the *actio pauliana* is a consequence of the principle of *paritas creditorium*, as regulated in Article 1131 of the Indonesian Civil Code (hereinafter referred to as "**ICC**"), where essentially, a debtor's control over their assets is restricted when they have outstanding debts to creditors. The presence of the *actio pauliana* fundamentally represents an exception to the application of the privity of

[8] *ibid*.;Amir Ilyas and Muhammad Nursal , *Kumpulan Asas-Asas Hukum* (2019).[20].
[9] Henry Campbell, 'Black's Law Dictionary, St. Paul Minn' [1990] West Publishing Co.[35].

contract principle, also known as the personality principle.[10] Based on the privity of contract principle, as articulated in Article 1315 in conjunction with Article 1340 of the ICC, a third party can only benefit from an agreement if there is a promise made specifically for that third party. However, with the provision of *actio pauliana*, the law grants a right to a creditor to seek the annulment of any unnecessary actions taken by their debtor that are detrimental to the creditor.[11]

Upon further examination of *actio pauliana* in Bankruptcy Law, the enforcement of this legal action is implicitly governed by Articles 41 to 47 of the Bankruptcy Law. Based on the explanations of several bankruptcy law experts,[12] it can be understood that there are at least 2 (two) conditions that must be met for the debtor's actions to be categorized as *pauliana* acts, namely: 1) the existence of a legal act, and 2) the legal act in question is detrimental to the creditors. The actions of a debtor typically falling under the scope of *actio pauliana* in bankruptcy comprise offering collateral to a creditor improperly, settling debts prematurely, selling goods to creditors and then offsetting the proceeds, or satisfying debts—regardless of their maturity—via non-monetary means, such as payment in a non-cash manner, for example, by paying with a specific item.

Additionally, for an *actio pauliana* application to be granted, it must meet the condition that the legal act causes detrimental effect to the creditor. This type of action include selling assets below their market value, gratuitously transferring assets to others, undertaking activities that increase obligations or encumbrances on the bankrupt estate, such as a subsidiary assuming liability for debts incurred by the parent company, or conducting transactions that may result in losses for certain creditors, such as making preferential debt payments or providing guarantees solely to specific creditors.[13]

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[10] M Muhtarom, 'Asas-Asas Hukum Perjanjian: Suatu Landasan Dalam Pembuatan Kontrak' (2014) 26 May; SUHUF.[48-56].

[11] Subekti, *Hukum Perjanjian* (Intermasa 2014).[84].

[12] Yahya Harahap, *Hukum Acara Perdata, Tentang Gugatan, Persidangan, Penyitaan, Pembuktian Dan Putusan Pengadilan* (Sinar Grafika 2005).[46].; Fred BG Tumbuan, *Penyelesaian Utang Piutang Melalui Pailit Atau Penundaan Kewajiban Pembayaran PKPU* (Alumni 2000).[36].

[13] Tumbuan (n 12).

Moreover, for an action taken by the debtor to be annulled through *actio pauliana*, the act must meet the requirement that it is "known" or "should be known" by both the debtor and the third party that the act is detrimental to the creditor. In this case, the burden of proof will depend on the time lapse between the bankruptcy declaration and the commission of the act, determining the evidentiary system applicable to an *actio pauliana*[14] application as stipulated in Article 42 of Bankruptcy Law. The concept of burden of proof or *onus probandi actori incumbit* determines which party bears the responsibility to substantiate a claim presented in legal proceedings.[15] Conversely, the standard of proof delineates the amount of evidence required to validate either a specific point or the entirety of a party's argument. In legal proceedings, the burden of proof typically rests on the party making an assertion, whether it's the claimant or the respondent. This burden usually requires evidence to be presented on a balance of probabilities, and failure to do so can lead to the dismissal of the claim. While the legal burden remains constant and never shifts, the evidential burden may change depending on the available evidence. Although the burden of proof often falls on the claimant as the party asserting the claim, it may also shift to the respondent if they raise affirmative defenses or counterclaims. Once evidence is presented, the burden may shift back and forth between parties as they rebut each other's claims.[16]

In an *actio pauliana* claim, there are two mechanisms applicable to the burden of proof. If the bankrupt debtor's action happens within a year before declaring bankruptcy and the curator sees it as harmful to the creditors' interests, both the debtor and the third party involved must prove that the action was necessary for them and didn't harm the bankrupt estate. However, if the action occurs within a

[14] Gavrilla Theodora, 'Upaya Hukum Kreditor Terkait Aset Yang Dialihkan Setelah Putusan Pencabutan Putusan Pernyataan Pailit' (2019) 2 Jurist-Diction.[1267].

[15] Eddy O. Hiariej, *Teori Dan Hukum Pembuktian* (Erlangga 2012).[43].

[16] Sarah Joseph, *'Civil and Political Rights' in The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, United Kingdom: OUP 2013). [166-214].;Chittharajan F Amerasinghe, *The Principle Actori Incumbit Onus Probandi. Evidence in International Litigation* (Brill Nijhoff 2005).[61-95].

year before the bankruptcy declaration is issued, a reversed burden of proof system might apply, but only in certain situations or for specific actions.[17]

In practice, there is often confusion about the one-year time limit mentioned in both Article 42 and Article 44 of the Bankruptcy Law, which is commonly interpreted as the timeframe for taking actions by the bankrupt debtor that can be canceled through *actio pauliana*. However, it's important to clarify that this time limit is actually meant to determine the burden of proof for applying *actio pauliana*. Under the law, the Bankruptcy Law does not stipulate a timeframe (expiration) for filing an *actio pauliana* application,[18] unlike the general provisions in ICC, which establish a five-year limitation period from the point when it's known that the debtor's actions harm the creditors, as stated in Article 1454 of the ICC.

