

## LEGAL REMEDIES AGAINST BANKRUPTCY DECISION FOLLOWING CONSTITUTIONAL COURT DECISION NO. 23/PUU-XIX/2021

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### ABSTRACT

Bankruptcy is a legal institution created as a way out of debt problems that befall debtors. The bankruptcy mechanism consists of the Postponement of Debt Payment Obligations (*Penundaan Kewajiban Pembayaran Utang*/PKPU) and bankruptcy itself. These two mechanisms have different legal consequences, especially regarding the available legal remedies, which differ between bankruptcy rulings originating from PKPU applications and those originating from bankruptcy applications. The available legal remedies also differ between bankruptcy rulings originating from applications submitted by debtors and those submitted by creditors. Constitutional Court Decision No. 23/PUU-XIX/2021 has changed the legal remedies provisions in Law No. 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations. Prior to the Constitutional Court's decision, there was no opportunity for debtors to file legal remedies against a bankruptcy ruling caused by the rejection of a peace agreement due to the failure to reach an agreement in the PKPU process. However, after the issuance of Constitutional Court Decision No. 23/PUU-XIX/2021, this has changed with the opening of the opportunity for legal remedies in the form of cassation against a bankruptcy ruling due to the rejection of a peace agreement because an agreement was not reached in the PKPU process. It is important to avoid the PKPU process being used as a means to bankrupt debtors who are still solvent but are bankrupted because there are interests of business competition involved.

**Keywords:** appeal; bankruptcy; creditors; debtors; PKPU.

### INTRODUCTION

In order to solve debt problems in Indonesia, various regulations have been issued that regulate the settlement of these debt problems, including Law No. 37 of 2004 concerning Bankruptcy and Delay of Debt Payment Obligations ("**Law 37/2004**"). Law 37/2004 is a more specific form of legislation than the provisions in Articles 1131 and 1132 of the Indonesian Civil Code, which state that all movable and immovable property of the debtor, both existing and future, becomes collateral for the debtor's obligations. The property serves as collateral for all creditors, and the proceeds from its sale are distributed proportionally, except for creditors who have a valid reason to be prioritized. It is known as the principle of *pari passu prorata parte*, which means that all of the debtor's assets are jointly guaranteed for the creditors and will be distributed proportionally.<sup>1</sup>

Bankruptcy is the implementation of *pari passu prorata parte* principle in the regime of wealth law (*vermogensrecht*). Bankruptcy is a commercial way out of debt problems that befall the debtor when the debtor no longer has the ability to pay its debts to its creditors. Therefore, when the debtor realizes the inability to pay its overdue obligations, the next possible step is to file a bankruptcy status

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<sup>1</sup> I Gede Khrisna Dharma Putra dan Kadek Agus Sudiarawan, "Pengaturan Upaya Perdamaian Oleh Debitor Pailit Setelah Adanya Putusan Pernyataan Pailit: Perspektif Hukum Kepailitan Indonesia", *Acta Comitatus*, Vol. 7, No. 1, 2022, p. 167.

determination request against itself by the debtor or bankruptcy status determination by the court against the debtor when it is proven that the debtor is indeed unable to pay its overdue and collectible debts.<sup>2</sup>

In cases where the debtor only has 1 (one) creditor and the debtor does not pay the debt to the creditor, the creditor can sue the debtor in civil court, and all of the debtor's assets become collateral for the payment of the debt to the creditor. However, when the debtor has more than 1 (one) or many creditors, these creditors will compete to get paid for their claims first. This results in late-coming creditors being unable to repay the debt because the debtor's assets have certainly been taken by the creditors who came first. It certainly creates injustice because "whoever is quick, gets it". For this reason, a bankruptcy institution was created to regulate the procedures for paying claims to creditors fairly.<sup>3</sup>

The procedural law for bankruptcy cases in Indonesia, as specifically regulated by Law No. 37/2004, is divided into two provisions, namely for bankruptcy as regulated in Chapter II of Law No. 37/2004 and for Suspension of Debt Payment Obligations (PKPU) as regulated in Chapter III of Law No. 37/2004. The examination of bankruptcy and PKPU cases is carried out in the Commercial Court as a special court established based on the mandate of Article 280 paragraph (1) of the Government Regulation in Lieu of Law (Perpu) No. 1 of 1998 concerning Amendments to the Bankruptcy Law which was established as Law No. 4 of 1998 ("**Law No. 4/1998**") and then lastly improved by the issuance of Law No. 37/2004.<sup>4</sup> The requirements for filing a bankruptcy and PKPU petition with the Commercial Court must comply with the conditions as stipulated in Article 2 paragraph (1) of Law No. 37/2004.

Ideologically, Law No. 37/2004, when viewed from a legal politic perspective, does not provide a provision regarding a "cessation of payment" as one of the conditions as regulated in Article 2 paragraph (1) of Law No. 37/2004. Still, in that article, it shows that the debtor's failure to make payment is caused by two circumstances, namely the debtor's inability or unwillingness. Thus, the debtor's circumstances that cannot be taken into account in terms of the level of solvency of its assets or finances can cause bankruptcy for the company even though the amount of its assets is much greater than the amount of its liabilities or debts.<sup>5</sup>

The regulation regarding Debt Payment Suspension (PKPU) is provided as a container or forum for debtors and creditors to restructure their debts and liquidate the debtor's assets. Therefore, it is expected that the PKPU process can facilitate negotiations to resolve debt-related issues and achieve

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<sup>2</sup> Hadi Subhan, *Hukum Kepailitan Prinsip, Norma, dan Praktik di Peradilan*, cet. 6, Kencana Prenadamedia Group, Jakarta: 2019, p. 2-3.

