DISCREPANCIES IN THE APPLICATION OF BANKRUPTCY LAW IN AUCTION PRACTICES BY SECURED CREDITORS: LESSONS FROM DECISION No. 15/2023/PN.Niaga.Smg

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Abstract

The execution of collateral by secured creditors is a special right regulated under Article 59 paragraph (1) UU 37/2004, which stipulates that execution may only be carried out no later than two months after the insolvency period begins. However, violations of this provision frequently occur, creating legal uncertainty for bankrupt debtors. This study aims to analyze the judicial considerations in Commercial Court Decision No. 15/Pdt.Sus-Gugatan Lain-lain/2023/PN.Niaga.Smg concerning the determination of the insolvency period and the execution of collateral by secured creditors. Using a normative juridical approach, this research emphasizes secondary data obtained through literature study, analyzed qualitatively. The results show that executions conducted after the insolvency period violate Article 59 paragraph (1) and may constitute an unlawful act. Bankrupt debtors have the right to pursue further legal remedies such as cassation and judicial review. Strengthening regulations and technical guidelines is needed to enhance legal certainty and protection in bankruptcy practice.

Keywords: *Bankruptcy, Collateral Execution, Insolvency Period.*

I. INTRODUCTION

Auction is one of the key instruments in the execution of bankruptcy estate settlements as regulated under Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations ("Law 37/2004"). In the context of bankruptcy, an auction serves as an open and competitive mechanism of sale, conducted under the supervision of authorized institutions, with the primary purpose of selling the assets of a debtor who has been declared bankrupt in order to settle debts owed to creditors. The presence of the auction mechanism in bankruptcy proceedings plays a crucial role as a form of general attachment over the debtor's estate and is inseparable from the fundamental aim of bankruptcy law, namely, to ensure a fair and equitable distribution of assets among creditors in light of the debtor's insolvency. [1]This highlights the

[1] M. Hadi Subhan, *Hukum Kepailitan : Prinsip, Norma, dan Praktik di Pengadilan*, Jakarta: Kencana, 2008.

intrinsic connection between auction mechanisms and bankruptcy procedures.

The Indonesian bankruptcy legal framework grants secured creditors a privileged position in executing their collateral over the assets of a bankrupt estate. Secured creditors are those who hold proprietary security rights, such as mortgage, fiduciary transfer, hypothec, or pledge, granted by the debtor to secure the repayment of a debt. This right is regulated under Article 55 paragraph (1) of Law 37/2004, which affirms that secured creditors are entitled to execute their security as if the bankruptcy had not occurred. In other words, secured creditors may independently sell the secured assets and retain the proceeds, separate from the general pool of bankruptcy assets.[2]

However, despite the recognition of these rights, Article 59 paragraph (1) of Law 37/2004 stipulates that such rights must be exercised within a maximum period of two months from the commencement of the state of insolvency. If the secured creditor fails to execute their rights within this two-month period, the right is forfeited, and the authority to sell the collateral is transferred to the bankruptcy trustee, who will proceed with the sale and include the proceeds in the general distribution of the bankrupt estate. This provision illustrates that the initiation and time limitation of execution are essential aspects of bankruptcy law, as they are directly linked to ensuring legal certainty for all interested parties.

Problems arise when the application of Article 59 paragraph (1) of Law Number 37 of 2004 is confronted with differing interpretations by the panel of judges at the Commercial Court. In the Decision of the Semarang Commercial Court Number 15/Pdt.Sus-Gugatan-Lain lain/2023/PN.Niaga.Smg, the panel of judges interpreted that the insolvency period did not commence upon the rejection of the debtor's composition plan in the Suspension of Debt Payment Obligations proceedings—which, by operation of law, resulted in the debtor being declared bankrupt—but rather from the point at which the debtor conducted claim verification following the re-submission of a composition plan during the bankruptcy process.

This interpretation contradicts the principle of a single composition plan adopted in the Indonesian bankruptcy system, as stipulated in Article 289 in conjunction with Article 292 of Law Number 37 of 2004. According to these provisions, if a composition plan submitted during the Suspension of Debt Payment Obligations proceedings is rejected by the creditors and the court declares the debtor bankrupt, the debtor may no longer submit a new composition plan. The rejection of the plan signifies the commencement of the insolvency period,

[2] Munir Fuady, *Hukum Pailit dalam Teori dan Praktek*. Bandung: Citra Aditya Bakti, 2005.

which marks the debtor's financial inability to satisfy all of their obligations and serves as the legal foundation for the trustee to begin the process of asset liquidation. Accordingly, the timeline for the secured creditor's right to execute their collateral should be calculated from the rejection of the initial composition plan.