In this context, if we draw parallels with the standard regulations for *actio pauliana* as stated in Article 1341 of the ICC, the timeframe for filing an *actio pauliana* application in bankruptcy should similarly be restricted to five years before the declaration of bankruptcy. Conversely, in comparison with the broader statute of limitations for legal actions, set at 30 years by Article 1967 of the ICC, Bankruptcy Law as *lex specialist* should clearly address the statute of limitations for *actio pauliana* applications in accordance with the distinctive nature of bankruptcy proceedings.

Actio Pauliana in Bankruptcy as Protection for Creditors in Various Countries

In European countries, the Recast Regulation signifies cooperation among European Union (hereinafter referred to as "**EU**") member State regarding bankruptcy procedures, especially for cross-border cases. This regulation applies to bankruptcy proceedings initiated after June 26, 2017 and may extend to include bankruptcy processes from outside the EU under certain conditions. However, it does not cover banks, credit institutions, insurance companies, investment firms, or

[17] Munir Fuady, *Hukum Pailit Dalam Teori Dan Praktik* (Citra Aditya Bakti 2005).[94-96].

[18] Alfatra Panatagama, 'Actio Pauliana Dalam Kepailitan Yang Melebihi Jangka Waktu Satu Tahun' (2020) 3 Jurist-Diction.[1249].

collective investment schemes.[19] The Recast Regulation establishes a standardized legal framework, combined with mandatory jurisdiction rules, with the goal of providing greater clarity to those involved with a debtor whose primary center of interests lies within the EU. This framework helps in identifying the specific legal provisions that will govern their rights in case of the debtor's insolvency. Generally, the law governing the insolvency proceedings and its outcomes is that of the member State where the proceedings are initiated. Therefore, unless secondary or territorial proceedings are also initiated, the law of the primary proceedings is expected to prevail.

According to this regulation, the primary jurisdiction for bankruptcy proceedings is the court of the member State where the debtor's main center of interest is located. For companies with multiple branches, their registered office serves as their primary center, unless proven otherwise, and cannot be relocated within three months before filing for bankruptcy.[20] The Recast Regulation allows courts in other member states to open "territorial" bankruptcy proceedings if the debtor has a presence there. These proceedings are subject to the laws of the respective member State. However, they are limited to the assets of the debtor within that territory and do not extend beyond it. The regulation also aims to prevent "synthetic secondary proceedings", where officials from the main bankruptcy proceedings make promises to creditors in another jurisdiction to avoid formal secondary bankruptcy proceedings.[21]

Emphasizing pre-bankruptcy and debtor rescue, the Recast Regulation aims to enhance the efficiency of cross-border bankruptcy proceedings and provide debtors with a second chance. It also regulates the standards and format of claims against the debtor.[22] Disputes arising from the implementation of the Recast

[19] Clifford Chance Global Restructuring and Insolvency Group, 'A Guide to Restructuring and Insolvency Procedures in Europe' <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/07/a-guide-to-restructuring-and-insolvency-procedures-in-europe.pdf> accessed 12 December 2022.

[20] *ibid*.[18].

[21] *ibid.*

[22] *ibid.*

Regulation among member States are resolved by the Court of Justice of the European Union.[23] This includes matters concerning *actio pauliana* in bankruptcy within the territorial scope of each EU member State. The bankruptcy laws of each EU member State with a territorial nature, especially concerning *actio pauliana* in bankruptcy.

In comparison with Indonesia, other countries have also adopted the concept of *actio pauliana* in bankruptcy. For instance, Belgian Bankruptcy Law also regulates the cancellation of transactions or legal acts carried out by or with the bankrupt debtor during the six-month period before bankruptcy (pre-bankruptcy) under the term "voidable preference rules." The actions and payments falling under voidable preference are detailed, including: 1) Disposal of assets without consideration or at a significantly low value; 2) Payments made for obligations not yet due and payable; 3) Payments in the form of goods, unless such payments are an agreed-upon method from the financial collateral arrangement; 4) All transactions with counterparts knowledgeable about the debtor's bankruptcy; and 5) New guarantees provided for pre-existing debts.[24]

Another example is the bankruptcy laws of the United Kingdom that embodied in the Insolvency Act 1986 and the Insolvency Rules 2016, emphasizing the rescue and restructuring of debtor businesses. In English Bankruptcy Law, detailed provisions have been made regarding forms of transactions that can be subject to avoidance, including: 1) Low-value transactions, with one such transaction recognized in the Court of Appeal's decision in Hill v. Spread Trustee Company Limited (2006) EWCA 542, where the debtor provides security to one of its creditors, even when such security does not deplete the debtor's assets, it can be subject to avoidance on the grounds of being a low-value transaction; 2) Preferential transactions favoring one creditor;[25] 3) Transactions defrauding creditors; 4) Transactions to avoid floating charges; and 5) Excessive credit transactions.