<sup>3</sup> *Ibid.*, p. 4.

<sup>4</sup> Elyta Ras Ginting, *Hukum Kepailitan Teori Kepailitan*, cet. 1, Sinar Grafika, Jakarta: 2018, p. 309-310.

<sup>5</sup> M. Hadi Shubhan, "Fenomena Hukum Pengajuan Kepailitan terhadap Pengusaha Oleh Pekerja Karena Hak Pekerja yang Tidak Dibayar Pengusaha", *Jurnal Hukum & Pembangunan*, Vol. 50, No. 2, 2020, p. 525-527.

reconciliation to avoid bankruptcy and its legal consequences.<sup>6</sup> With PKPU, the provision in Article 24 of Law No. 37/2004, which regulates the transfer of debtors' rights to manage their company after a bankruptcy decision, can be prevented. It means the debtor can still conduct business transactions to maintain cash flow and the company's market value.<sup>7</sup> However, during the PKPU process, the debtor must prepare a reconciliation plan that will reach homologation because if the plan is rejected, the debtor will be declared bankrupt with all its legal consequences.

The legal provisions for bankruptcy and PKPU are also specifically regulated in Law No. 37/2004, and there are differences between the two. Bankruptcy is regulated in Chapter II, Article 11, Article 12, Article 13, and Article 14 of Law No. 37/2004. Meanwhile, PKPU is regulated in Chapter III, Article 235, Article 293, and Article 295 of Law No. 37/2004. These regulations are a special provision (*lex specialis*) compared to the provisions on cassation and review legal remedies in Article 20, Article 23, and Article 24 of Law No. 48/2009 regarding Judicial Power. This article will discuss the sources of bankruptcy decisions and legal remedies against them, analyze the legal consequences of Constitutional Court Decision No. 23/PUU-XIX/2021 regarding legal remedies against bankruptcy decisions, and critique its legal consequences.

## RESEARCH METHOD

This article uses the normative juridical research method based on a literature review.<sup>8</sup> This method addresses the issues in this research, which cannot be separated from the need for data that can be fulfilled by searching for books or other writings. Normative juridical means that this research refers to the legal norms contained in legislation and court decisions and the applicable norms that bind society.<sup>9</sup> The legal norms examined in this study include Law No. 37/2004 and Constitutional Court Decision No. 23/PUU-XIX/2021. The type of research used in this study is descriptive research because it is intended to provide data as detailed as possible about humans, situations, or other phenomena.<sup>10</sup> In this descriptive research, readers will better understand the topic discussed, which is the legal remedies against bankruptcy rulings after the issuance of Constitutional Court Decision No. 23/PUU-XIX/2021.

The type of data used in this research is secondary data. Secondary data is data that is not obtained directly from the field but is obtained from literature or document studies.<sup>11</sup> This secondary data consists of primary, secondary, and tertiary legal materials. Primary legal materials are legal materials that are binding. Primary legal materials include written laws such as regulations and court decisions. This research examined and analyzed primary legal materials such as Faillissement-

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<sup>6</sup> Wiwin Budi Pratiwi Devi Andani, "Prinsip Pembuktian Sederhana Dalam Permohonan Penundaan Kewajiban Pembayaran Utang", *Jurnal Hukum Ius Quia Iustum*, Vol. 28, No. 3, 2021, p. 636.

<sup>7</sup> M. Pasca Zakky Muhajir, "Penyimpangan Bentuk Upaya Hukum terhadap Putusan Pailit Akibat PKPU Gagal", *Notaire*, Vol. 2, No. 1, 2019, p. 49.

<sup>8</sup> Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif (Suatu Tinjauan Singkat)*, Cet. 8, PT Raja Grafindo Persada, Jakarta: 2004, p. 29.

<sup>9</sup> Sri Mamudji, et.al., *Metode Penelitian dan Penulisan Hukum*, Badan Penerbit Fakultas Hukum Universitas Indonesia, Jakarta: 2005, p. 9-10.

<sup>10</sup> Soerjono Soekanto dan Sri Mamudji, *Op.Cit.*, p. 34.

<sup>11</sup> *Ibid.*, p. 28.

Verordening Staatsblad 1905 Number 217 junction Staatsblad 1906 Number 348 (“**Faillissement-Verordening 1906**”), Law No. 4/1998, and Law No. 37/2004, as well as commercial court and Constitutional Court decisions. Secondary legal materials are materials that provide explanations about primary legal materials.<sup>12</sup> To explain these primary legal materials, secondary legal materials such as books, scientific journals, newspaper articles, and the internet are used. Tertiary legal materials guide primary and secondary legal materials, such as dictionaries and encyclopedias.<sup>13</sup> Data collection in this research was conducted through document or literature studies, a data collection method that uses "content analysis" of written data.<sup>14</sup> All legal materials, whether primary, secondary, or tertiary, will be examined and analyzed concerning the legal issues being studied, namely legal efforts against bankruptcy decisions after the issuance of Constitutional Court Decision No. 23/PUU-XIX/2021.

