
PKPU AS AN INSTITUTION THAT ATTEMPTS RESTRUCTURING TO PREVENT BANKRUPTCY

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Abstract

This study aims to analyze PKPU in implementing debt restructuring in Decision No. 718/K/Pdt.Sus-Pailit/2019.jo.No.4/Pdt.Sus.PembatalanPerdamaian/2019/PN.Niaga.Jkt.Pst.jo.No.23/PKPU/2011/PN.Niaga.Jkt.Pst regarding the judge's consideration in terms of Law No. 37 of 2004 concerning Bankruptcy and PKPU. The research method used is a qualitative method using data collection techniques in the form of literature studies. This research is studied based on Law No. 37 of 2004 concerning Bankruptcy by combining the theory of justice as a Grand Theory. The results of this research are in the form of *Judex Jurist* considerations that grant the petition of the Applicant for the cancellation of the peace agreement that has been homologated based on Decision No. 23/PKPU/2011/PN.Niaga.Jkt.Pst because the peace agreement dated November 1, 2011, which was homologated by the court, is a decision that is final and legally binding, so it cannot be changed for any reason, let alone changes made outside the court. As well as the PKPU Applicant, PT. Arpeni Pratama Ocean Line, Tbk. has admitted everything argued by the Bankruptcy Applicant, PT. Bank CIMB Niaga, Tbk. especially regarding all substantial requirements of the PKPU Applicant.

Keywords: Bankruptcy; Debt Restructuring; Homologation; *Judex Jurist*; Suspension of Debt Payment Obligation

INTRODUCTION

Globalization in the economic sector and the business world requires companies to develop further in order to compete with others. Companies that are established to provide profits for their owners often partner with investors to obtain funding. However, many companies face obstacles in implementation, causing difficulties in fulfilling partner achievements. In Indonesia, companies face difficulties collecting debt payments, posing a risk to businesses and their partners. To address this issue, the government should be proactive in addressing these risks and ensuring a healthy business cycle between debtors and creditors.

When a company is in a state of having collectible debts that have fallen due and the debtor or business actor knows that his financial situation is in difficulty and that it is likely to stop paying his debts, it can choose several steps in settling the debt.¹ Efforts to prevent company bankruptcy can be carried out through debt restructuring. Debt restructuring of debtor companies in order to pay their debts can generally be done in two ways, namely:²

1. With an approach between creditors and debtors to seek restructuring through deliberation and consensus, or;
2. By proposing and requesting a postponement of debt payment obligations stipulated in the bankruptcy law.

Postponement of Debt Payment Obligations (PKPU) is a period of deliberation between the debtor and the creditor supervised by the court to allow the debtor to improve its financial position and submit a peace plan that includes an offer of payment of part or all of the debt to its creditor. According to legal expert Fuady, PKPU is a type of legal moratorium.³ which allows the debtor to continue to manage its business and prevent bankruptcy, even though it is having difficulty paying its obligations. A PKPU petition has the power to prevent bankruptcy as it can be filed at any time before a bankruptcy declaration is decided by the court (i.e., before a bankruptcy declaration petition is filed as well as after a bankruptcy declaration petition is filed but there has been no court decision). If the bankruptcy petition and the PKPU petition are heard at the same time, the PKPU petition must be decided first if it is filed at the first hearing of the bankruptcy petition.⁴

In general, the path that is more often taken is the submission of a debt payment obligation postponement application (hereinafter referred to as a PKPU), which can be carried out by debtors or creditors. PKPU is a condition in which the Commercial Court Judge provides a time span for the debtor and creditor to negotiate a mechanism for paying the debtor's debts, either partially or in full, including restructuring the debt. Moreover, PKPU is an option for debtors who have good faith in resolving their debt obligations. Given that it is possible that there are creditors who have bad intentions and want to destroy the business continuity of the debtor through the bankruptcy mechanism, The purpose of postponement of payment is to prevent the bankruptcy of a debtor who cannot pay but may be able to pay in the near future.⁵ The debtor is merely facing a temporary liquidity problem. According to Fuady, PKPU is a

¹ Man S. Sastrawidjaja, *Hukum Kepailitan dan Penundaan Kewajiban Pembayaran Utang* (Bandung: Alumni, 2006), hlm. 202.

