



DECISION

Case Number: 071/PUU-II/2004

Case Number: 001- 002/PUU-III/2005

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Examining, hearing, and deciding at the first and final level, has passed the following decision, in a case of petition for judicial review of Law Number: 37 Year 2004 regarding Bankruptcy and Postponement of Debt Settlement Obligation against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

I. Petitioner in Case Number: 071/PUU-II/2004.

INDONESIAN INSURANCE CONSUMERS' FOUNDATION (YLKAI),
domiciled at Wisma Metropolitan I 7th Floor, Jl. Jenderal Sudirman Kav. 29
Jakarta 12920;

II. Petitioner in Case Number: 001/PUU-III/2005

ARYUNIA CANDRA PURNAMA, Private Person, having her address at
Jl. Pengadegan RT. 002 RW. 007, South Jakarta;

III. Petitioner in Case Number: 002/PUU-III/2005

SUHARYANTI, Private person, having her address at Trukan Sub-District
Pracimantoro District, Wonogiri Regency, Central Java;

Hereinafter referred to as **PETITIONERS**;

In this matter by virtue of Special Powers of Attorney dated December 21,
2004, January 10, 2005, and January 11, 2005, authorizing the following
persons:

1. LUCAS, S.H;
2. SWANDY HALIM, S.H;
3. MARSELINA SIMATUPANG, S.H;
4. FINDA MAYANG SARI, S.H;
5. NUR ASIAH, S.H;
6. SHILVIANA, S.H;
7. SONY R. WICAKSONO, S.H., LLM;
8. LILI BADRAWATI, S.H;
9. RENTY H.GULTOM, S.H.;
10. TISYE ERLINA YUNUS, S.H., M.M;
11. MUHAMMAD AS'ARY, S.H.;
12. TOMMY S. SIREGAR, S.H., LLM.

having their address at Wisma Metropolitan I, 7th Floor, Jl. Jenderal
Sudirman Kav. 29, South Jakarta 12920;

Having read the petition of the Petitioners;

Having heard the statement of the Petitioners;

Having examined the evidence;

Having heard the statements of Witnesses and Experts;

Having heard the testimony of the Government;

Having read the affidavits of the Government and People's Legislative Assembly of the Republic of Indonesia;

LEGAL CONSIDERATIONS

Considering whereas the purpose and objective of the *a quo* Petitioners are as mentioned above;

Considering whereas prior to examining the principal issue of the case, the Constitutional Court (hereinafter referred to as the Court) needs to first take the following matters into account:

1. Whether the Court has the authority to examine, hear, and decide upon the petition for review of Law Number 37 Year 2004 regarding Bankruptcy and Postponement of Debt Settlement Obligation (hereinafter referred to as Law Number 37 Year 2004);
2. Whether the Petitioner in case Number 071/PUU-II/2004 (hereinafter referred to as Petitioner 071/2004), the Petitioner in Case Number 001/PUU-III/2005 (hereinafter referred to as Petitioner 001/2005) and the

Petitioner in case Number 002/PUU-III/2005 (hereinafter referred to as Petitioner 002/2005) have the legal standing to file a petition for judicial review of Law Number 37 Year 2004 against the 1945 Constitution;

In respect of the abovementioned two issues, the Court is of the following opinion:

1. Authorities of the Court

Considering whereas based on Article 24C Paragraph (1) of the 1945 Constitution as affirmed in Article 10 Paragraph (1) Sub-Paragraph a of Law Number 24 Year 2003 regarding the Constitutional Court (hereinafter referred to as the Constitutional Court Law), one of the Court's authorities is conducting judicial review of laws against the 1945 Constitution, so that the Court has the authority to examine, hear, and decide upon the petition of the Petitioners;

2. Legal standing of the Petitioners

Considering whereas Article 51 Paragraph (1) of the Constitutional Court Law has stipulated two criteria which must be met so that the Petitioners have the legal standing, namely:

- a. Qualification of the Petitioners whether as individual Indonesian citizens (including groups of people having a common interest), units of customary law communities insofar as they are still in existence and in accordance with the development of the community and the principle of the Unitary State of the Republic of Indonesia as regulated

in law, public or private legal entities, or state institutions;

- b. Assumption that in such qualification the Petitioners' constitutional rights and/or authorities have been impaired by the coming into effect of a law;

Considering whereas Petitioner 001/2005 is an Indonesian citizen who deems that her constitutional rights have been impaired by the coming into effect of Article 2 Paragraph (5) and Article 6 Paragraph (3) of Law Number 37 Year 2004, with the rejection of a petition for bankruptcy declaration filed by the Petitioner against PT. Prudential Life Insurance by the Commercial Court at the Central Jakarta District Court. Similar petition rejection was also made by the Commercial Court at the Semarang District Court against the petition of Petitioner 002/2005.