## DISCUSSION

### Bankruptcy Decision Arising from Bankruptcy Petition and its Legal Remedies

A bankruptcy decision can come from two sources: first, a bankruptcy decision that arises from a bankruptcy petition filed by the debtor/creditor, and second, a bankruptcy decision that arises from a PKPU (Suspension of Debtor Payment Obligations) petition filed by the debtor/creditor. These two sources of bankruptcy decisions have different impacts on the legal remedies that can be taken against the resulting bankruptcy decision.

Debtors/creditors can directly petition the court to declare the debtor bankrupt as stipulated in Article 2 paragraph (1) of Law No. 37/2004 when it is proven in the commercial court hearing that the debtor has two or more creditors and has failed to pay at least one debt that has fallen due and is collectible.<sup>15</sup> Furthermore, Article 8 paragraph (4) stipulates that a bankruptcy declaration petition must be granted if there are facts or circumstances that are proven simply that the requirements for being declared bankrupt, as referred to in Article 2 paragraph (1), have been fulfilled. In Law No. 37/2004, it is not necessary to prove the inability to pay debts or insolvency as previously required in Article 1 paragraph (1) of the Faillissement-Verordening 1906. Still, it is sufficient to simply prove the condition that the debtor has stopped paying their debts, and there are creditor claims.<sup>16</sup>

Based on the provisions in Article 2 paragraph (1) of Law No. 37/2004, there are only 3 (three) requirements for a debtor to be declared bankrupt, namely: (1) the existence of a debt; (2) one of the debts has fallen due and is demandable; and (3) there are at least two or more creditors. The bankruptcy requirements in Article 2 paragraph (1) of Law No. 37/2004 are indeed very simple

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<sup>12</sup> *Ibid.*, p. 52.

<sup>13</sup> *Ibid.*, p. 33.

<sup>14</sup> Soerjono Soekanto, *Pengantar Penelitian Hukum*, Penerbit Universitas Indonesia, Jakarta: 2008, p. 21.

<sup>15</sup> Elyta Ras Ginting, *Op.Cit.*, p. 304.

<sup>16</sup> Devi Andani dan Wiwin Budi Pratiwi, “Prinsip Pembuktian Sederhana dalam Permohonan Penundaan Kewajiban Pembayaran Utang”, *JH Ius Quia Iustum*, Vol. 28, No. 3, September 2021, p. 640.

because even if the debtor still has the ability to pay his debts if he meets the three bankruptcy requirements above, the debtor can be declared bankrupt normatively.<sup>17</sup>

To ensure that the bankruptcy decision can be executed as soon as possible, the legal remedy that can be taken against a bankruptcy decision originating from a bankruptcy petition based on Article 11 paragraph (1) of Law No. 37/2004 is directly in the form of cassation to the Supreme Court of Indonesia, without going through an appeal to the high court. The cassation petition based on Article 11 paragraph (3) of Law No. 37/2004 can be submitted not only by the debtor and creditor who are parties in the first-level court hearing but also by other creditors who are not parties in the first-level court hearing who are dissatisfied with the decision on the bankruptcy petition. Then, against the final and binding cassation decision, a judicial review can be filed based on Article 14 paragraph (1) of Law No. 37/2004.<sup>18</sup>

Thus, it is clear that legal remedies in the form of cassation and judicial review can be taken against a bankruptcy decision originating from a bankruptcy petition as regulated in Chapter II of Law No. 37/2004. However, what about legal remedies against a bankruptcy decision originating from a PKPU petition as regulated in Chapter III of Law No. 37/2004?

### **Bankruptcy Decisions Based on PKPU Petition and Legal Remedies**

One thing to note in the process of PKPU and bankruptcy petitions is that a PKPU petition can be filed by the debtor before or after a bankruptcy petition is filed by the creditors. In practice, if this happens, the PKPU petition must be decided first, and the judge must postpone the examination of the bankruptcy petition.<sup>19</sup> In the Law No. 37/2004, a PKPU petition can be filed by both the debtor and the creditor, which is different from the norm in the *Faillissement-Verordening* 1906, which has been in effect since November 1, 1906, and the 1998 Bankruptcy Law, which only grants the right to file a PKPU petition to the debtor and not to the creditor.<sup>20</sup>

According to Article 222 Law 37/2004, the debtor or creditor may propose PKPU toward the debtor with more than 1 (one) creditor, if:

1. Debtors who are unable or estimate to be unable to continue paying their debts which are due and with the intention of submitting a reconciliation plan which includes an offer to pay part or all of their debts to creditor(s);
2. Creditor(s) who estimate that the debtors are unable to continue paying their debts which are due and collectible. The creditor(s) may request to the commercial court to allow the debtors

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<sup>17</sup>Tata Wijayanta, "Kajian Tentang Pengaturan Syarat Kepailitan Menurut Undang-Undang Nomor 37 Tahun 2004", *Mimbar Hukum*, Vol. 26, No. 1, 2014, p. 3.

<sup>18</sup>Sutan Remy Sjahdeni, *Sejarah, Asas, dan Teori Hukum Kepailitan*, cet. 2, Prenadamedia Group, Jakarta:2018, p. 270.

<sup>19</sup>Andrea Louisa Doren dan Putu Aras Samsithawrati, "Pengaturan Pengajuan Permohonan Penundaan Kewajiban Pembayaran Utang oleh Debitor Terhadap Permohonan Pernyataan Pailit oleh Kreditor", *Jurnal Kertha Wicara*, Vol. 11, No. 6, 2022, p. 1198.