² Kartini Muljadi, "Restrukturisasi Utang, Kepailitan dalam Hubungannya dengan Perseroan Terbatas," *dalam Seminar Penundaan Kewajiban Pembayaran Utang sebagai Sarana Menangkis Kepailitan dan Restrukturisasi Perusahaan, diselenggarakan oleh Kantor Advokat Yan Apul and Rekan* (Jakarta, 1998).

³ Munir Fuady, *Hukum Pailit dalam Teori dan Praktek* (Bandung: Citra Aditya Bakti, 2017), hlm. 177.

⁴ Indonesia, Law Number 37 Year 2004 on Bankruptcy and Suspension of Debt Payment Obligations, Article 229 paragraph (3).

⁵ Jerry Hoff, *Undang-Undang Kepailitan di Indonesia*, Penerjemah Kartini Muljadi (Jakarta: Tatanusa, 2000), hlm. 187.

type of legal moratorium that allows the debtor to continue managing its business and prevent bankruptcy even though it is having difficulty paying its obligations.⁶

The implementation of debt restructuring through the mechanism of filing a postponement of debt payment obligations is a way taken by PT. Arpeni Pratama Ocean Line, Tbk. as a debtor company to pay off its debts that have fallen due and are collectible from its creditors. In reality, not all peace agreements embodied in peace deeds through the PKPU mechanism between debtors and creditors go well. Occasionally, there are also efforts or bad faith from the debtor in implementing the peace deed; for example, with the achievement of peace, the debtor deliberately delays debt payments by taking refuge in the clauses of the agreed peace agreement. This is not uncommon, causing losses to creditors who actually expect debt restructuring to run in accordance with the peace deed, but what happens is the uncertainty of debt payments provided by the debtor. The case involved PT. Arpeni Pratama Ocean Line, Tbk. as the debtor and PT. Bank CIMB Niaga, Tbk. as the creditor.

In this case, PT. Arpeni Pratama Ocean Line, Tbk. was negligent or defaulted on the contents of the peace deed agreed upon with PT. Bank CIMB Niaga, Tbk. and other creditors. Arpeni Pratama Ocean Line, Tbk. in bad faith, deliberately committed negligence or default against the provisions of the debt restructuring scheme by making a new agreement (the Peace Agreement dated November 1, 2011) that regulates the change of debt payment from money to shares. But then there was a cancellation of the Peace Agreement dated November 1, 2011, which had been homologated based on the Decision of the Commercial Court at the Central Jakarta District Court No. 23/PKPU/2011/PN.Niaga.Jkt.Pst dated November 10, 2011 between PT. Arpeni Pratama Ocean Line, Tbk as the Debtor with the Applicant as one of the creditors of the debtor along with other creditors, and the request for Cancellation of Amendments to the Peace Agreement effective February 7, 2019. If examined closely, the article has a tendency to harm the creditor. The creditor suspected that the supervisory judge and the management did not pay close attention to the contents of each article before it was homologated so that Article 3, as well as Article 5, which was detrimental to the creditor, could be included in the peace deed.

On October 31, 2011, Arpeni Pratama Ocean Line, Tbk. was declared in a state of suspension of debt payment obligation (PKPU) based on the decision of the Commercial Court at the Central Jakarta District Court Number 23/PKPU/2011/PN.Niaga.Jkt.Ps. PT. Arpeni Pratama Ocean Line, Tbk. has submitted a peace plan proposal to its creditors, which was submitted and discussed in the creditors meeting on November 10, 2011. Only in November 2018, PT. Arpeni Pratama Ocean Line, Tbk. sent a restructuring concept accompanied by a draft amended composition plan and a draft restructuring support agreement appointing BANI as the forum for resolving the dispute. In November 2018, PT. Arpeni Pratama Ocean Line, Tbk repeatedly revised the submitted drafts until they were declared the final draft on November 23, 2018. Based on the draft that has been declared final by PT. Arpeni Pratama Ocean Line, Tbk. again on December 7, 2018, PT. Arpeni Pratama Ocean Line, Tbk. sent a revised draft of the Amendment to the Peace Agreement, which was again declared the final draft. However, Arpeni Pratama Ocean Line, Tbk. again sent the revised draft on December 19, 2018. In addition to the revised draft of the Amendment to the Peace Agreement submitted by PT. Arpeni Pratama Ocean Line, Tbk. on December 19, 2018, PT. Arpeni Pratama Ocean Line, Tbk. on January 11, 2019, submitted a side-letter draft on the draft of the Amendment to the Peace Agreement with the title of Joint Agreement.