However, in the a quo decision, the panel of judges instead allowed the debtor to resubmit a new composition plan during the bankruptcy stage, and held that the insolvency period would only be considered to have commenced after the claim verification process in the bankruptcy proceedings was completed, even though similar verification had already taken place during the earlier Suspension of Debt Payment Obligations proceedings. This interpretation creates serious consequences for secured creditors, as it shifts the deadline for collateral execution from the date of the bankruptcy declaration to a later administrative stage. As a result, auctions conducted by secured creditors more than two months after the bankruptcy declaration were still deemed valid, because the insolvency period was considered not to have begun.

Previous studies have discussed the mechanism of composition plans within both the Suspension of Debt Payment Obligations process and bankruptcy proceedings, including issues related to the determination of the insolvency period. One relevant study was conducted by Beresman J. Siagian, who in his academic work analyzed the implications for legal certainty arising from inconsistent application of Article 292 of Law Number 37 of 2004 concerning the determination of the insolvency period after a debtor was declared bankrupt following the Suspension of Debt Payment Obligations process. His research also addressed the legal protection granted to creditors in the context of such inconsistencies and examined the application of the law through a case study of Supreme Court Decision Number 667 K/Pdt.Sus-Pailit/2021 in conjunction with Decision Number 29/Pdt.Sus-PKPU/2020/PN.Niaga.Jkt.Pst. The findings of the study emphasized the legal uncertainty that emerges from different interpretations regarding the starting point of the insolvency period and how this affects creditors in exercising their rights.

Nevertheless, up to the present time, there has been no article that specifically analyzes the inconsistency in determining the insolvency period in court practice in relation to the execution rights of secured creditors. This is especially relevant regarding the actual implementation of Article 59 paragraph 1 of Law Number 37 of 2004. In addition, this article will examine in detail the available legal remedies for bankrupt debtors against auction actions conducted after the insolvency period has ended. This is an area that has not been widely addressed in previous legal literature. Therefore, the purpose of this article is to evaluate and ensure consistency between the legal norms and their application in practice.

Based on the background described above, the main issues to be addressed in this article are as follows:

1. How did the Panel of Judges in the Commercial Court Decision of Semarang No. 15/Pdt.Sus-Gugatan Lain-lain/2023/PN.Niaga.Smg consider the determination of the insolvency period in relation to the time limit for the execution of security rights by secured creditors under the provisions of the Law on Bankruptcy and Suspension of Debt Payment Obligations?
2. What legal remedies are available to the bankrupt debtor against an auction carried out by a secured creditor after the end of the insolvency period in the Commercial Court Decision of Semarang No. 15/Pdt.Sus-GugatanLain-lain/2023/PN.Niaga.Smg, according to the Law on Bankruptcy and Suspension of Debt Payment Obligations?

II. RESEARCH METHODS

This research employs a normative juridical method, focusing on the analysis of written legal norms relevant to resolving the legal issues raised. The normative juridical approach is chosen because the main problem in this study concerns how the law ought to be applied in concrete situations, in accordance with prevailing principles and legal norms. This research relies on secondary data obtained through library research, which includes primary, secondary, and tertiary legal materials. Primary legal materials consist of relevant legislation, particularly Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, as well as court decisions that form the object of the study. Secondary legal materials include legal literature, scholarly journals, articles, and previous academic works that discuss similar issues, while tertiary legal materials serve as supporting references to clarify legal definitions and terminology. This research is descriptive-analytical in nature, presenting a systematic explanation of the legal problems under study in order to obtain a comprehensive understanding of the validity and implementation of legal norms in practice. In analyzing the issues, this study uses a statutory approach and a conceptual approach. The statutory approach is used to examine and interpret the normative provisions in Law Number 37 of 2004 that are directly related to the rights of secured creditors and the time limit for executing collateral during the insolvency period. Meanwhile, the conceptual approach is employed to understand legal principles such as the principle of a single composition and the concept of insolvency. All data are analyzed using a qualitative juridical analysis method by correlating legal facts found in court decisions with the applicable legal provisions.

III. RESEARCH RESULTS AND DISCUSSION

3.1 Judicial Considerations on Insolvency Period and Collateral Execution in Decision No. 15/2023/PN.Niaga.Smg

Asset liquidation in bankruptcy proceedings becomes a critical phase, particularly in relation to the precise determination of when the state of insolvency begins. The term "insolvency" appears in the elucidation of Article 57 of Law Number 37 of 2004, which explains that insolvency refers to the condition of being unable to pay debts. A debtor is considered insolvent when they are unable to repay debts owed to all creditors, not merely a single creditor.[3]

This issue is significant because the right of execution by secured creditors is limited by Law Number 37 of 2004. In principle, secured creditors are granted the right to execute their collateral as if bankruptcy had not occurred, as stipulated in Article 55 paragraph (1) of the law. However, this right is not absolute and is subject to the limitation provided under Article 59 paragraph (1), which states: “Subject to the provisions of Articles 56, 57, and 58, creditors holding security rights as referred to in Article 55 paragraph (1) must exercise such rights no later than two months after the commencement of the insolvency period as referred to in Article 178 paragraph (1).”