<sup>20</sup>Pasal 212 *Faillissement-Verordening* 1906 stipulated that "Any debtor who believes that they will not be able to continue to pay their debts that are due for payment may request a deferment of payment"; and Article 212 of Law 4/1998 which states that "A debtor who is unable or anticipates that they will be unable to continue to pay their overdue and enforceable debts may apply for a postponement of their debt payment obligations, generally with the aim of proposing a settlement plan that includes an offer to pay all or part of the debts to concurrent creditors."

to propose a reconciliation plan which includes an offer to pay part or all of their debts to their creditors.

The above provision indirectly explains that a PKPU petition is a request for a moratorium on the debtor's obligations, in this case, the debt that the debtor must pay to the creditors, with the aim of allowing the debtor to settle their debts.<sup>21</sup> Several articles in Chapter III of Law No. 37/2004 explain legal remedies against a PKPU decision or a bankruptcy decision that arises from a PKPU petition, namely:

Article 235, paragraph (1) Law 37/2004, states that:

*“Any decision on the suspension of debt payment obligation may not be filed for any legal remedies.”*

Article 293, paragraph (1) Law 37/2004, states that:

*“There is no legal remedy against the court decision based on the provisions in chapter III, unless otherwise stipulated under this Law.”*

Article 295, paragraph (1) Law 37/2004, states that:

*“Upon the decision of a judge that has obtained permanent legal force, a petition for judicial review may be submitted to the Supreme Court, unless otherwise stipulated under this law.”*

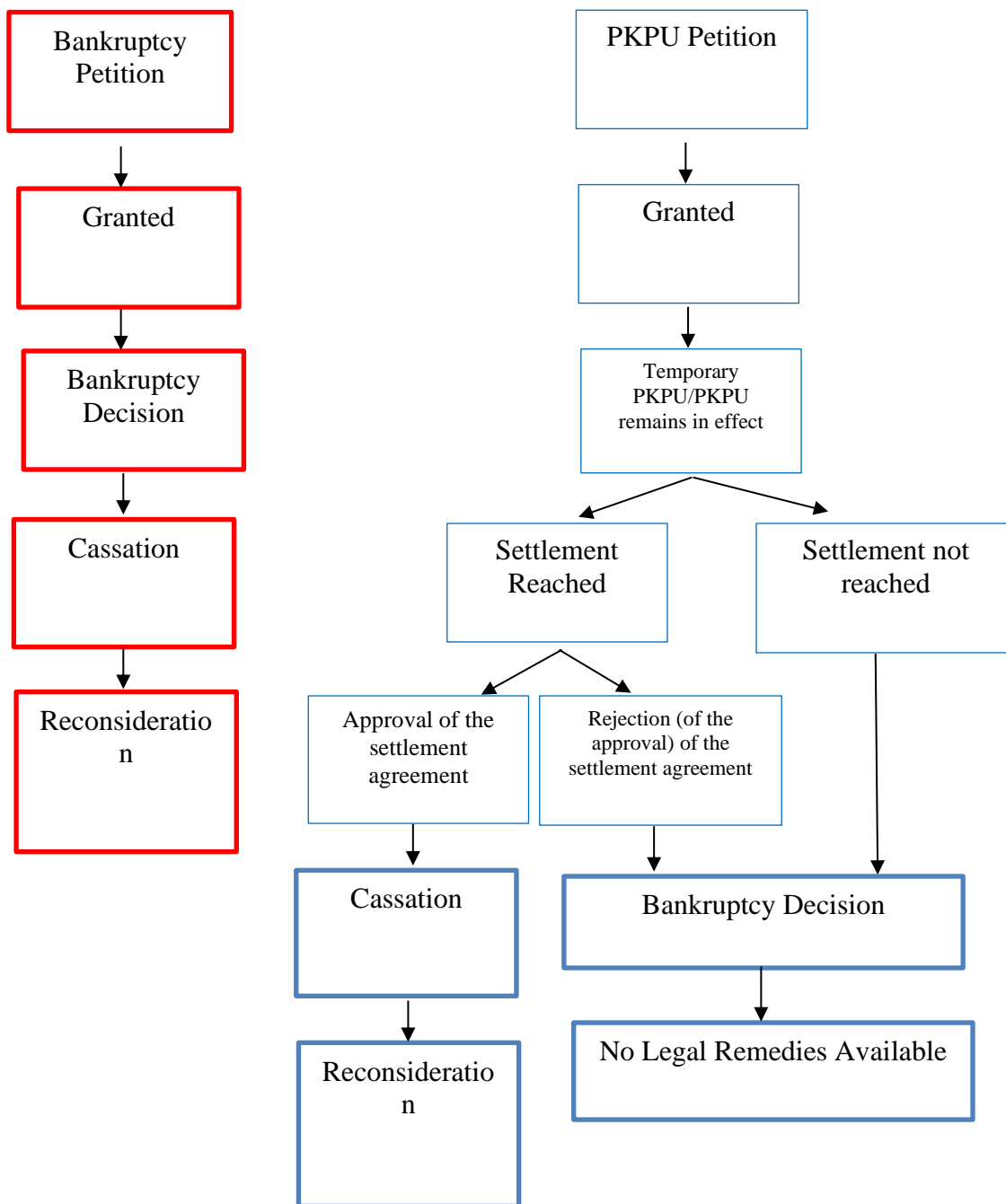
Furthermore, in Article 290 of Law 37/2004, it is explained that if the court has declared a debtor bankrupt, then the provisions of bankruptcy as referred to in Chapter II apply to the bankruptcy declaration decision, except for Articles 11, 12, 13, and 14 of Law 37/2004. It means that there can be no legal action taken against the bankruptcy declaration decision caused by the debtor's failed settlement plan in the PKPU process as referred to in Article 289 of Law 37/2004, whether it is through the ordinary legal remedy of cassation or the extraordinary legal remedy of judicial review.