⁶ Munir Fuady, *Loc.cit.*, hlm. 177.

In addition to the actions of PT. Arpeni Pratama Ocean Line, Tbk continued to stall for time and did not provide certainty of the time of implementation of PT. Arpeni Pratama Ocean Line's debt payment obligations. When it was time for PT. Arpeni Pratama Ocean Line, Tbk to pay the installment of principal and interest, PT. Arpeni Pratama Ocean Line, Tbk persuaded PT. Bank CIMB Niaga to sign the Deed of Mutual Agreement No. 80 dated October 13, 2015, made before Yondri Darto, SH, Notary in Batam. Basically, in the agreement, PT. Arpeni Pratama Ocean Line, Tbk. through its subsidiary PT Surya Prima Bahtera, has promised to pay off the entire debt of PT. Arpeni Pratama Ocean Line, Tbk. to PT. Bank CIMB Niaga, Tbk. outside the Peace Agreement dated November 1, 2011 by selling the land owned by PT Surya Prima Bahtera and/or voluntarily handing it over to PT. Bank CIMB Niaga, Tbk. Tbk. and then the proceeds of the sale will be used to make payments. But the fact is that, until now, the promises of repayment as stated in the deed have never been realized by PT. Arpeni Pratama Ocean Line, Tbk. Therefore, it should be suspected that this is just a trick for PT. Arpeni Pratama Ocean Line, Tbk. to avoid the obligation to pay the principal and interest debts. As stated above, an effort that can be made by the debtor to avoid bankruptcy is to make an effort called Postponement of Debt Payment Obligation, or PKPU. The premise of PKPU is to provide an opportunity for debtors to restructure their debts, which may include payment of all or part of the debt to concurrent creditors. If this can be done well, in the end, the debtor can fulfill his obligations and continue his business.⁷

Debtors who have more than one creditor and are unable or expect to be unable to continue paying their debts that are due and collectible may apply to the court for a temporary postponement of debt payment obligations for 45 (forty-five) days with the intention of proposing a peace plan that includes an offer of payment of part or all of the debt to creditors. Based on the right of PT. Arpeni Pratama Ocean Line, Tbk. as a debtor to apply for a postponement of debt payment obligations above in order to restructure its debts, the author is interested in raising the issue of the consideration of the Supreme Court as a *Judex Jurist* in canceling a homologated peace agreement based on Decision No. 23/PKPU/2011/PN.Niaga.Jkt.Pst. Based on the background and problem formulation described above, the research objectives to be achieved in this writing are to analyze PKPU's implementation of debt restructuring in Decision No. 718/K/Pdt.Sus-Pailit/2019. jo. No. 4/Pdt.Sus.Pembatalan Perdataan/2019/PN.Niaga.Jkt.Pst. jo. No. 23/PKPU/2011/PN.Niaga.Jkt.Pst regarding the judge's consideration in terms of Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations.

RESEARCH METHOD

The type of research used is normative legal research. Normative legal research is research that aims to examine the quality of legal norms based on written regulations or legal materials related to this research. This normative or library research is mostly conducted on secondary data in the library. This research is based on legislation, namely, Law No. 37 of 2004, concerning bankruptcy and suspension of debt payment obligations.

Primary legal materials: Cohen and Olson define primary legal materials as all legal rules whose enforcement or imposition is carried out by the state. In the case of this paper, the law used is Law No. 37 of 2004 concerning bankruptcy and suspension of debt payment obligations.