If a secured creditor fails to exercise their right within two months after the commencement of the insolvency period, the curator has the authority to request the surrender of the collateral for sale according to the procedures outlined in Article 185, without prejudice to the secured creditor’s right to the proceeds from such sale.

The determination of the beginning of the insolvency period is regulated in Article 178 paragraph (1) of the same law, which provides that insolvency is deemed to commence if no composition plan is proposed during the verification meeting, the proposed plan is rejected, or the ratification of the plan is denied through a decision that has obtained legal force. Therefore, the determination of the starting point of the insolvency period is of utmost importance because it marks the beginning of the two-month period in which secured creditors must execute their rights.

In the Decision of the Commercial Court of Semarang No. 15/Pdt.Sus-GugatanLain-lain/2023/PN Niaga Smg, rendered on August 14, 2023, a legal issue arose concerning the determination of the commencement of the state of insolvency, which impacted the execution rights of the secured creditor. In the decision, after the debtor was declared bankrupt on January 16, 2023, CV Sumber Baru was by law deemed to be in a state of insolvency as regulated under Article 178

[3] Sutan Remy, *Hukum Kepailitan Memahami Undang-undang No. 37 Tahun 2004 tentang Kepailitan*, Jakarta: Pustaka Utama Grafiti, 2008.

paragraph (1) of Law No. 37 of 2004. As the peace plan deliberation and voting meeting had been held on January 12, 2023, and the majority of creditors rejected the plan proposed by CV Sumber Baru, this fulfilled one of the conditions for the commencement of the state of insolvency, namely the rejection of the debtor's peace plan. The decision that declared the debtor bankrupt due to the failure of the Suspension of Debt Payment Obligations process automatically placed the debtor in a state of insolvency. The secured creditor then had two months to execute their security. If the execution was not carried out within that period, the bankruptcy receiver must request the surrender of the secured asset for subsequent sale by the receiver.[4]

However, on February 21, 2023, another meeting was held for claim verification, tax verification, and voting on a new peace proposal submitted during the bankruptcy proceedings. The result of this meeting was again the rejection of the debtor's proposal by the majority of creditors. This contradicts the provisions of Article 289 in conjunction with Article 292 of Law No. 37 of 2004, which state that once a peace proposal is rejected by creditors or its ratification is denied by the Commercial Court, the debtor may no longer submit another peace proposal. Therefore, the debtor's bankruptcy estate should, by operation of law, be considered to be in a state of insolvency, triggering the secured creditors' right to execute within a maximum period of two (2) months from the commencement of insolvency, as stipulated in Article 59 paragraph (1) of Law No. 37 of 2004.

The judges in this case overlooked the legal effect of the insolvency declaration, thereby reopening the opportunity to submit and vote on a second peace proposal in the bankruptcy process. This created ambiguity regarding the commencement date of the debtor's insolvency. The judge appeared to ignore the principle of a single peace proposal under Law No. 37 of 2004, as regulated in Article 289 in conjunction with Article 292, which obliges the Supervisory Judge to immediately notify the Court of the rejection of the peace plan by submitting a copy of the peace plan and the meeting minutes.[5] This clearly affirms that a second submission of a peace plan is impermissible.

Supreme Court Circular Letter No. 5 of 2021 (SEMA 5/2021) on the Enforcement of the Formulation of the 2021 Supreme Court Plenary Chamber Meeting as a Guideline for Judicial Duties also reaffirms that a debtor who is declared bankrupt because a peace plan was rejected by creditors under Article 289 of Law

[4] Daniel Marihot, *Wewenang Kreditor Separatis Dalam Mengeksekusi Jaminan Saat Insolvensi Akibat Gagalnya Penundaan Kewajiban Pembayaran Utang (PKPU)*, Jurist Diction, Vol. 5, No. 3 (2022): 2167, https://e-journal.unair.ac.id/JD/article/view/40076

[5] Beresman J. Siagian, *Kepastian Hukum terhadap Penerapan Pasal 292 Undang-Undang Nomor 37 Tahun 2004 Tentang Kepailitan dan Penundaan Kewajiban Pembayaran Utang Terkait Penetapan Keadaan Insolvensi (Studi Kasus Putusan Nomor 667 K/Pdt.Sus-Pailit/2021 Jo. Nomor 29/Pdt-SUS-PKPU/2020/PN.Niaga.Jkt.Pst Jo. Nomor 29/ Pdt.Sus-PKPU/2020/PN.Niaga.Jkt.Pst.)*, Jakarta: UGM, 2022.