Supreme Court Regulation Number 3 of 2015 concerning the Application of the Formulation of the Plenary Meeting Results of the Supreme Court Chamber in 2015 as Guidelines for the Implementation of Duties for the Court (“SEMA 3/2015”) also emphasizes that there is no legal recourse available for the Temporary PKPU Decision, the Permanent PKPU Decision as referred to in Article 235 of Law 37/2004, the PKPU Rejection Decision as referred to in Article 285 paragraph (4) of Law 37/2004, and the Decision on the application for rehabilitation of the debtor (heir) after the end of bankruptcy as referred to in Article 220 of Law 37/2004, if the creditors do not approve the Permanent PKPU Decision, and the debtor is declared bankrupt as referred to in Article 290 of Law 37/2004. If legal remedies such as cassation or judicial review are filed with the Supreme Court, the ruling will be "inadmissible". As for legal remedies against bankruptcy and PKPU decisions based on Law 37/2004, they can be seen in the table below:

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<sup>21</sup>Umar Haris Sanjaya, *Penundaan Kewajiban Pembayaran Utang dalam Hukum Kepailitan*, Cet. I, NFP Publishing, Yogyakarta: 2014, p. 64.

**Table 1: Legal Remedies against Bankruptcy and PKPU Decisions based on Law 37/2004 before Constitutional Court Decision Number 23/PUU-XIX/2021.**



**Legal Consequences of Constitutional Court Decision Number 23/PUU-XIX/2021**

As stipulated in Article 24C (1) of the 1945 Constitution in conjunction with Article 10 (1) of Law Number 24 of 2003 as amended by Law Number 7 of 2020 on the Constitutional Court (“**Constitutional Court Law**”), the Constitutional Court is a product of reform with a role and responsibility to protect constitutional rights as an integral part of establishing constitutional

supremacy.<sup>22</sup> The Constitutional Court's decision is final and binding, as stated in Article 10 (1) of the Constitutional Court Law, so no legal remedies can be taken once the Constitutional Court has pronounced its decision in court. In addition, the Constitutional Court's decision also has the character of *erga omnes*, which means it is generally binding on all state institutions and the public who may have dealings related to the Constitutional Court's decision. Thus, the Constitutional Court's decision applies not only to the parties involved in the case being tried in the Constitutional Court.<sup>23</sup>

In light of the previous explanation, it can be understood that if a bankruptcy decision arises from a bankruptcy petition, an appeal and a review can be submitted, including a confirmation of the settlement decision that arises from the PKPU process, which can also be appealed or reviewed based on Article 285 (4) of Law Number 37 of 2004. However, regarding bankruptcy decisions resulting from the rejection (approval) of a settlement or bankruptcy decisions resulting from the rejection of a settlement plan in the PKPU process, no legal remedies are available as regulated in Chapter III of Law Number 37 of 2004 and reaffirmed through Supreme Court Regulation Number 3 of 2015. Faced with such legal remedies in the PKPU and bankruptcy, PT Sarana Yeoman Sembada submitted a request for a material review of the provisions of Article 235 (1), Article 293 (1), and Article 295 (1) of Law Number 37 of 2004 to the Constitutional Court in case Number 23/PUU-XIX/2021.<sup>24</sup>

In its application, the Applicant, PT Sarana Yeoman Sembada, argues that the provision in the article being challenged in the constitutional review results in the Applicant being unable to file any legal remedies, which in turn prevents the Applicant from managing its assets due to the bankruptcy status issued by the Commercial Court of Medan through Decision Number 42/Pdt.Sus-PKPU/2020/PN.Niaga.Mdn dated December 15, 2020. With the closure of legal remedies against the bankruptcy decision originating from the PKPU decision, this potential can be utilized for the purpose of stopping or defeating business competitors, as experienced by the Applicant.<sup>25</sup>

The Applicant argues that, in essence, because Article 222 paragraph (1) and paragraph (3) of Law 37/2004 provides an opportunity for creditors to file a PKPU application, this becomes a *modus operandi* for bankrupting a company or entity that is still solvent and contrary to the principle that a bankruptcy declaration cannot be imposed on a solvent debtor.<sup>26</sup> In this case, the Applicant explains its experience when it was declared bankrupt based on Decision Number 42/Pdt.Sus-PKPU/2020/PN.NIAGA.Medan dated February 15, 2021. In that case, the Applicant explained that it was declared in PKPU status, and the conciliation proposal submitted by the Applicant was rejected

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<sup>22</sup> Mohammad Agus Maulidi, "Problematika Hukum Implementasi Putusan Final dan Mengikat Mahkamah Konstitusi Perspektif Negara Hukum", *Jurnal Hukum Ius Quia Iustum*, Vol. 24, No. 4, 2017, p. 536.