The approaches used are the statute approach and the conceptual approach. This approach is carried out by examining all laws and regulations related to the role and responsibilities of

⁷ Rudhy A. Lontoh, Denny Kailimang, dan Benny Ponto, *Penyelesaian Utang Piutang: Melalui Pailit Atau Penundaan Kewajiban Pembayaran Utang* (Bandung: Alumni, 2001), hlm. 173.

the curator in maximizing the bankruptcy estate. This statutory approach is carried out by studying the consistency or compatibility between the Constitution and the law, or between one law and another law.⁸

The data collection technique is library research.⁹ The method of data analysis carried out is qualitative, namely by describing all data according to the quality and nature of symptoms and legal events by sorting the relevant legal materials mentioned above to suit the problems discussed and linking existing legal materials.¹⁰ The method of drawing conclusions is done deductively. The inference method basically consists of two, namely the deductive and inductive inference methods. The deductive inference method is a general proposition whose truth is known and ends in a conclusion (new knowledge) that is specific.¹¹

RESULT AND DISCUSSION

The Principle of Business Going Concern (Business Continuity)

Experts generally agree that a going concern situation in business practice is used as a parameter in estimating the ability of an entity to maintain its business activities within a certain period of time, usually 1 year ahead.¹² The following is an explanation of the principles of business continuity in bankruptcy and postponement of debt payment obligations:

- a) The principle of balance: this law regulates several provisions that are manifestations of the principle of balance, namely, on the one hand, there are provisions that can prevent the abuse of bankruptcy institutions and institutions by dishonest debtors, and on the other hand, there are provisions that can prevent the abuse of bankruptcy institutions and institutions by creditors who are not in good faith;
- b) In accordance with the principle of business continuity, in this law, there are provisions that allow prospective debtor companies to be continued;
- c) The principle of justice in bankruptcy The principle of justice implies that the provisions regarding bankruptcy can fulfill a sense of justice for the parties concerned. The arbitrariness of the collectors who seek payment of their respective bills against the debtor with no regard for other creditors; and
- d) The principle of integration, in this law, implies that the formal and material law system is an integral part of the national civil law system and civil procedure law.

Justice as Grand Theory

According to Hans Kelsen, justice is a certain social order under whose protection the search for truth can flourish. According to him, justice is justice of liberty, justice of peace, justice of democracy, and justice of tolerance. Kelsen is of the view that law as a social order can be declared just if it can regulate human actions in a satisfactory way so that they can find happiness in it.¹³ Hans Kelsen's view is a positivist view, the values of individual justice can

⁸ Hudyarto Hudyarto, "Pertanggungjawaban Putusan Pailit Perseroan Terbatas," *Binamulia Hukum* 10, no. 1 (2021): 91-106, <https://doi.org/10.37893/jbh.v10i1.380>.

⁹ M. Nazil, *Metode Penelitian* (Jakarta: Ghia Indonesia, 2010), hlm. 111.

¹⁰ Edy Ikhsan dan Mahmud Siregar, *Metode Penelitian dan Penulisan Hukum Sebagai Bahan Ajar* (Medan: Fakultas Hukum Universitas Sumatera Utara, 2009), hlm. 24-25.

¹¹ Bambang Sunggono, *Metodologi Penelitian Hukum* (Jakarta: Rajawali Pers, 2018), hlm. 11.

¹² Elyta Ras Ginting, *Hukum Kepailitan: Rapat-Rapat Kreditor* (Jakarta: Sinar Grafika, 2018), hlm. 185.

¹³ Hans Kelsen, *Teori Hukum Murni: Dasar-Dasar Ilmu Hukum Normatif*, penerjemah Raisul Muttaqien (Bandung: Nusamedia, 2016), hlm. 7.

be known by legal rules that accommodate general values, but still fulfill a sense of justice and happiness for each individual.

Hans Kelsen further argues that justice is a subjective value judgment. Although a just order assumes that an order is not the happiness of each individual but the greatest possible happiness for as many individuals as possible in the sense of a group, namely the fulfillment of certain needs that are considered by the ruler or lawmaker as needs that should be met, such as the need for clothing, food, and shelter, But which human needs should be prioritized? This can be answered by using rational knowledge, which is a value judgment determined by emotional factors and therefore subjective.¹⁴ As a school of positivism, Hans Kelsen also recognizes that absolute justice comes from nature, which is born from the nature of things or human nature, from human reasoning, or from God's will.