[23] *ibid.*[19].
[24] *ibid.*[24].
[25] *ibid.*

In French Bankruptcy Law, the provisions for *actio pauliana* or clawback state that in the context of the rehabilitation or liquidation process, the court establishes the date when the debtor is declared bankrupt, marking the beginning of the "hardening period," which can be set at any time within eighteen months before the commencement of the proceedings. Specific transactions carried out by the debtor during the hardening period are automatically annulled by the court.[26]

The Dutch Bankruptcy Act (*Faillissementswet*) governs three processes: bankruptcy, suspension of payments (*surseance van betaling*), and debt restructuring for individuals (*schuldsaneringsregeling natuurlijke personen*). The Dutch Bankruptcy Law contains numerous provisions regarding creditor protection, including *actio pauliana* to annul transactions conducted to the detriment of one or more creditors.[27] Dutch Law acknowledges the so-called *actio pauliana* both inside (invoke by trustee) and outside (invoked by individual creditors) bankruptcy settings. According to Dutch Bankruptcy Law, an act performed by a debtor can be declared legally void even if the debtor is not obliged to perform it, and even if the debtor knew or should have known that the act would harm its creditors.[28] In Dutch Bankruptcy Law, if certain conditions are met, the trustee or any creditor, whether inside or outside bankruptcy, has the right to annul transactions conducted by the bankrupt debtor with third parties based on Article 42 of The Dutch Bankruptcy Act, which deals with preference transactions (*actio pauliana*).[29] As a consequence of such annulment, the recipient can be directed to an alternative course regarding the relevant assets, as if the annulled transaction did not occur, up to the amount equivalent to the actual loss suffered by a creditor.

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[26] *ibid.*[32].

[27] Faillisement A. M. J. van Buchem Spapens and Th. A. Pouw, *Surseance van Berating En Schuldsanering* (Kluwer, Deventer 2004).[41-49].

[28] MAAK Advocaten N.V., 'Creditor Protection Under Dutch Law' <https://www.maak-law.com/creditor-protection-under-dutch-law/> accessed 26 December 2022.

[29] Clifford Chance Global Restructuring and Insolvency Group (n 19).[129],; Wolfgang Faber, *National Reports on the Transfer of Movables in Europe* (Volume 6:, Sellier European Law Publishers GmbH 2011).[88].

This sanction differs from that in Belgium. In Dutch Law, paulianic legal acts are avoidable, while in Belgian Law they are non-invokable against the estate of the bankrupt. As far as can be seen, this difference is not very important: in either case it is (in the Netherlands *de iure*, in Belgium *de facto*) up to the trustee to decide whether to take the paulianic nature of the legal act into account, or to let matters rest.

In German Bankruptcy Law, *actio pauliana*, also known as clawback (*Anfechtungserklärung*), is recognized, where the bankruptcy administrator (or known as the curator in Indonesia) can declare null and void any transaction conducted by the debtor if the transaction is deemed to prejudice other bankruptcy creditors. Any assets seized from the debtor, including inherited assets through a voidable transaction, must be returned to the bankruptcy estate.[30]

Actio Pauliana, or more commonly known as fraudulent transfer law in the United States, which over time, it evolved into the Uniform Fraudulent Conveyance Act, the Bankruptcy Act of 1975, and the Uniform Fraudulent Transfer Act,[31] where the United States prohibited the transfer of wealth by a debtor with the intent to hinder, delay, or defraud creditors.[32] Therefore, in the United States, fraudulent transfer laws were established with the aim of preventing debtors from manipulating their assets by making transfers before declaring bankruptcy, thereby reducing or depleting the debtor's wealth that should be used to satisfy obligations to creditors. In other words, the purpose of fraudulent transfer laws is to prevent debtors from concealing or selling their assets to deceive their creditors.[33]

In its development, the Bankruptcy Code expands the scope of fraudulent transfers to include constructively fraudulent transfers or constructive fraud.

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[30] Wolfgang Faber (n 29).[88].

[31] Douglas G Baird and Thomas H. Jackson, 'Fraudulent Conveyance Law and Its Proper Domain", 1985; 38 Vand. L. Rev. p. 829; Rosenberg, "Intercorporate Guaranties and the Law of Fraudulent Conveyances: Lender Beware", 125 U. Pa. L. Rev. 235, 1976, [241]; Acles and Dorr, "*A Critical Analysis of the New Uniform Fraudelent Transfer Act*", *1985 U. III.L. Rev. 527*, 1985, p. 256; and Cook and Medales, "*Unform Fraudelent Transfer Act: An Introductory Critique*", *62 Am. Bankr. L. J. 87*, 1988'.[565].

[32] Daniel V. Davidson,[*et.,al.*] *Comprehensive Business Law Principles and Cases* (Kent Publishing Company 1987).[674].

[33] John D Donell,[, *Law of Business* (Richard D Irwin, Icn, Illinois 1983).[47].

Constructive fraud is deemed to occur when a debtor sells its assets at a low price, and as a result of such a sale, the debtor becomes bankrupt. Additionally, if the debtor was already bankrupt when the unreasonable and illogical sale of assets occurred, that sale is also considered a form of constructively fraudulent transfer or constructive fraud.[34] Meanwhile, the scope of debtor actions falling under fraudulent transfers has also evolved to include actual fraud. Actual fraud is considered to occur when the debtor intends to hinder or delay the payment of its debts to creditors. If the debtor engages in such actions, these can be nullified.