Considering whereas the rejection of both petitions above was based on the same articles, namely Article 2 Paragraph (5) Law No. 37 Year 2004;

Considering whereas rejection by the Commercial Court of the intended petitions was based on arguments that the Court does not have the authority, because according to the Commercial Court, as indicated in the statement of the Government in the court hearing which was not denied by the Petitioners, the intended petitions were not based on the relationship between insurance company and insurance policy holders but on "cessie", whereas such cessie had not met the requirements, since the claims transferred from receiver (Mr. Yuhelson) to both Petitioners had not obtained any court stipulation. Therefore,

the Petitioners were not harmed in the context of Article 51 Paragraph (1) of the Constitutional Court Law;

Considering whereas even if such claims were legally valid, and the Petitioners once again filed the petition to the Commercial Court to issue a bankruptcy declaration against both insurance companies, it was certain that the Commercial Court would not grant petition of the Petitioners since it was not filed by the Minister of Finance, as required by the provision of Article 2 Paragraph (5) of Law No. 37 Year 2004;

Considering whereas however, since Law No. 37 Year 2004 states that it is only the Minister of Finance who may file a petition for bankruptcy declaration of insurance companies, the Petitioners' assumption that their constitutional rights have been impaired by the coming into effect of Article 2 Paragraph (5) of Law No. 37 Year 2004 has adequately met the requirements of Article 51 Paragraph (1) of the Constitutional Court Law, so that the Court is of the opinion that the Petitioners have the legal standing to file the *a quo* petition;

Considering whereas the Petitioner 071/2004, YLKAI, claims itself as a legal entity in the form of a foundation. In the court hearing the Government disclosed that the legal entity status of Petitioner 071/2004 is in doubt, because the YLKAI has not been registered or has never filed any request for legalization or notification to the Department of Law and Human Rights;

In respect of the aforementioned arguments expressed by the Government, the Court is of the opinion that even if it were correct (*quod non*) that the YLKAI has

not been legalized, however, based on Article 71 Paragraph (1) of Law Number 28 Year 2004 regarding the Amendment to Law Number 16 Year 2001 concerning Foundations which reads, "At the time this law enters into force, foundations that, or have been registered at District Courts and having operational licenses issued by the relevant governmental authorities *shall remain acknowledged as legal entities.....*", therefore YLKAI is acknowledged as a legal entity;

In the court hearing it was also disclosed that YLKAI has been registered at the Registrar's Office of South Jakarta District Court (please refer to Exhibit P-1a) and has obtained licenses to conduct activities from the Industry and Trade Service Office of the Provincial Government of the Special Capital City Region of Jakarta (please refer to Exhibit P-3);

In accordance with Article 46 Paragraph (1) of Law Number 8 Year 1999 concerning Consumers' Protection, YLKAI as a non-government consumers' protection agency, shall be entitled to represent the consumers' interests within the scope of its activities to file a petition for judicial review of Article 2 Paragraph (5) and Article 6 Paragraph (3) deemed to have impaired the constitutional rights of the consumers concerned;

Based on the above considerations, the Court is of the opinion that Petitioner 071/2004 has the legal standing to act as Petitioner in the *a quo* petition;

Considering whereas since the Court has authority and the Petitioners have the legal standing, the Court shall further consider the arguments and the

petitum of the Petitioners in the principal case;

3. Principal Issue of the Petition

Considering the Petitioners argue that Article 2 Paragraph (5) and Article 6 Paragraph (3) as well as Articles 223 and 224 Paragraph (6) of Law Number 37 Year 2004 are contradictory to Article 28D Paragraph (1) and Article 27 Paragraph (1) of the 1945 Constitution;