<sup>23</sup> Antonius Sidik Maryono, et.al., "Quo Vadis Esensi Lembaga Pkpu Pasca-Putusan Mahkamah Konstitusi Nomor 23/PUU-XIX/2021", *Rewang Rencang: Jurnal Hukum Lex Generalis*, Vol. 3, No.4, 2022, p. 252-253.

<sup>24</sup> Supreme Court Decision Number: 23/PUU-XIX/2021, p. 99.

<sup>25</sup> *Ibid.*, p. 100.

<sup>26</sup> *Ibid.*, p. 101.

by the PKPU Applicant and other creditors, resulting in bankruptcy. The Applicant argues that the conciliation mechanism was not used to find a solution but rather to legitimize the Applicant's bankruptcy, leaving no legal remedies available.

The Applicant believes that with the application of Article 235 paragraph (1), Article 293 paragraph (1), and Article 295 paragraph (1) of Law 37/2004, there is no legal remedy available to the Applicant to obtain justice, despite the lack of precision in the examination, adjudication, and decision-making of the Panel of Judges resulting in the Applicant feeling aggrieved and having its legal rights taken away by the provision in the article. The Applicant argues that there are errors in the application of the law and that it undermines the sense of justice if there is no opportunity for legal remedies, both in cassation and judicial review. The Applicant believes that the temporary PKPU decision and the bankruptcy decision that stems from the PKPU application should be open to legal remedies, as the same law provides legal remedies for cases originating from bankruptcy applications and resulting in bankruptcy decisions.<sup>27</sup>

The Constitutional Court, in its decision Number 23/PUU-XIX/2021, opined that the debtor itself is the one who knows best about its financial ability and to make corrections to the court decision based on the PKPU petition submitted by the creditor. There needs to be a mechanism to control the court decision at the lower level. In the event that a PKPU petition is filed by the creditor and the request for settlement is rejected by the creditor, it is not impossible that there is a *contentiosa* dispute of interest and the potential for bias or errors in the application of the law by the judge at the lower level. Therefore, in this case, the Constitutional Court opined that legal efforts need to be made against the PKPU petition submitted by the creditor and the debtor's settlement offer rejected by the creditor. Furthermore, the Constitutional Court opined that the PKPU petition is a case that requires quick legal certainty in the business world and is closely related to the stability of a country's economy. Therefore, in relation to legal efforts, it is sufficient to open up one level because there is a possibility of errors in the application of the law by the judge at the lower level, so the available legal remedy is cassation, and it is not possible to file a review.<sup>28</sup>

Further, in its considerations, the Constitutional Court explained that the norms contained in Article 235 paragraph (1) and Article 293 paragraph (1) of Law No. 37/2004 are contradictory to the 1945 Constitution and do not have binding legal force if not specifically exempted, allowing for a cassation appeal against the PKPU ruling filed by the creditor and the rejection of the debtor's settlement offer by the creditors. Additionally, with regards to the norm contained in Article 295 paragraph (1) of Law No. 37/2004, it is not justified to file a request for a judicial review against a bankruptcy ruling stemming from a PKPU petition by the creditor, which was rejected by the creditors' refusal of the debtor's settlement offer. It is to prevent case overload in the Supreme Court and ensure legal certainty and business continuity. Therefore, in the verdict of case No. 23/PUU-XIX/2021, which was read on December 15, 2021, the Constitutional Court declared:

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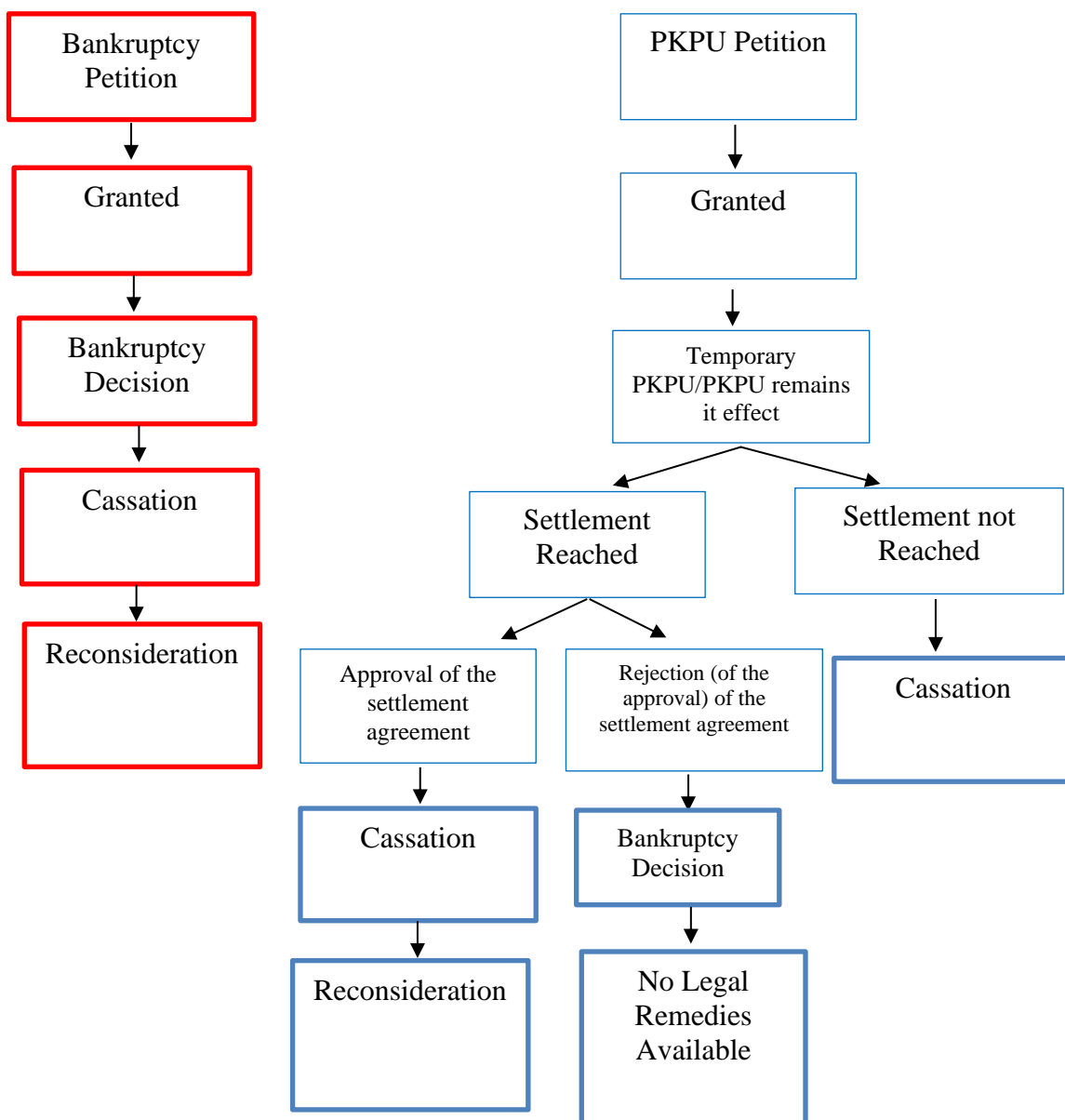
<sup>27</sup> *Ibid.*, p. 102.

<sup>28</sup> *Ibid.*, p. 109.

"Declares that Article 235 paragraph (1) and Article 293 paragraph (1) of Law No. 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations (State Gazette of the Republic of Indonesia Year 2004 Number 131, Additional State Gazette of the Republic of Indonesia Number 4443) are contrary to the Constitution of the Republic of Indonesia Year 1945 and have no binding legal force, to the extent that they are not interpreted as **“allowing an appeal in cassation against a Postponement of Debt Payment Obligation ruling submitted by a creditor and the rejection of a debtor's settlement offer.**

Therefore, after the Constitutional Court's ruling, legal remedies against bankruptcy and PKPU decisions are as follows, as shown in the table below:

**Table 2: Legal Remedies against Bankruptcy and PKPU Decisions based on Law 37/2004 after Constitutional Court Decision No. 23/PUU-XIX/2021.**



**Analysis and Critical Notes on Legal Efforts Against Bankruptcy and PKPU Decisions Post-Constitutional Court Decision No. 23 / PUU-XIX / 2021.**

First, what needs to be analyzed and criticized is that the petitioner's arguments are a review of legal efforts arising from bankruptcy decisions resulting from the rejection of debtor's settlement proposals by creditors in PKPU applications made by creditors. It should be emphasized here that **the creditor applies for the PKPU, not the debtor themselves**. As previously explained, before the enactment of Law 37/2004, the applicable norm under the Faillissement-Verordening 1906 and Law 4/1998 was that only the debtor had the right to apply for PKPU. It is logical because the basic logic behind the PKPU application is that debtors who feel they can no longer meet their debt repayment obligations can restructure their debts to their creditors in terms of time and amount paid. Of course, the debtor has the knowledge and ability to calculate the amount and time needed for such restructuring related to the debtor's internal financial condition.

In addition, in the PKPU, a manager will be appointed to work with the debtor in carrying out their activities and preparing a settlement proposal to be submitted for approval by the creditors. In order for the debtor's activities and the preparation of the settlement proposal in the PKPU to run smoothly, the manager must be proposed by the debtor at the time of the debtor's PKPU application to the commercial court. Moreover, the manager's honorarium is also paid by the debtor. It is strange if the PKPU application comes from the creditor and the creditor appoints the manager in the PKPU, thus forcing the debtor to collaborate with a PKPU manager who was not selected by themselves but whose honorarium is charged to the debtor.

Therefore, it is unusual if the creditor takes the initiative to file for PKPU. Why would the creditor themselves file for PKPU? Why would the creditor kindly ask for their obligation/debt to be restructured for the debtor's benefit? After all, if the creditor has noble intentions to help the debtor restructure their debt, it can be done bilaterally between the creditor and the debtor themselves. If the creditor has difficulty obtaining payment for their debt from the debtor, then the mechanism that should be taken is a civil lawsuit through the district court and not a PKPU petition through the commercial court. In a civil case in the district court, there is also a mediation process that the creditor and debtor can utilize to discuss debt restructuring issues among them, the decision of which can become a legally binding court decision based on Article 130 paragraph (2) and (3) of the Indonesian Civil Code (HIR) and Article 27 of the Supreme Court Regulation No. 1 of 2016 concerning Mediation Procedures in Court. On the other hand, if the creditor has seen that the debtor is no longer expected to repay their debts because they are already in an insolvent state, where the amount of debt owned by the debtor is greater than the value of their assets, then it is not a PKPU petition that the creditor should file, but a direct bankruptcy petition.<sup>29</sup>