Nonetheless, a drawback of the Bankruptcy Code and other applicable laws in the United States is the lack of clarity on whether a creditor receiving services from the debtor, performed without diminishing or harming its assets, is obligated to return the value of the services received. In the United States, over time, the limitations of fraudulent transfer law became less clear when a debtor, facing a halt in debt payments, did not transfer its assets but rather transferred services. This ambiguity arises from the fact that the regulation of fraudulent transfers only addresses the transfer of assets, excluding the transfer of services. Consequently, the liability defined is limited to the transfer of assets and does not encompass the transfer of services.[35]

However, in practice, this deficiency has been addressed through court decisions and practices. Bankruptcy Courts categorize services as assets, thereby including them in the scope of fraudulent transfer law. Consequently, creditors have the authority to claim the value of these services from third parties who received the service transfer. The determination of whether services can be considered assets under fraudulent transfer law is exclusively within the court's discretion, using one of the purposes of fraudulent transfer law—which is maximizing debtor assets to fulfill obligations to creditors.[36]

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[34] McCoid, 'Constructively Fraudulent Conveyances: Transfer for Inadequate Consideration' (1983) 62 Tex. L. Rev.[647-648].

[35] Oksana Lashko, 'Enhancing Creditor Recovery, Should Services Be Deemed "Property" for the Purpose of Fraudulent Transfer Law?' (2006) 72 Brook. L. Rev.[318-391].

[36] *ibid.*[319].

The considerations of the Bankruptcy Court in expanding the scope of assets to include services in the application of fraudulent transfer law have effectively set aside the traditional definition of services that should not fall within the ambit of assets. The Bankruptcy Court's considerations are grounded in the "underlying chattel" theory, asserting that services are not inherently assets unless they "culminate in transferable property." In other words, if the execution of a service transfer that diminishes or harms the debtor's assets results in the transfer of the debtor's assets to the recipient, it is deemed a form of property transfer. *A contrario*, if the service transfer does not deplete or harm the debtor's assets but is deemed beneficial to the debtor's assets, creditors cannot regard such services as a transfer of the debtor's assets under the fraudulent transfer regime.[37] For example, in the Dawson v. Myers case,[38] which concerns the provision of healthcare services that do not comply with the standards set by regulations. Consequently, the rendering of these services imposes an obligation on the debtor to provide compensation, burdening the debtor's assets. The Bankruptcy Court deemed that the provision of these services constituted a fraudulent transfer and, as such, could be voided.[39]

Challenges in Implementing *Actio Pauliana* in Bankruptcy in the Practice of Judicial Institutions in Indonesia

In practice, despite the normative regulations concerning *actio pauliana*, both within and outside of bankruptcy contexts, initiating an *actio pauliana* lawsuit and obtaining judicial approval is a complex process. This difficulty primarily stems from the challenge of proving *actio pauliana* itself and the legal protections provided to third parties engaging in transactions with the bankrupt debtor. According to Andriani Nurdin, a former Commercial Judge at the Commercial Court of the Central Jakarta District Court, data from 1998 to 2004 revealed only six recorded

[37] *ibid.*

[38] *Dawson v Myers, 622 F 2d 1404, 9th Cir 1980*.

[39] Michael Bagge, '"Planned Poverty's Pitfalls and Pratfalls-Ain't We Got Fun?" 69-Aug N.Y. St. B.J.26, July-August 1997'.[27].

actio pauliana lawsuits at the Central Jakarta Commercial Court. Unfortunately, all of these cases were rejected by the Commercial Court at both the trial and appellate levels, as well as during the review process.[40] This occurs due to differences in perception among commercial judges on whether the actions or transactions undertaken by the debtor constitute fraud, thereby causing harm to the creditors and consequently allowing for a request for cancellation or *actio pauliana*.[41] The challenge is not limited to *actio pauliana* applications within bankruptcy; it extends to lawsuits outside of bankruptcy as well. Throughout its history, *actio pauliana* lawsuits have rarely been successful, only one *actio pauliana* lawsuit outside of bankruptcy was successfully granted. This case occurred in the Bandung District Court, where the debtor sold assets to their brother but retained ownership without transferring the title, while continuing to pay property taxes. This scenario clearly exposed the debtor's fraudulent attempt to conceal assets from creditors.[42]

Considering this, to make a successful claim using *actio pauliana* in bankruptcy cases, certain conditions must be met. First, before declaring bankruptcy, the debtor must have engaged in a legal action, such as making a contract or transferring property, which was not obligatory. During this action, the debtor should have been aware that it would harm the creditor's interests. Additionally, the other party involved in the legal action should also have known or reasonably should have known about the potential harm to the creditor. However, proving these conditions can be quite challenging, especially demonstrating that both the debtor and the other party were aware or should have been aware of the harm to the creditor. This complexity makes proving *actio pauliana* applications no longer a straightforward matter.[43]

Such difficulty differs from the simpler nature of evidence in bankruptcy cases,[44] another obstacle in filing *actio pauliana* applications in bankruptcy