Article 2 Paragraph (5) of Law Number 37 Year 2004 reads, "In the event that a Debtor is an insurance Company....., a petition for bankruptcy declaration may **only** be filed by **the Minister of Finance**." The Petitioners argue that by the existence of the aforementioned provisions has impeded the constitutional rights of the Petitioners to directly file a petition for bankruptcy declaration of the insurance company which has impaired their interests, even the Petitioners no longer have such rights. According to the Petitioners, this is contradictory to Article 28D Paragraph (1) of the 1945 Constitution which reads, "Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law", and Article 27 Paragraph (1) of the 1945 Constitution which reads, "Without exception, all citizens shall have an equal position before the law and government and shall be obligated to uphold such law and government";

In addition, the Petitioners are of the opinion that the granting of limited authorities to the Minister of Finance has caused the Minister of Finance to become a part of judicative institution performing the duty of making a judicial

decision (*quasi judicial*). According to the Petitioners, the aforementioned matter is contradictory to Article 24 Paragraphs (1), (2), and (3) of the 1945 Constitution, as well as Article 24C Paragraph (1) which substantially state that the judicial power shall be an independent power to uphold law and justice which shall be exercised by the Supreme Court and the Constitutional Court;

In respect of the abovementioned arguments of the Petitioners, the Court considers as follows:

Article 2 Paragraph (5) of Law Number 37 Year 2004

1. Whereas the provisions set forth in Article 2 Paragraph (5) of Law Number 37 Year 2004 shall apply not only to the Petitioners but also to all Indonesian citizens without exception. Therefore, all citizens shall have an equal obligation to uphold the legal provision set forth in the aforementioned article;
2. Whereas the provision set forth in Article 2 Paragraph (5) of the *a quo* Law does not eliminate right of the Petitioners as guaranteed in the substantive civil law. If it is evidently true in legal respect that the Petitioners have civil rights in the form of claims to the insurance company, the aforementioned rights will remain legally acknowledged, guaranteed, protected, in a certain and just manner, in accordance with the meaning of Article 28D Paragraph (1) of the 1945 Constitution;
3. Whereas it is the right of the Petitioners in the context of formal law (procedural law) which is limited, namely that if the Petitioners intend to file a

petition for bankruptcy declaration against an insurance company, such petition may not be filed by the Petitioners to the Commercial Court, but may only be filed by the Minister of Finance;

The Court is of the opinion that such rights limitation can be made by law, provided that such limitation, although it is apparently unbalanced, meets rational balance;

4. Whereas the intended balance exists if such limitation is intended for protecting a larger interest. In addition, for the party on which such limitation is imposed, there is other legal remedy alternative available for the party concerned to fight for his/her;

In this case, the limitation imposed on insurance consumers to file a petition for bankruptcy declaration of an insurance company is based on the consideration that an insurance company is a company having a special characteristic relating to various interests which must be protected, particularly the consumers' interest (insurance policy holders) who are usually in a very large number up to hundreds of thousands or millions persons, as well as the insurance company's interest in order to maintain its company. All interests relating to insurance matters must be acknowledged, guaranteed, and protected in a balanced way, whether such interest relates to insurance consumers or to community members who are not insurance consumers;

An insurance company constitutes a prudential financial institution, which

absorbs, manage, and control the funds of the people, even the majority part of its assets is an accumulation of public funds, and only a small part of it constituting the company's capital. Part of the accumulation of such sufficiently large public funds is used to finance national economic development;

Therefore, a bankruptcy declaration against an insurance company may shake the economic life of the society. Furthermore, a bankruptcy declaration against an insurance company will create a bad public image for insurance companies in general, leading to the diminishing or even the loss of public trust to the insurance companies. Whereas, reliable insurance companies capable of accumulating public funds for supporting the national economic development are urgently needed;

5. Whereas the meaning of the limitation in the provision of Article 2 Paragraph (5) of the *a quo* law is increasingly important if related to Article 2 Paragraph (1) of the *a quo* law which reads, "Debtor having two or more Creditors and not settling at least one matured and collectable debt shall be declared bankrupt by virtue of a Court stipulation, whether at his/her own request or at the request of one or more of his creditors." Requirements for a petition for bankruptcy declaration included in the *a quo* Article is extremely lenient, so that a creditor can easily file a petition for bankruptcy declaration merely based on a matured and collectable debt;