No. 37 of 2004 may not re-submit a peace proposal. The purpose of this SEMA is to provide clarity and legal interpretive guidance to prevent judicial errors that could lead to legal uncertainty.[6] The reasoning of the Court in this case reflects a gap between *das sollen* and *das sein*. Although Articles 289 and 292 of Law No. 37 of 2004 as well as SEMA 5/2021 clearly prohibit the re-submission of a peace plan by a debtor declared bankrupt due to the rejection of a peace proposal, the judges nevertheless allowed the debtor to submit a second plan. This reflects an inconsistency between the legal norms that should apply and what actually occurred in court, resulting in legal uncertainty for parties involved in the bankruptcy process.

Articles 178 and 292 of Law No. 37 of 2004 must be consistently applied by the panel of judges in their decision-making to uphold legal certainty in the execution of debt payments by debtors. Legal certainty is a form of protection for justice seekers against arbitrary actions and ensures that individuals can obtain what they are entitled to under specific legal conditions.[7]

The judge's considerations in the decision created uncertainty, particularly for the secured creditor holding execution rights. PT BCA, as the secured creditor, should have been able to execute the collateral object as of January 16, 2023, the date when CV Sumber Baru's peace proposal was rejected, as outlined in the Semarang District Commercial Court Decision No. 21/Pdt.Sus-PKPU/2022/PN.Niaga.Smg dated January 16, 2023. The two-month execution period should have ended on March 16, 2023. However, based on Letter No. W12.U1/991/HK.03/3/2023 dated March 6, 2023 regarding the Insolvency Certificate for Case No. 21/Pdt.Sus-PKPU/2022/PN.Niaga.Smg, the court determined that the insolvency period began on February 21, 2023, the date of the second rejection of a peace plan by CV Sumber Baru.

This uncertainty resulted in prejudice against the secured creditor in this case. PT BCA maintained that its execution rights remained valid, whereas the receiver argued that such rights had expired following the lapse of the two-month period after the peace plan was rejected and the debtor declared bankrupt. This difference in interpretation led to a new dispute between the receiver and the secured creditor, as evidenced by the receiver's lawsuit seeking to annul the auction. Meanwhile, the auction of the secured asset was carried out by State Assets Management and Auction Office and was won by Ong, Rudy Agus Wijaya, and

[6] Raihan Andhika Santoso et al., *Kedudukan dan Kekuatan Hukum Surat Edaran Mahkamah Agung (SEMA) dalam Hukum Positif Indonesia*, Jurnal Publikasi Ilmu Hukum, Vol. 1, No. 4 (2023): 14, https://ifrelresearch.org/index.php/Deposisi-widyakarya/article/view/1392

[7] Fikri Fadhil Ramadhani et. al., *Kepastian Hukum atas Proses Kepailitan dalam Gugatan Actio Pauliana Perkara Kepailitan*, Jurnal Tana Mana, Vol. 4, No. 3 (2023): 253, https://ojs.staialfurqan.ac.id/jtm/article/download/399/324/

PT BCA. This situation further exacerbates the legal uncertainty faced by all parties involved, including the debtor, the secured creditor, and the State Assets Management and Auction Office.

There are also other implications arising from the uncertainty in the judges' reasoning, particularly losses to concurrent creditors. In this case, the concurrent creditors of CV Sumber Baru faced uncertainty regarding repayment of their claims. Under Articles 1131 and 1132 of the Indonesian Civil Code, concurrent creditors are entitled to repayment from the debtor's unencumbered assets based on principles of proportional and equitable distribution. Upon the debtor's insolvency, the receiver should have been able to immediately proceed with the inventory, collection, management, and settlement of the bankruptcy estate to repay the debtor's debts, as stipulated in Article 69 of Law No. 37 of 2004. However, due to the uncertainty over the effective commencement of insolvency in this case, the receiver was unable to proceed with settlement due to a lack of clarity regarding the determination of the bankruptcy estate, which forms the basis for calculating and distributing repayments to creditors. Consequently, payments to concurrent creditors were delayed and became uncertain.