[40] Pane (n 2).[261].
[41] *ibid.*
[42] *ibid.*[97-98].
[43] Kartini Muljadi and Gunawan Widjaja, *Seri Hukum Perikatan (Perikatan Pada Umumnya)* (Raja Grafindo Persada 2003).[304].
[44] Siti Anisah, *Perlindungan Kepentingan Kreditor Dan Debitor Dalam Hukum Kepailitan Di Indonesia* (Total Media 2008).[225]

arises due to the curator's difficulty in accessing documents held by the debtor. Typically, after the bankruptcy declaration, the debtor will transfer their movable assets, including bank accounts, to avoid the curator's asset liquidation. The same applies to the debtor's assets in the form of legal entities, where ownership under personal names is retained by shareholders, and specific agreements with other parties are backdated.[45]

For instance, in the Ibist case, where all company documents were taken away by Wandi Sofian, the curator could not ascertain the extent of Ibist's wealth. On the other hand, some of Ibist's assets had been seized by the Bandung District Court with Decree Number 36/Pen.Pid/2007/PN.Bdg dated January 5, 2007, for evidentiary purposes in a criminal case. In the Ibist case, the estimation of the bankruptcy estate's value was too low, and there were attempts by the debtor to evade obligations. Additionally, in this case, debtors commonly take actions with the intention of harming creditors' interests before the bankruptcy declaration. One such action involves splitting "inter-company loan" bills using the cession provisions as regulated in Article 613 of the ICC. If cession has been executed, the debtor's legal representatives tend to overly protect the debtor and its assets. Another common tactic employed by debtors is approaching specific creditors with certain compensations, such as partial payments or transferring debts or claims to affiliated companies, aiming to gain support in creditors' meetings or voting sessions.[46]

Moreover, debtors commonly request creditors, shareholders, or their affiliates to purchase creditor claims through a special purpose vehicle at a specific price. By this way, the shareholders or affiliates of the debtor become new creditors who will participate in creditors' meetings. Typically, these methods are applied to claims arising from negotiable instruments that will not be recorded in the debtor's accounting, complicating the formation of a creditors' committee. Even if a creditors' committee is formed, it may not function effectively since the committee members are creditors affiliated with the debtor. Such tactics are challenging for curators

[45] *ibid*.
[46] *ibid.*

to detect, and if discovered, curators may be reluctant to file an *actio pauliana* application, despite the legal basis provided by Bankruptcy Law for curators to apply *actio pauliana*. This is due to the high difficulty in proving the debtor's malicious intent behind actions that result in losses to its creditors.[47]

Furthermore, the difficulty in detecting the presence of the debtor's assets also arises due to the lack of participation and technical cooperation from other authorities, including the Directorate General of Taxation, the Directorate General of State Receivables and Auctions, the police, the prosecutor's office, and the banking sector. For instance, curators may face obstacles in accessing the debtor's accounts in banks, citing bank secrecy regulations, leading to ineffective collaboration in the bankruptcy proceedings with the banking institutions regarding the freezing of the debtor's accounts. Similarly, the provision regarding the ten-year expiration period for tax claims can pose challenges for curators, as they must wait until this expiration period concludes before distributing the proceeds of the asset liquidation to concurrent creditors.[48]

In addition, Bankruptcy Law only grants the sole authority to file an *actio pauliana* application to the curator as the representative of the bankrupt debtor. Creditors, on the other hand, only have the right to contest the acceptance of a claim. The interests of creditors in filing an *actio pauliana* application are represented by the curator due to the curator's role in protecting and managing the bankrupt estate for the benefit of all parties involved, including both creditors and the bankrupt debtor. Therefore, if a creditor wishes to seek the annulment of a debtor's act, the creditor can request the curator to file an *actio pauliana* application. However, it is not impossible for the curator to reject the creditor's request to file an *actio pauliana* application. In such a situation, the creditor can independently file an *actio pauliana* lawsuit within the framework of "other lawsuits" as regulated in Article 3(1) of Bankruptcy Law based on the provisions of Article 1341 of the ICC. Nevertheless, this legal framework raises questions

[47] *ibid.*
[48] *ibid.*

about whether *actio pauliana* in bankruptcy truly safeguards creditors' interests from the "fraudulent" actions of the debtor.

Furthermore, in its development, there is an intersection between protecting the interests of creditors and safeguarding third parties with good intentions, due to the provision of Article 49 paragraph Article 3 of Bankruptcy Law, which states that the rights of third parties over assets as acquired in good faith and not gratuitously, must be protected. However, there is still no detailed regulation regarding the criteria for determining third parties with good intentions that deserve protection, especially when related to the absence of legal provisions regarding the expiration period for filing *actio pauliana* applications in bankruptcy. Therefore, to truly provide legal protection for creditors, clear criteria for determining third parties with good intentions deserving protection should be explicitly established.

Establishing Legal Protection for Third Parties in Good Faith on *Actio Pauliana* Litigation in Bankruptcy Proceedings

Before delving into the criteria defining buyers of bankrupt estates as *bona fide* third parties, it is essential to grasp the concept of "acting in good faith" and the role of third parties acting in good faith in general civil law regime. In Indonesia, the ICC lacks explicit provisions defining "good faith" and detailing its elements, rather Article 1965 of the Civil Code, in fact, regulates that 'good faith must always be assumed, and whoever brings a claim based on bad faith must prove it', emphasizing more on proving bad faith' rather than proving 'good faith', which is burdened on the party alleging bad faith. Article 1965 of the ICC primarily addresses proving the existence of "bad faith" rather than "good faith".