The Court is of the opinion that such extremely lenient requirements for filing a petition for bankruptcy declaration constitutes **omission** of the legislators in formulating Article 2 Paragraph (1) concerned because if compared to, for example, the provision set forth in Article 1 Paragraph (1) of the *Faillissement - Verordening* (Stb. 05-217 jo. 06-348) which reads, “*De schuldenaar, die in den toestand verkeert dat hij heeft opgehouden te betalen, wordt, hetzij op eigen aangifte, hetzij op verzoek van een of meer zijner schuldeischers, bij rechterlijk vonnis in staat van faillissement verklaard*”, it is evident that Phrase “*hij heeft opgehouden te betalen*” (insolvency) does not exist in the formulation of Article 2 Paragraph (1) of the *a quo* law. Due to the lack of “insolvency” requirements, the creditor can easily file a petition for bankruptcy declaration against an insurance company without an obligation to prove that such insurance company is insolvent;

For another comparison, in *Titel II United States Bankruptcy Code 1994* as amended in 1998, being “*under the condition of being unable to pay debts*” which is known by the term of “*insolvent*” constitutes one of the requirements of a petition for bankruptcy declaration;

In the aforementioned *Bankruptcy Code*, *insolvent* means among other things being in a, “.... *financial condition that the sum of such entity’s debts is greater than all of such entity’s property*”; “*unable to pay its debts as they become due*”;-

Whereas with such requirement, a bankruptcy declaration must be preceded by a test whether or not a debtor has been in an insolvent condition (insolvency test), but in fact the aforementioned matter is not mentioned in the formulation of Article 1 of the *a quo* law. Therefore, in the context of improving Law concerning the Bankruptcy in the future, such matter must be properly considered;

Whereas such omission by the legislators of the phrase “unable to pay”, giving flexibility to the creditor which can be utilized by any creditor with bad faith to force insurance companies, is counterbalanced by the existence of Article 2 Paragraph (5) stating that in the event that a debtor is an insurance company, the petition for bankruptcy declaration may only be filed by the Minister of Finance;

Such lenient requirements will not be a problem if the debtor is an individual or a company which does not involve a very large public interests;

If the individual creditor’s right is not limited in filing a petition for bankruptcy declaration of a prudential company involving a very large public interests and which may shake fluctuate the national economy, it means that a very larger public interests is sacrificed for the interests of a small group of individuals.

Whereas limitation of a right, according to the opinion of expert Prof. Dr. Philipus M. Hadjon, S.H., can be made provided that the party who is

subject to such limitation is given equal opportunity to fight for his/her right;

In fact, the limitation set forth in Article 2 Paragraph (2) of Law Number 37 Year 2004 shall not abolish the right of the creditor who deems that he/she has been disfavored to file a civil lawsuit through the court of general jurisdiction;

With the reasons that there is larger interest that must be protected and in order to maintain other equal alternatives available for the parties who feel to have been harmed by the coming into effect of the *a quo* Article 2, the Court is of the opinion that the aforementioned article is not contradictory to Article 28D Paragraph (1) and Article 27 Paragraph (1) of the 1945 Constitution. In addition, the limitation for such reasons is approved by Article 28J Paragraph (2) which reads, "In exercising his/her right and freedom, every person must submit to the restrictions stipulated in laws and regulations with the sole purpose to guarantee the recognition of and the respect for other persons' rights and freedom and fulfill fair demand in accordance with the considerations of morality, religious values, security, and public order in a democratic society";

Obligation to guarantee the recognition of and the respect for other persons' rights and freedom (in this matter rights of insurance consumers other than Petitioners the number of which is larger), disturbance of public security and order can be understood to be made as a rational

consideration by the legislators in formulating the restrictions set forth in Article 2 Paragraph (5) concerned;

Considering whereas in respect of the Petitioners' arguments stating that the granting of authorities to the Minister of Finance as indicated in Article 2 Paragraph (5) causes the Minister of Finance to become a part of judicative institution performing duties of taking a judicial decision (*quasi judicial*), the Court is of the following opinion:

The authorities of the Minister of Finance in Article 2 Paragraph (5) granted by the legislators shall only relate to the legal standing of the Minister of Finance as a Petitioner in a bankruptcy case because of its function as an authority holder in the field of financial affairs and shall not make a judicial decision which constitutes an authority of justices. Therefore, the authority granted by the legislators to institutions within the executive institutions shall not constitute judicial authority, hence it can not be deemed to have been contradictory to Article 24 paragraphs (1), (2), and (3) of the 1945 Constitution as well as Article 24C Paragraph (1) of the 1945 Constitution;