From the debtor's perspective, this uncertainty also negatively impacted efforts to resolve outstanding debts. Under bankruptcy law, the debt settlement process through asset liquidation is intended to provide certainty for debtors regarding the extent of obligations that can be repaid from the proceeds of the bankruptcy estate. With the delay in the liquidation process due to the unclear insolvency period, the debtor is placed in a legally uncertain position regarding payments to creditors. Moreover, the value of the estate risks depreciating over time, maintenance costs may increase, and the potential for new disputes regarding asset management may arise. All these issues prolong the bankruptcy process and increase the financial and administrative burden on the debtor. This contradicts the objectives of the Bankruptcy and Suspension of Debt Payment Obligations Law, which aims to ensure that bankruptcy and Suspension of Debt Payment Obligations cases are resolved more efficiently, fairly, and transparently.[8]

The improper determination of the insolvency commencement date in the Decision of the Semarang Commercial Court No. 15/Pdt.Sus-Gugatan Lain-lain/2023/PN. Niaga. Smg. hinders the effectiveness of the legal certainty principle in bankruptcy law. The judge's deviation from applicable

[8] Devi Andani & Wiwin Budi Pratiwi, *Prinsip Pembuktian Sederhana dalam Permohonan Penundaan Kewajiban Pembayaran Utang,* Jurnal Hukum Ius Qua Iustum, Vol. 28, No. 3 (2021): 653, https://journal.uii.ac.id/IUSTUM/article/view/17469

provisions impedes the secured creditor's ability to exercise execution rights and delays the settlement of the bankruptcy estate. This not only harms creditors but also complicates the debtor's efforts to fulfill its obligations. The inaccuracy in determining the insolvency period illustrates inconsistency in legal application, which should prioritize certainty and order in resolving bankruptcy cases.

3.2 Legal Remedies by Bankrupt Debtor Against Auction Conducted by Secured Creditor After the End of Insolvency Period in the Commercial Court Decision of Semarang No. 15/Pdt.Sus-Gugatan-Lain-lain/2023/PN.Niaga.Smg Based on Bankruptcy Law and Postponement of Debt Payment Obligations

The Panel of Judges in the Commercial Court Decision of Semarang No. 15/Pdt.Sus-Gugatan-Lain-lain/2023/PN.Niaga.Smg determined an insolvency period that is not in accordance with Article 59 paragraph (1) of Law Number 37 of 2004. This resulted in the auction of collateral objects by PT BCA as a secured creditor beyond the two-month period since the commencement of the insolvency period. In response, CV Sumber Baru filed a legal remedy through a miscellaneous lawsuit as a form of objection to the auction action.

Basically, legal remedies are efforts granted by law to individuals or legal entities to, under certain conditions, oppose a judge's decision.[9] From a philosophical perspective, Philipus M. Hadjon opines that legal protection for the people takes the form of preventive and repressive government efforts. Preventive aims to prevent disputes from occurring, while repressive aims to resolve disputes in the judicial realm.[10] The miscellaneous lawsuit filed by CV Sumber Baru is a form of repressive effort aimed at cancelling the auction conducted by PT BCA on 12 April 2023, which was won by Ong, Rudy Agus Wijaya and PT BCA Tbk, because the auction violated the time limit for executing the collateral. The legal remedy in the form of a miscellaneous lawsuit taken by CV Sumber Baru is based on Article 3 paragraph (1) of Law Number 37 of 2004 which reads: "The decision on the application for a declaration of bankruptcy and other matters related to and or regulated in this law shall be decided by the court whose jurisdiction includes the legal domicile of the debtor."

The elucidation of Article 3 paragraph (1) of Law Number 37 of 2004 explains that the term "other matters" includes actio pauliana, third party objections to seizure, or cases where the debtor, creditor, receiver, or administrator is a party in a dispute related to

[9] Retnowulan Sutantio & Iskandar Oeripkartawinata, *Hukum Acara Perdata Dalam Teori Dan Praktek*, Bandung: Mandar Maju, 2019.

[10] Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat Indonesia*, Surabaya: PT Bina Ilmu, 1987.

the bankruptcy estate. Also included in this scope are lawsuits filed by the receiver against members of the board of directors on the grounds of alleged negligence or error that caused the company to be in a state of bankruptcy. Based on this, the miscellaneous lawsuit filed by CV Sumber Baru is a valid legal remedy and in accordance with the scope of the authority of the Commercial Court, which in the a quo case is the Commercial Court of Semarang as the court in the area of the legal domicile of CV Sumber Baru.

However, in its decision, the Panel of Judges rejected the lawsuit on the grounds that the auction conducted by PT BCA did not constitute an unlawful act as regulated in Article 1365 of the Civil Code. The judge considered that the auction on 12 April 2023 was still within the insolvency period, and therefore did not violate the provisions of Article 59 paragraph (1) of the Bankruptcy Law. This consideration was based on the fact that after the rejection of the peace proposal, the Panel of Judges did not immediately declare the debtor in a state of insolvency, thereby reopening the agenda for submitting a peace proposal during the bankruptcy stage. This agenda was followed by another debt verification on 21 February 2023, because the debt verification in the debt postponement process dated 2 November 2022 was only intended to determine the creditors' voting rights on the peace proposal and not to determine the final amount of debt. Based on this, the Panel of Judges assessed that the insolvency period only began after the completion of the debt verification in the proposal submission process during the bankruptcy, and the auction conducted in April 2023 was still within the two-month time limit as stipulated by Law Number 37 of 2004.