Besides Indonesia, the principle of good faith is a universal principle, recognized and applied in various countries with both civil law and common law systems. Common law countries such as the United States, Australia, New Zealand, and Canada have also embraced the doctrine of good faith in their contract law. For example, in the United States, under The American Uniform Commercial Code, it is stated that 'every contract or duty within this Act imposes an obligation of good

faith in its performance or enforcement', which can be freely interpreted as every contract or obligation within this law imposes a duty of good faith in its execution or enforcement. Similarly, the Restatement of Contracts (Second) also states that 'every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement'.[49] Additionally, in international trade, the principle of good faith is also included in the United Nations Convention on Contracts for the International Sale of Goods 1980,[50] where Article 7 of this Convention includes an obligation to interpret the provisions of the convention based on international character and uniform compliance with good faith in international trade.

The Position of Buyers of Bankruptcy Estates as Third Parties in Bankruptcy Proceedings

In the context of Bankruptcy Law, the law clearly recognizes the involvement of buyers of bankruptcy estates as third parties whose interests must be protected. This is specifically regulated in certain articles, for instance in Article 49 (3) of Bankruptcy Law stipulates that the rights of third parties over assets acquired in good faith and not gratuitously must be protected. Additionally, there are other provisions in Bankruptcy Law concerning the protection of third parties. However, Article 1 of Bankruptcy Law, pertaining to definitions, does not provide clarification and definition regarding who can be categorized as "third parties" in the bankruptcy process.

With respect to *actio pauliana* lawsuit, the term "third party" refers to the party with whom the bankrupt debtor engages in a legal action or transaction. For example, if the debtor sells their asset to a third party, then the third party referred to is the buyer of the bankrupt debtor's property; if the debtor donates their asset, then the third party referred to is the recipient of the donation; if the debtor mortgages their asset, then the third party is the party receiving the debtor's property and binding it as collateral (mortgagee); and so forth, in accordance with the actions or

[49] Michael Furmston, *Law of Contract* (Oxford University Press, United States of America).[33].
[50] 'UN Doc. A/CONF/97/19, 1489 UNTS 3, 11 April 1980'.

legal transactions performed by the debtor.[51] Thus, it can be understood that buyers of goods that are part of the bankrupt estate can also be considered as third parties in an *actio pauliana* lawsuit, as they are positioned as third parties who possess the debtor's assets due to the debtor's actions before the bankruptcy declaration judgment is rendered.

Criteria for Buyers of Bankruptcy Estates as Good-Faith Third Parties

The protection for good-faith third parties in *actio pauliana* claims will not be automatically granted and certain requirements must be met. Bankruptcy Law lays out these conditions in several articles to ensure that third parties are safeguarded during suspension of debt payment obligations (hereinafter referred to as "**PKPU**") and bankruptcy process, including in the following provisions:

1. Article 52 (1) of Bankruptcy Law regulates the requirement of good faith for third parties who have taken over a debt or receivable from another third party, before the bankruptcy declaration judgment is pronounced, at the time of taking over the debt or receivable, so that the debt reconciliation application submitted by that party can be granted;
2. Article 53 of Bankruptcy Law regulates the requirement of good faith for third parties who have a debt to the Bankrupt Debtor and intend to offset their debt with a receivable by assignment or a substitute receivable, where such good faith can be observed and proven from the position of the third party who has become the owner of the assigned receivable or substitute receivable at the time the bankruptcy declaration judgment is pronounced;
3. Article 124 (4) of Bankruptcy Law regulates the requirement of good faith expressed in the form of an oath from a third party as a substitute for the rights of the deceased original creditor, stating that they believe in good faith that the debt exists and has not been settled; and
4. Article 248 of Bankruptcy Law regulates the requirement of good faith for third parties who have taken over a debt or receivable from another third party on behalf of the debtor, before the PKPU which intends to submit a debt reconciliation, where debts or receivables taken after the commencement of the PKPU are considered as taking over debts or receivables without good faith and therefore cannot be reconciled.

Furthermore, regarding the legal protection for good-faith third parties concerning the *actio pauliana* institution in bankruptcy, it is specifically regulated in Article

[51] *ibid*.

49 (3) of Bankruptcy Law which states that, 'the rights of third parties over assets as referred to in paragraph (1) obtained in good faith and not gratuitously, must be protected'. The elucidation part also confirms that 'the term "good faith and not gratuitous" also includes holders of security rights over such assets." Referring to this provision, it can be understood that lawmakers provide an exception to the applicability of *actio pauliana* to good-faith third parties, and if the transaction or legal action undertaken by the debtor with the third party does not involve gratuitous transactions.