This thinking is licensed as a doctrine called natural law. The doctrine of natural law assumes that there is an order of human relationships that is different from positive law, which is higher, fully valid, and just because it comes from nature, human reasoning, or the will of God.¹⁵ Thinking about the concept of justice, Hans Kelsen, who adheres to the positivism school, also recognizes the truth of natural law. So that his thinking on the concept of justice creates dualism between positive law and natural law. According to Hans Kelsen,¹⁶

“The dualism between positive law and natural law makes the characteristics of natural law similar to Plato's metaphysical dualism of the world of reality and the world of ideas. The core of Plato's philosophy is his doctrine of the world of ideas, which contains profound characteristics. The world is divided into two distinct spheres: the first is the visible world that can be captured through the senses, called reality; the second is the invisible world of ideas; and the third is the invisible world of ideas.”

Two more concepts of justice were put forward by Hans Kelsen: the first is about justice and peace. Justice originates from irrational ideals. Justice is rationalized through knowledge, which can take the form of interests that ultimately lead to a conflict of interest. The resolution of the conflict of interests can be achieved through an order that satisfies one interest at the expense of another or by trying to reach a compromise towards peace for all interests.¹⁷

Second, the concepts of justice and legality to establish on a solid foundation a certain social order, according to Hans Kelsen, the notion of “justice” means legality. A general rule is “just” if it is actually applied, while a general rule is “unjust” if it is applied to one case and not applied to another similar case. This concept of justice and legality is applied in the national law of Indonesia, which means that national legal regulations can be used as a legal umbrella for other national legal regulations according to their level and degree, and the legal regulations have binding force on the materials contained in the legal regulations.¹⁸

Consideration of the Supreme Court as a *Judex Jurist* in the Cancellation of a Homologated Peace Agreement Based on Decision No. 23/PKPU/2011/PN.Niaga.Jkt.Pst

Through its decision Number 718/K/Pdt.Sus-Pailit/2019, the *Judex Jurist* argued that the *Judex Facti*'s decision misapplied the law. *Judex Facti* has affirmed the Court's decision that homologated the peace agreement between PT. Bank CIMB Niaga, Tbk. and PT. Arpeni Pratama Ocean Line, Tbk. through Decision Number 23/PKPU/2011/PN.Niaga.Jkt.Pst. In its legal reasoning, the *Judex Facti* argued that the content of the agreement stating the

¹⁴ *Ibid.*, hlm. 9.

¹⁵ *Ibid.*, hlm. 12.

¹⁶ *Ibid.*, hlm. 14.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, hlm. 71.

permissibility of changes to the peace agreement that has been homologated by the court with the approval of the majority creditors is valid and does not constitute an unlawful causation.

Meanwhile, according to the *judex jurist's* consideration, the peace agreement made in front of a notary based on the clause of Article 26 of the Peace Agreement dated November 1, 2011 cannot be justified because the clause contradicts the principle of balance and justice adopted in bankruptcy law, where the decision must provide equal benefits and protection for all parties involved, both debtors and creditors, so that the clause in the peace agreement made in front of a notary becomes a peace that is not sufficiently guaranteed to be implemented.

According to Hans Kelsen, justice is a certain social order under whose protection the search for truth can flourish. According to him, justice is justice of liberty, justice of peace, justice of democracy, and justice of tolerance. Furthermore, Hans Kelsen argues that justice is a subjective value judgment. Although a just order assumes that an order is not the happiness of each individual but the greatest happiness for as many individuals as possible in the sense of a group, namely the fulfillment of certain needs that are considered by the ruler or lawmaker as needs that should be met, such as the need for clothing, food, and shelter,

The Peace Agreement dated November 1, 2011, which was homologated by the Court, is a final and legally binding decision, so it cannot be changed for any reason, let alone changes made outside the court. In addition, it has become a permanent jurisprudence of the Supreme Court that if there is a conflict between peace agreements made outside the court after the BHT decision, the BHT court decision applies.