Article 1365 of the Civil Code explains that an unlawful act is every act that violates the law and causes harm to others, requiring the person who causes the harm due to their fault to compensate for the loss. Based on the provisions in Article 1365 of the Civil Code, an act can be considered unlawful if it fulfills several elements. The elements of an unlawful act are cumulative because if one element is not fulfilled, then it is not included in the category of an unlawful act.[11] The elements of an unlawful act are as follows:

1. The existence of an act;
2. The act is against the law;
3. There is fault;
4. There is loss;
5. There is a causal relationship between the act and the loss

The element of the existence of an act means that the actor does something in the active sense or fails to do something in the

[11] Sudaryat, *Tanggung Jawab Pemegang Saham Mayoritas yang Merangkap sebagai Direksi Terhadap Kerugian Pihak Ketiga Akibat Perbuatan Melawan Hukum Perseroan*, Jurnal Bina Mulia Hukum, Vol. 4 , No. 2, (2020): 320, https://jurnal.fh.unpad.ac.id/index.php/jbmh/article/view/93

passive sense.[12] The act of PT BCA which still carried out the auction of the collateral object on 12 April 2023 and had exceeded the validity period of the right to execute the collateral, is a form of active action that fulfills the element of the existence of an act. This shows that the first element of an unlawful act in the form of the existence of an act has been fulfilled.

The second element of an unlawful act is that the act must be against the law. There are several definitions of an unlawful act, among others:[13]

1. Acts that violate applicable laws;
2. Acts that violate the rights of others guaranteed by law;
3. Acts that are contrary to the legal obligations of the actor;
4. Acts that are contrary to decency;
5. Acts that are contrary to the good conduct in society to consider the interests of others (indruist tegen de zorgvuldigheid, welke in het maatschappelijik verkeer betaamt ten aanzien van anders persoon of goed)

In the a quo case, PT BCA as a secured creditor conducted an auction after the expiration of two months from the start of the insolvency period. As is known, Article 59 paragraph (1) of Law Number 37 of 2004 affirms that a secured creditor can only exercise their right within two months from the beginning of the insolvency period. After that period expires, the secured creditor loses the right to execute the collateral independently, and the execution must be carried out through the receiver. Based on this, the action of PT BCA in continuing to auction the collateral object on 12 April 2023 has fulfilled the definition of an unlawful act and can be said to have fulfilled the second element of an unlawful act.

The next element of an unlawful act is the existence of fault. Fault in the elements of an unlawful act refers to the cause of the loss, whether intentional or due to negligence.[14] A person can be said to be at fault if they actually have the ability to prevent the loss, either by not taking certain actions or choosing different actions. In the a quo case, PT BCA continued to conduct the auction of the collateral object on 12 April 2023 even though based on Article 59 paragraph (1) of Law Number 37 of 2004, the auction should be conducted no later than two months from the beginning of the insolvency period. The insolvency period should have begun since the rejection of the

[12] Prihati Yuniarlin, *Penerapan Unsur-Unsur Perbuatan Melawan Hukum Terhadap Kreditur yang Tidak Mendaftarkan Jaminan Fidusia*, Jurnal Media Hukum, Vol. 19, No. 1 (2012): 6, https://www.neliti.com/id/publications/35881/penerapan-unsur-unsur-perbuatan-melawan-hukum-terhadap-kreditur-yang-tidak-menda

[13] Indah Sari, *Perbuatan Melawan Hukum (PMH) dalam Hukum Pidana dan Hukum Perdata*, Jurnal Ilmu Hukum Dirgantara, Vol. 11, No. 1 (2020): 67, https://journal.universitassuryadarma.ac.id/index.php/jihd/article/view/651

[14] Mendy Cevitra & Gunawan Djajaputra, *Perbuatan Melawan Hukum (Onrechtmatige Daad) Menurut Pasal 1365 Kitab Undang-Undang Hukum Perdata dan Perkembangannya*, Unes Law Review, Vol. 6, No. 1 (2023): 2726, https://review-unes.com/index.php/law/article/view/1074

peace proposal by the Panel of Judges on 16 January 2023 and there was no further agenda for submitting a second peace proposal. The two-month deadline ended on 16 March 2023, after which only the settlement agenda should remain. Based on this, PT BCA's action of continuing the auction process after the deadline shows the existence of fault. PT BCA should understand the legal consequences of the time limit for executing the collateral and should have known that the action could harm the debtor, namely CV Sumber Baru. Thus, the element of fault in the unlawful act has been fulfilled.