Based on the considerations as described above, the petition of Petitioners insofar as relating to Article 2 Paragraph (5) of Law Number 37 Year 2004 must be rejected;

Article 223 of Law Number 37 Year 2004

Considering the Petitioners also argue that Article 223 of Law Number 37

Year 2004 is contradictory to Article 28D paragraphs (1), (2), and Paragraph (3) as well as Article 24C Paragraph (1) of the 1945 Constitution;

Whereas the provisions of Article 223 shall apply *mutatis mutandis* to Article 2 Paragraph (5), so that the considerations of the Court shall also apply *mutatis mutandis* to Article 223 of the *a quo* law. Therefore, the Court is of the opinion that Article 223 is not proven to be contradictory to the 1945 Constitution, and therefore the petition of Petitioners, insofar as it relates to Article 223 of the *a quo* Law, must be rejected;

Article 6 Paragraph (3) of Law Number 37 Year 2004

Considering the Petitioners argue that Article 6 Paragraph (3) of Law Number 37 Year 2004 has revoked, restricted, and abolished the constitutional rights of the Petitioners to register the petition for bankruptcy declaration and this is contradictory to Article 28D Paragraph (1) and Article 27 Paragraph (1) of the 1945 Constitution. In addition, according to the Petitioners, Article 6 Paragraph (3) of the *a quo* law is contradictory to Article 16 Paragraph (3) of Law Number 4 Year 2004 concerning Judicial Power;

With respect to the aforementioned arguments of the Petitioners, the Court considers as follows:

1. Whereas the interpretation of Article 6 Paragraph (3) must be systematically related to the previous paragraphs [Paragraph (1) and Paragraph (2)];

Article 6 Paragraph (1) entirely reads, “Petition for bankruptcy declaration shall be filed to the Head of the Court”.

Article 6 Paragraph (2) entirely reads, “Clerk shall register a request for bankruptcy declaration on the date the relevant request is filed, and petitioner will be granted a written receipt signed by the competent authorities with the same date as the date of registration.”

Meanwhile Article 6 Paragraph (3) reads, “Clerk shall be obligated to reject registration of request for bankruptcy declaration for institutions as intended in Article 2 Paragraphs (3), (4), and (5) if conducted not in accordance with the provisions in the relevant paragraphs.”

2. Whereas although Clerk constitutes a position in the court, but to the position concerned it shall only be given technical judicial administrative duties in the context of supporting judicial functions constituting the justices’ authority;

In connection therewith, Article 35 of Law Number 4 Year 2004 states that, “Clerks, substitute clerks and bailiffs shall be court officials whose appointment and dismissal as well as principal duties shall be stipulated in a law”.

In the elucidation of Law Number 2 Year 1986 regarding the court of general jurisdiction as has been amended by Law Number 8 Year 2004, it is stipulated that the principal duties of the clerks are “handling cases administration and other administrative matters having technical judicial in nature” and does not relate to judicial functions (*rechtsprekende functie*)

constituting authorities of justices;

Rejecting the registration of a petition basically includes in the **judicial domain**. According to Article 6 Paragraph (1), a petition must be filed to the Head of the Court. If Clerks are granted with duties, authorities, and responsibilities to exercise judicial functions, hence the aforementioned matter is contradictory to the essence of the independent judicial power, as well as to law and justice enforcement as indicated in Article 24 Paragraph (1) of the 1945 Constitution;

Considering also whereas the legal principle which have long been acknowledged reads as follows, "The Courts of Justice may not refuse to examine, hear, and decide upon cases filed to them with the reason of the absence of unclarity of the law, but they shall instead be obligated to examine and try the cases";

This principle has been included in Article 22 AB which reads, "*De regter, die weigert regt te spreken, onder voorwendsel van stilzwijgen, duisterheid of onvolledigheid der wet, kan uit hoofde van regtsweigering vervolgd worden. (Rv. 859 v.; Civ.4)*";

Lastly, this principle is specified in Article 16 Paragraph (1) of Law Number 4 Year 2004 concerning Judicial Power. By using an *argumentum a contrario* interpretation, the Courts of Justice may not therefore refuse to examine and hear a case the law of which clearly regulates the case filed to the court;