Therefore, it can be understood that third parties are only protected from *actio pauliana* lawsuits if they meet the following conditions: 1) acting in good faith, and 2) engaging in transactions or legal actions that are not gratuitous or obligatory, whether they are reciprocal or unilateral. In this scenario, a buyer of bankruptcy estate assets, acting as a third party in an *actio pauliana* lawsuit, who acquires the debtor's assets through a reciprocal contract such as a purchase agreement, meets the second condition, as the legal action taken is not gratuitous or obligatory. However, there are currently no specific criteria outlined for buyers of bankruptcy estates in their capacity as good-faith third parties as intended in Article 49 (3) of Bankruptcy Law. Therefore, further clarification is needed regarding the criteria for buyers of bankruptcy estates in their capacity as good-faith third parties as mentioned in Article 49 (3) of Bankruptcy Law.

***Ratio Decidendi* of Judicial Decisions Regarding Buyers of Bankruptcy Estates as Good-Faith Third Parties in Indonesia**

The Indonesian judiciary has on several occasions received and adjudicated *actio pauliana* cases within bankruptcy proceedings. However, the legal considerations of the panel of judges in assessing the good faith of third parties are very limited; in fact, often the panel of judges does not conduct a thorough assessment regarding the existence of good faith on the part of third parties. Generally, the panel of judges instead base their legal considerations on the one-

year time frame for filing *actio pauliana* claims should not serve as a deadline for filing *actio pauliana* claims, but rather to determine the burden of proof of the *actio pauliana* claim submitted. One such instance is seen in the case involving the Curator Team of PT Dimas Utama (in bankruptcy) against PT Dimas Utama and others,[52] wherein the dispute between the parties concerns PT Dimas Utama releasing the rights to a 2012 Black Metallic Toyota Innova car to Ade Kusuma based on a Release of Rights letter dated February 27, 2017, while PT Dimas Utama was declared bankrupt on October 23, 2017.

In its legal considerations, the commercial court at the Central Jakarta District Court considers that in the instant case, the commercial court judges erred in interpreting the one-year time limit as stipulated in Article 42 and Article 44 of Bankruptcy Law, which should not have been construed as the deadline for filing an *actio pauliana* lawsuit against actions of a bankrupt debtor to be annulled, but rather that period is intended to determine the burden of proof for an *actio pauliana* application. Additionally, the ruling indicates and emphasizes that considerations regarding the "good faith of third parties" including *bona fide* purchasers, are not included in the crucial considerations in determining whether a transaction or legal action carried out by the bankrupt debtor should be annulled or not, due to the fact that the requirement of good faith from the third party is not stated as one of the conditions for the acceptance of an *actio pauliana* lawsuit. In these legal considerations, the commercial court put greater emphasizes on the fulfillment of the formal requirements of *actio pauliana* as regulated in Article 41 and Article 42 of Bankruptcy Law, without considering whether the buyer is acting in good faith.

The erroneous consideration regarding the 1 (one) year provision in Articles 42 and 44 of Bankruptcy Law is also apparent in the case involving Roosmarty Fattah, S.H., the curator of PT Mitra Satya Wiguna, against PT Utomodeck and

[52] Tim Kurator PT Dimas Utama (dalam pailit) melawan PT Dimas Utama (dalam pailit) dan kawan-kawan, Putusan Pengadilan Niaga pada Pengadilan Negeri Jakarta Pusat Nomor 25/Pdt.Sus. GGL-Actio Pauliana/2018/PN.Niaga.Jkt.Pst dated November 21, 2018.

others.[53] In this case, the Panel of Judges instead used the one-year time limit as stipulated in Articles 42 and 44 of Bankruptcy Law as a benchmark for determining whether the debtor's actions constituted wrongful acts, rather than to determine the burden of proof in the *actio pauliana* lawsuit. This further emphasizes the judge's misinterpretation of the one-year time limit provision as stipulated in Articles 42 and 44 of Bankruptcy Law. Additionally, in adjudicating the case, the panel of judges also failed to consider whether there was good faith on the part of the party receiving the transfer of property rights from the debtor.

Based on the considerations of the commercial court in the aforementioned rulings, it is evident that in practice, many commercial court judges do not fully comprehend the provisions of Bankruptcy Law, particularly concerning the *actio pauliana* institution, leading to various interpretations that differ from one verdict to another, thus deviating from the spirit of Bankruptcy Law itself. Furthermore, commercial judges tend to be reluctant in considering whether third parties receiving the transfer of property rights over bankrupt estates have acted in good faith, given the lack of rigid rules defining the limitations and criteria for third parties (buyers) acting in good faith and deserving protection of their ownership rights over property as stipulated in Article 49 (3) of Bankruptcy Law. Therefore, to provide a comprehensive understanding of the *actio pauliana* institution in bankruptcy and its protection for *bona fide* buyers, it is necessary to establish legal regulations that can serve as guidelines for judges in handling and adjudicating *actio pauliana* cases in bankruptcy proceedings.