Likewise, the amendment to the peace agreement dated February 7, 2019 is invalid, null, and void. For the parties, there is no other choice but to implement the sound of the homologated peace. The settlement must be returned to the homologation decision in which the respondent, as the debtor of the applicant, is obliged to pay the debt to the applicant according to the payment scheme stipulated in the peace agreement dated November 1, 2011, consisting of principal debt and interest through payment of money, while payment in the form of debt conversion into shares as stated in the amendment to the peace agreement dated February 7, 2019, is invalid. Thus, the respondent cannot prove that the homologated peace agreement has been fulfilled as required by Article 170 paragraph (2) of Law Number 37 of 2004 concerning bankruptcy and suspension of debt payment obligations.

The Panel of Judges then related this to Article 170 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations which regulates the requirements for submitting a request for the cancellation of peace by including the reason that the debtor has neglected to fulfill the contents of the peace. The article *quo* reads "The creditor may demand the cancellation of a ratified peace if the debtor fails to fulfill the contents of the peace." With the rejection letter from the issuing bank stating that the account of PT. Arpeni Pratama Ocean Line, Tbk has been closed, PT. Arpeni Pratama Ocean Line, Tbk is proven to be no longer in a state of ability to pay. In some jurisprudence, the meaning of "cessation of payment" has been interpreted more broadly, namely:

- a) The situation of ceasing to pay is not the same as the situation that the debtor's wealth is not sufficient to pay his collectible debts, but rather that the debtor does not pay his debts; and
- b) The debtor may be deemed to be in a state of cessation of payments even if the debts are not yet collectible at that time.

In accordance with the provisions of Article 291 of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, because the Respondent/Debtor has not acted in good faith and has failed to fulfill the contents of the peace agreement dated

November 1, 2011, which was homologated by making payments on its obligations even until the application for cancellation of peace was filed, the peace agreement a quo was declared void and the Respondent/Debtor was declared bankrupt with all legal consequences. This is also in line with the provisions of Article 291 paragraph (2) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, which states that the debtor must also be declared bankrupt in a court decision that annuls the peace, so that PT. Arpeni Pratama Ocean Line, Tbk was declared a bankrupt debtor on July 28, 2018.

Then, the *Judex Jurist*, in his decision, ordered the appointment of a curator in accordance with the provisions of Article 15 of Law Number 37 of 2004 concerning bankruptcy and suspension of debt payment obligations and the appointment of a supervisory judge to the Chairman of the Commercial Court at the Central Jakarta District Court. The decision to annul the peace ordered that the bankruptcy be reopened with the appointment of a supervisory judge, a curator, and members of the creditors committee, if in the previous bankruptcy there was such a committee. This provision is regulated in Article 172, Paragraph 1, of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. After the bankruptcy is reopened, no peace offer can be made, and the curator must immediately take action to organize the bankruptcy property in accordance with the provisions of Article 175 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations.

Based on these considerations, the Supreme Court annulled the decision of the Commercial Court at the Central Jakarta District Court Number 4/Pdt.Sus-Cancellation of Peace/2019/PN.Niaga.Jkt.Pst. jo. Decision Number 23/PKPU/2011/PN.Niaga.Jkt.Pst. dated May 28, 2019. Although there are differences of opinion between *Judex Facti* and *Judex Jurist*, in accordance with the description that has been stated, it can be seen that the PKPU institution as a means of debt restructuring for debtors against their creditors and cassation decision Number 718/K/Pdt.Sus-Pailit/2019 with PT. Bank CIMB Niaga, Tbk. as the cassation petitioner and PT. Arpeni Pratama Ocean Line, Tbk. as the cassation respondent is in line with Law Number 37 of 2004 concerning bankruptcy and suspension of debt payment obligations.

CONCLUSIONS

According to the consideration of the *Judex Jurist* who granted the petitioner's request for the cancellation of the peace agreement that had been homologated based on Decision No. 23/PKPU/2011/PN.Niaga.Jkt.Pst, the peace agreement dated November 1, 2011, which was homologated by the Court, was a decision that was final and legally binding (BHT), so it could not be changed for any reason, let alone changes made outside the court. In addition, it has become a permanent jurisprudence of the Supreme Court that if there is a conflict between peace agreements made outside the Court after the BHT decision, the BHT Court decision applies.

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