Considering such a situation, it is appropriate for the Constitutional Court to consider that there is a possibility that if a creditor files a PKPU application and a peace proposal is rejected by the creditor, there may be a contentiosa dispute of interest and potential bias or errors in the application

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<sup>29</sup> Gede Aditya Pratama, "Hilangnya Tes Insolvensi sebagai Syarat Kepailitan di Indonesia", *Krtha Bhayangara*, Vol. 15, No. 1, 2021, p. 7.

of the law by the lower court judge. As well as the petitioner's concerns in the material testing case, PKPU is used as a gateway by unscrupulous creditors to bankrupt debtors who are still solvent. Based on these considerations, the Constitutional Court is correct in providing a legal remedy in the form of cassation for debtors who are declared bankrupt due to a peace proposal submitted by the debtor being rejected by the creditor during the PKPU process. It serves to correct the commercial court's decision which is not immune to errors or disputes of interest.

**Secondly**, because the constitutional review petition in case number 23/PUU-XIX/2021 that was discussed concerns the bankruptcy ruling against the debtor due to the failure to reach a settlement agreement, as the settlement proposal submitted by the debtor was rejected by the creditor, the bankruptcy ruling resulting from the failure to approve the settlement agreement in the PKPU by the commercial court based on Article 285 of Law 37/2004 was not discussed by the Constitutional Court. Therefore there is still no legal remedy available. However, an error was made by the commercial court judge when rejecting the settlement agreement. Therefore, it is still possible for parties who feel disadvantaged to challenge in the Constitutional Court whether legal remedies can be sought against the bankruptcy ruling that stems from the rejection of the approval of a settlement agreement based on Article 285 of Law 37/2004. It is clear that legal remedies can be sought against bankruptcy rulings, whether they stem from a bankruptcy petition, a PKPU petition from the creditor and the rejection of the debtor's settlement proposal, or the rejection of the settlement proposal by the commercial court. However, legal remedies cannot be sought against a bankruptcy ruling that stems from a PKPU petition submitted by the debtor himself, as the debtor must have been aware of his financial situation and the inability to repay his creditors without restructuring through PKPU when submitting the PKPU petition. Therefore, if the creditors do not accept the settlement proposal submitted by the debtor, it is appropriate for the debtor to be declared bankrupt, and there is no need for legal remedies against such a ruling.

## **CLOSING**

Before the Constitutional Court Decision Number 23/PUU-XIX/2021, Law Number 37 of 2004 only provided cassation and judicial review as legal remedies for bankruptcy rulings originating from bankruptcy petitions and confirmation of peace agreements originating from PKPU petitions. However, no legal recourse was available to debtors in the case of a bankruptcy ruling resulting from rejecting a peace agreement or failing to reach a peace agreement in the PKPU process. But with the issuance of the Constitutional Court Decision Number 23/PUU-XIX/2021, debtors can now file for cassation in case of a bankruptcy ruling resulting from the failure to reach a peace agreement from a creditor's PKPU petition. This correction is necessary to address the possibility of bias or errors in the application of the law by judges in lower commercial courts, as a creditor may reject a debtor's proposed peace agreement due to conflicting business interests.

In this case, the Constitutional Court has correctly corrected the norms in Article 235 paragraph (1) and Article 293 paragraph (1) of Law Number 37 of 2004, as requested in the material review. However, several key issues still need to be further examined through a revision of Law Number 37 of 2004 or a further material review request to the Constitutional Court. Firstly, the right of creditors to file PKPU petitions needs to be reviewed and, if necessary, returned to the norms in the *Faillissement-Verordening* 1906, which only granted the right to file PKPU petitions to debtors. It is because creditors have no interest in requesting that their debts be restructured for the benefit of debtors, which debtors can do themselves. Furthermore, it could lead to further problems when creditors are given the right to file PKPU petitions but then reject the debtor's proposed peace agreement. It would be better for creditors who see that debtors cannot pay their debts to file for bankruptcy from the outset. It is more in line with the principle that bankruptcy can only be declared against debtors who are already insolvent.

Secondly, a bankruptcy decision due to the invalidation of the peace agreement reached in the PKPU by the commercial court based on Article 285 of Law 37/2004, which still does not allow for any legal recourse, either through cassation or judicial review. However, it is possible that the rejection of the approval of the peace agreement by the panel of judges at the lower commercial court was also erroneous. Therefore, it is necessary to open a correctional legal recourse in the higher court. This can be a consideration for stakeholders to be used as material testing in the future when parties feel disadvantaged by this legal norm. This issue can also be a consideration for future lawmakers, especially in the plan to revise the bankruptcy and PKPU laws, to include legal remedies for cassation and/or judicial review against the bankruptcy decision that is rejected by the panel of judges as regulated in Article 285 of Law 37/2004.

Since the enactment of Law 37/2004 until now, there have been various dynamics in the practice of PKPU and bankruptcy in commercial courts. In the future revision of the bankruptcy and PKPU laws, it is necessary to consider the legal remedies available against bankruptcy decisions by learning from the practices that have occurred in commercial courts. It is important that future revision of the law can reduce the possibility of partiality, conflicts of interest, and errors that may occur in commercial courts when bankruptcy decisions are imposed on debtors.

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