The element of loss is the next element that must be proven in an unlawful act. The Civil Code recognizes two forms of loss in an unlawful act, namely material loss and immaterial loss. Material loss is an actual loss truly experienced by the aggrieved party and can be measured objectively in monetary terms, whereas immaterial loss is a loss arising from an unlawful act that cannot be concretely proven or restored to the original condition, and results in impacts such as loss of life comfort, fear, pain, or shock, including types of losses that cannot be valued in monetary terms.[15]

CV Sumber Baru suffered material and immaterial losses in the form of loss of the right to execute the collateral object through the receiver in the form of two plots of land and buildings with an area of approximately 1,386 square meters and a plot of land with an area of approximately 1,604 square meters auctioned by PT BCA beyond the two-month insolvency period as stipulated in Article 59 paragraph (1) of Law Number 37 of 2004. CV Sumber Baru also lost the potential to maximize the value of the assets through a fairer sales process by the receiver, which could be used to proportionally pay debts to all creditors. In addition, CV Sumber Baru also suffered losses in the form of loss of sense of security and legal certainty, psychological pressure due to the loss of important assets without due legal process, damage to the company's reputation, and loss of control over debt resolution that should have been carried out by the receiver during the insolvency period. All these losses, both material and immaterial, are a direct result of PT BCA's action of proceeding with the auction even though the insolvency period had not legally started, thereby fulfilling the element of loss.

The last element that must be fulfilled is the existence of a causal relationship between the act and the resulting loss. Based on the theory of factual connection, the causal relationship is viewed as an empirical or real matter, so that every cause that results in the emergence of loss can be considered a factual

[15] Rai Mantili, *Ganti Kerugian Immateriil Terhadap Perbuatan Melawan Hukum dalam Praktik: Perbandingan Indonesia dan Belanda*, Jurnal Ilmiah Hukum De'jure: Kajian Ilmiah Hukum, Vol. 4, No. 2 (2019): 300, https://journal.unsika.ac.id/index.php/jurnalilmiahhukumdejure/article/view/6460

cause, as long as it can be proven that the loss would not have occurred if the cause did not exist.[16] In the a quo case, the element of causal relationship can be clearly seen from the series of events that occurred. The action of PT Bank Central Asia which proceeded with the auction of the collateral owned by CV Sumber Baru outside the two-month insolvency period as stipulated in Article 59 paragraph (1) of Law Number 37 of 2004, became the direct causal factor of the losses suffered by CV Sumber Baru. As a result of the unlawful auction, CV Sumber Baru lost the right to execute the collateral object through the curator, namely over 2 (two) plots of land along with buildings with an area of approximately 1.386 square meters and a plot of land with an area of approximately 1.604 square meters. CV Sumber Baru also lost the opportunity to obtain an optimal sale result through a fair and proportional sale mechanism conducted by the curator for all creditors.

Not only economic losses, the act of PT Bank Central Asia also caused non-material losses, such as the loss of a sense of security, legal uncertainty, mental pressure due to the loss of important assets without a lawful process, as well as damage to the company's reputation. Thus, all these forms of losses are a direct result originating from the creditor's action of carrying out the auction by ignoring the time limit for the execution of the right during the insolvency period. Based on the theory of factual connection, it can be concluded that the element of causal relationship between the act and the loss has been fulfilled.

With the fulfillment of all the elements of an unlawful act based on Article 1365 of the Civil Code, it can be concluded that the consideration of the Panel of Judges in the Decision of the Commercial Court of Semarang Number 15/Pdt.Sus-Gugatan-Lain-lain/2023/PN. Niaga. Smg is inaccurate and disregards the applicable law, especially the provisions of Article 59 paragraph (1) of Law Number 37 of 2004. The action of PT Bank Central Asia in proceeding with the auction after the expiration of that time limit is clearly a violation of the applicable legal provisions and causes significant losses to CV Sumber Baru. The Panel of Judges should have considered more carefully the right of the debtor to obtain legal protection through legal remedies in accordance with the applicable provisions.