If the Clerks are granted with the authority to refuse the registration of a petition

for bankruptcy declaration against an insurance company, it can be interpreted that the clerks have taken over the Justices' authority to make a decision upon a petition. Such authorities eliminate the Petitioners' rights to obtain legal disputes settlement in a just and publicly open process. This matter is contradictory to the principles of "*due process of law*" and "*access to courts*" constituting the main pillar for the upholding of the "*rule of law*" as intended by Article 1 Paragraph (3) of the 1945 Constitution;

Although the final result of the related petition may be the same, namely being declared that it can not be accepted (*niet ontvankelijkheid*) due to non fulfillment of the legal standing requirements as provided for in Article 2 Paragraph (5) of the *a quo* law, which according to the Court is not contradictory to the 1945 Constitution, such decision must be set out in a decision with the heading "For the Sake of Justice Under the One Almighty God";

Considering whereas because the elucidation of Article 6 Paragraph (3) constitutes an inseparable part of the elucidated article, hence the aforementioned article's Elucidation is automatically treated as being similar to the elucidated article;

Considering whereas based on the above considerations, it is evident that Article 6 Paragraph (3) of Law Number 37 Year 2004 is contradictory to the 1945 Constitution, therefore petition of the Petitioners, insofar as it relates to Article 6 Paragraph (3) of Law Number 37 Year 2004 concerning this matter, is sufficiently grounded to be granted;

Article 224 Paragraph (6) of Law Number 37 Year 2004

Considering the Petitioners argue that Article 224 Paragraph (6) of Law Number 37 Year 2004 is contradictory to Article 28 Paragraphs (1), (2), and (3), as well as Article 24 Paragraphs (1), (2), and (3) and Article 24C Paragraph (1) of the 1945 Constitution. The intended Article 224 Paragraph (6) reads: “*Provisions as intended in Article 6 Paragraphs (1), (2), (3), (4), and (5) shall apply mutatis mutandis as the procedures for filing an application for the postponement of debt settlement obligation as intended in Paragraph (1)*”;

Considering whereas the formulation of Article 224 Paragraph (6) concerned means that if the petition for the postponement of debt settlement is not made by the party as appointed by Article 6 Paragraph (3) of the *a quo* Law, the Clerk shall be obligated to refuse the intended petition registration in accordance with the Provision of Article 6 Paragraph (3). Meanwhile, the Court has declared that Article 6 Paragraph (3) of the *a quo* Law is contradictory to the 1945 Constitution, so that the consideration of the Court with regard to Article 6 Paragraph (3) as has been described above shall apply *mutatis mutandis* to Article 224 Paragraph (6) of the *a quo* law. Therefore, the Court is of the opinion that Article 224 Paragraph (6), insofar as it relates to the word “Paragraph (3)” of the *a quo* law is proven to be contradictory to the 1945 Constitution and therefore it must be declared as having no binding legal effect, so that Article 224 Paragraph (6) of the *a quo* law must read “*Provisions as intended in Article 6 Paragraph (1), Paragraph (2), Paragraph (4), and Paragraph (5) shall apply*

mutatis mutandis as procedure for filing application for postponement of debt settlement obligation as intended in Paragraph (1)".

Therefore, petition of the Petitioners insofar as it relates to the aforementioned matter must be granted;

In view of Article 56 Paragraphs (2), (3) and Paragraph (5) of Law Number 24 Year 2003 regarding the Constitutional Court;

PASSING THE DECISION

To grant the petition of the Petitioners partly;

To declare that Article 6 Paragraph (3) together with its elucidation and Article 224 Paragraph (6) to the extent they contain the word of "Paragraph (3)" of Law Number 37 Year 2004 concerning Bankruptcy and Postponement of Debt Settlement Obligation (State Gazette of the Republic of Indonesia Year 2004 Number 131, Supplement to the State Gazette of the Republic of Indonesia Number 4443) are contradictory to the 1945 Constitution of the State of the Republic of Indonesia;

To declare that Article 6 Paragraph (3) together with its elucidation and Article 224 Paragraph (6) to the extent that they contain the word of "Paragraph (3)" of Law Number 37 Year 2004 concerning Bankruptcy and Postponement of Debt Settlement Obligation (State Gazette of the Republic of Indonesia Year 2004 Number 131, Supplement to the State Gazette of the Republic of Indonesia Number 4443) do not have any binding a legal effect;

To reject the remaining petition of the Petitioners;

To order proper publication of this decision in the Official Gazette:

Dissenting Opinion:

Considering, whereas with respect to the abovementioned decision of the Court, Constitutional Court Justice Prof. Dr. H.M. Laica Marzuki, SH., has the following dissenting opinion:

Freedom of contract (*'vrijheidscontract'*) covers creditors' rights to independently bring legal action against the debtor deemed to have breached the before the judges;

When the legislators of Law Number 37 Year 2004 regarding Bankruptcy and Postponement of Debt Settlement Obligation determined that a subject of creditor who petition for bankruptcy declaration against an insurance company and/or reinsurance company shall only be filed by the Minister of Finance to the Commercial Court (please refer to Article 2 Paragraph (5)), it basically restricts the freedom of contract of the parties binding themselves in the insurance contract and/or reinsurance contract the substance of which is deemed to have legal effect (*'.... hebben aangegaan tot wel'*) for them, as intended in Article 1338 BW. Besides that the aforementioned procedural requirements are not subject to a contract the intended matter undermines or tends to impede the imposition of obligation on one of the parties in order to fulfill his/her promises, in accordance

with Article 1338 BW, similar provisions are expressly prohibited in the Constitution of the United States of America *article one, section ten, clause 1* in connection with '....*law impairing the obligation of contracts*';

Neither is it justified, based on the freedom of contract, if a petition of the subject of debtor for postponement of debt settlement obligation may only be filed by the Minister of Finance (please refer to Article 223):

Constitutionally, the procedural requirements determined by *de wetgever* contains discriminatory treatment when the creditor and/or debtor under another contract shall not be subject to similar provisions, as prohibited by the constitution based on Article 28D Paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia;

Meanwhile, if the involvement of the Minister of Finance is deemed as a protection efforts of the state administration in relation to the organization of "the modern welfare state", then the *bestuurszorg* carried out by the public officials concerned has exceeded the mission of *publieke bevoegheden* like '*the pendulum of the clock has gone too far*' because if the intervention of the Minister of Finance in case of filing of petition for bankruptcy declaration and petition for postponement of debt settlement obligation concerned are ".....to develop trust degree of the society to Insurance Companies or Reinsurance Companies as risk management institution and at the same time as society's fund management institution having strategic position in economic development and life' (Elucidation of Article 2 Paragraph (5)) therefore efforts to protect state

administrative institutions or officials should be conducted at the preventive stage by establishing administrative regulations (*'besluit van algemene strekking'*) and various K.TUN-K.TUN, rather than by involvement in repressive settlement stage within the procedural domain of the court;

The Court should have granted the petition of the Petitioners in its entirety;

Hence this decision was made in the consultative meeting of justices attended by 9 (nine) Constitutional Court Justices on Monday, May 16, 2005 and was pronounced in a Plenary Session of the Constitutional Court open for the public on this day Tuesday, May 17 2005 by us: Prof. Dr. Jimly Asshiddiqie, S.H. as the Chairperson and concurrent Member, Prof. Dr. H.M. Laica Marzuki, S.H., Prof. H.A.S. Natabaya, S.H., LL.M., Prof. H. A. Mukthie Fadjar, S.H. M.S., H. Achmad Roestandi, S.H., Dr. Harjono, S.H., M.C.L., I Dewa Gede Palguna, S.H., M.H., Maruarar Siahaan, S.H., and Soedarsono, S.H., respectively as Members, and assisted by Eddy Purwanto, S.H., Cholidin Nasir, S.H., and Ida Ria Tambunan, S.H. as Substitute Registrars and in the presence of the Petitioners/their Attorneys-In-Fact, the Government/or its representative and the People's Legislative Assembly/or its representative.

CHIEF JUSTICE,

signed

Prof. Dr. Jimly Asshiddiqie S.H.

JUSTICES,

signed

Prof. Dr. H. M Laica Marzuki, S.H.

signed

Prof.. H.A.S Natabaya.S.H. LLM

signed

Prof. H. Abdul Mukthie Fadjar, S.H. M.S.

signed

H. Achmad Roestandi, S.H.

signed

Dr. Harjono, S.H., M.CL.,

signed

I Dewa Gede Palguna, S.H., M.H.

signed

Maruarar Siahaan, S.H.

signed

Soedarsono, S.H.

SUBSTITUTE REGISTRAR,

signed

Eddy Purwanto, S.H.

signed

Cholidin Nasir, S.H.

signed

Ida Ria Tambunan, S.H.