Legal Protection for Buyers of Bankruptcy Estate as Third Parties Acting in Good Faith in *Actio Pauliana* Lawsuits in Bankruptcy

In relation to the *actio pauliana* lawsuit as described above, it can be understood that the criteria for buyers of bankruptcy estates acting in good faith

[53] Roosmarty Fattah, S.H., Kurator PT Mitra Satya Wiguna melawan PT Utomodeck dan kawan-kawan, Putusan Pengadilan Niaga pada Pengadilan Negeri Surabaya Nomor 2/Pdt.Sus-Actio Pauliana/2019/PN.Niaga.Sby dated October 08, 2019.

can be differentiated based on the bankruptcy estate that is the subject of the sale, whether it is tangible movable property, intangible movable property, unregistered property, immovable property, and/or registered property. Such regulations cannot yet be found in Indonesian legislation, therefore, these provisions need to be incorporated into the amendment of Bankruptcy Law. Additionally, amendments to Bankruptcy Law are necessary, including:

1. Granting rights to creditors to independently file *actio pauliana* lawsuits if the creditor's request to file an *actio pauliana* lawsuit is not fulfilled by the curator;
2. Clarification that the 1 (one) year period in Article 42 or Article 44 of Bankruptcy Law is not intended as the deadline for filing *actio pauliana* lawsuits against actions of bankrupt debtors intended to be annulled, but rather, this period is intended to determine the burden of proof from the *actio pauliana* petition; and
3. Clarification of the statute of limitations for *actio pauliana* lawsuits against actions of debtors intended to be annulled, Article 1454 of the ICC, the statute of limitations for filing *actio pauliana* lawsuits is within 5 (five) years from the date it is known that the debtor's action is detrimental to creditors.

Furthermore, cooperation is needed between various agencies including the Directorate General of Taxes, the Directorate General of Receivables and State Auctions, the police, the prosecution, and the banking sector to facilitate the process of tracing and detecting the existence of debtor assets so that the bankruptcy process can proceed smoothly.

In addition to that, before the refinement regulations regarding Bankruptcy Law have not been enacted, to fill the legal vacuum, the Supreme Court may first issue a Supreme Court Regulation or at least a Circular Letter of the Supreme Court containing the substance. This is considering, judicially, that the Supreme Court has the authority and function to regulate based on the provisions of Article 79 of Law Number 14 of 1985, as amended by Law Number 3 of 2009. The regulations established by the Supreme Court are considered as part of statutory regulations and hold binding power. Supreme Court Regulations containing procedural content are binding for all law enforcement agencies and individuals seeking justice who are

involved in ongoing court proceedings. On the other hand, Supreme Court Regulations that focus on organizational matters only apply to court personnel as they pertain to internal regulations.[54] This is reaffirmed in Article 8 (1) of Law Number 12 of 2011 regarding Establishment of Legislations, amended by Law Number 15 of 2019. Therefore, it is expected that in the future, with the improvement of Bankruptcy Law or temporary Supreme Court Regulations, comprehensive guidelines regarding the criteria for *bona fide* purchasers of bankrupt estates deserving protection in *actio pauliana* lawsuits, along with other necessary adjustments mentioned earlier can guarantee fairness and legal certainty for those in pursuit of it.

The comparison reveals a diverse landscape of actio pauliana provisions in bankruptcy laws across several countries, including those within the European Union (EU), such as Belgium, France, the Netherlands, and Germany, as well as jurisdictions like the United Kingdom and the United States. In the EU, the Recast Regulation fosters cooperation among member states in cross-border bankruptcy cases, emphasizing standardized procedures and the protection of creditor rights. Belgium's laws outline voidable preference rules to cancel transactions before bankruptcy, while France establishes a "hardening period" for automatic annulment of certain debtor transactions. The Netherlands empowers trustees and creditors to annul detrimental transactions, both within and outside bankruptcy settings, aiming to protect creditor interests. In Germany, the bankruptcy administrator can nullify transactions prejudicial to creditors, ensuring the return of seized assets to the bankruptcy estate. Meanwhile, the United Kingdom focuses on rescuing debtor businesses, identifying various transactions subject to avoidance. In the United States, fraudulent transfer laws prevent asset manipulation before bankruptcy, encompassing both fraudulent and constructive transfers, including services. While each jurisdiction varies in its approach, the overarching objective remains consistent: to safeguard creditor interests and uphold fairness in bankruptcy proceedings.

[54] HM Syarifuddin, *Small Claim Court Dalam Sistem Peradilan Perdata Di Indonesia, Konsep Norma Dan Penerapannya Berdasarkan Perma 2/2015 & Perma 4/2019* (Imaji Cipta Karya 2020).[38].

Conclusion

The *actio pauliana* mechanism in Indonesian bankruptcy law serves to safeguard the bankruptcy estate and protect creditors' interests from debtors' detrimental actions. These actions can be annulled if they meet specific conditions outlined in Bankruptcy Law, such as the debtor's legal act causing prejudice to creditors, occurring before the bankruptcy declaration, and lacking good faith on the part of third-party buyers. However, the law lacks clear criteria for defining good-faith third parties, leading to judicial inconsistencies. Proposed improvements include granting creditors the right to file *actio pauliana* lawsuits independently, clarifying the one-year time limit's purpose, and establishing a statute of limitations. Additionally, interagency cooperation is essential for efficient asset tracing, and until legislative amendments occur, the Supreme Court should issue regulations to mitigate legal uncertainties. In addition to that, by draw an inspiration from several countries, including those in the EU, Belgium, France, the Netherlands, Germany, the United Kingdom, and the United States, sheds light on the application of actio pauliana, or clawback provisions, in bankruptcy laws. While each jurisdiction has its unique approach, such as the Recast Regulation in the EU fostering cooperation and standardization, Belgium's voidable preference rules, or the United States' focus on preventing asset manipulation, the overarching aim remains consistent: to protect creditor interests and ensure fairness in bankruptcy proceedings.

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