With the rejection of the entire other claims by the Panel of Judges, CV Sumber Baru still has the right to file further legal remedies. Law Number 37 of 2004 accommodates 3 (three) legal remedies that can be taken in the event of bankruptcy, namely: opposition, cassation, and judicial review. Against the decision of the first level court, an appeal cannot be filed, but

[16] Munir Fuady, *Perbuatan Melawan Hukum*, Bandung: Citra Aditya Bakti, 2002.

a cassation may be immediately pursued.[17] Based on Article 11 of Law Number 37 of 2004, cassation is a form of legal remedy that can be submitted against a decision on a bankruptcy declaration petition to the Supreme Court. CV Sumber Baru may file a cassation remedy first by registering with the Clerk of the Semarang Commercial District Court within a period of no later than 8 (eight) days after the date the Decision of the Semarang Commercial District Court Number 15/Pdt.Sus-Gugatan-Lain-lain/2023/PN. Niaga. Smg was pronounced. After the cassation petition is filed, the Clerk will record it on the same day as the submission. The petitioner will then receive a written receipt signed by the Clerk, with a date that matches the day of the recording of the petition.

The cassation examination process will be carried out by the Supreme Court, which is limited to assessing the application of law by the judex facti (first level judge). The Supreme Court will not re-examine the facts or evidence that have been submitted at the first level, but will only assess whether the Semarang Commercial District Court has applied the law properly and in accordance with the applicable legislation. Thus, cassation becomes an important legal remedy for CV Sumber Baru to demonstrate that there has been an error in legal consideration, especially regarding the implementation of the right of execution by the separatist creditor outside the two-month insolvency period as stipulated in Article 59 paragraph (1) of Law Number 37 of 2004.

If the cassation does not yield the expected results, CV Sumber Baru still has one extraordinary legal remedy, namely judicial review. Judicial review as a form of extraordinary legal remedy that can be taken aims to find justice and material truth.[18] Based on Article 14 paragraph (1) of Law Number 37 of 2004, CV Sumber Baru may file a judicial review petition to the Supreme Court. Judicial review can be filed if there is novum (new evidence) that was not known at the time of the previous case examination or if there is a clear error in the previous judge's decision. In the a quo case, if CV Sumber Baru is able to find new evidence related to the execution procedure by PT Bank Central Asia, or is able to show that the judge's consideration is contrary to the applicable laws and regulations, then the basis for filing a judicial review petition becomes strong.

IV. CONCLUSION

The Decision of the Panel of Judges of the Semarang Commercial Court in Case Number 15/Pdt.Sus-Gugatan-Lain-

[17] Guslan Omardani & Mardalena Hanifah, *Upaya Hukum dalam Perkara Kepailitan*, Jurnal Multilingual, Vol. 3, No. 4 (2023): 399, https://ejournal.penerbitjurnal.com/index.php/multilingual/article/download/596/522/945

[18] Herri Swantoro et al., *Permohonan Upaya Hukum Peninjauan Kembali Kedua Kali Berbasis Keadilan dan Kepastian Hukum*, Mimbar Hukum, Vol. 29, No. 2 (2017): 190, https://jurnal.ugm.ac.id/jmh/article/view/22103

lain/2023/PN.Niaga.Smg contains a fundamental legal error in determining the commencement of the insolvency period. The Panel ruled that the insolvency period began after the completion of the debt verification meeting on 21 February 2023. However, pursuant to Article 59 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, the two-month time limit for a secured creditor to execute its collateral must be calculated from the date the composition proposal was rejected, namely 16 January 2023—the same date the bankruptcy decision was pronounced. This misinterpretation has significant legal implications as it effectively reopens the possibility of a composition process after bankruptcy, contradicting the principle of *a single peace process* enshrined in Articles 289 and 292 of Law Number 37 of 2004 and reinforced by Supreme Court Circular Letter Number 5 of 2021. Consequently, it delays the settlement process and fosters legal uncertainty.

The auction conducted by the secured creditor, PT Bank Central Asia, on 12 April 2023, exceeded the statutory two-month limit calculated from 16 January 2023. As the execution occurred beyond the period prescribed by law, it should be deemed legally invalid and *null and void ipso jure*. Such an act fulfills the elements of an unlawful act as stipulated in Article 1365 of the Indonesian Civil Code. Although CV Sumber Baru filed a separate claim with the Semarang Commercial Court, the Panel dismissed it based on a flawed interpretation that the insolvency period commenced after debt verification. This interpretation disregards the explicit provisions of Article 59 paragraph (1) and undermines the debtor's substantive legal rights.

CV Sumber Baru still retains legal avenues to seek justice through *cassation* and *judicial review* under Articles 11 and 14 of Law Number 37 of 2004 to obtain legal protection and correct judicial inconsistency. This case underscores the urgent need for a unified interpretation among commercial judges regarding the calculation of the insolvency period and the extension of the execution timeframe under Article 59 paragraph (1). Consistent and harmonized judicial interpretation is essential to uphold the principles of legal certainty, fairness, and debtor protection within Indonesia's bankruptcy law system.

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