D E C I S I O N

Number 015/PUU-III/2005

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

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

TOMMY S. SIREGAR, SH., LLM., having his address at Jln. Camar II Blok AG/25, RT.04/RW.08, Pondok Betung Sub-district, Pondok Aren District, Tangerang Regency, West Java, who by virtue of a special power of attorney dated June 20, 2005, who has authorized: **Swandy Halim,SH., Marselina Simatupang, SH., Muhammad As'ary, SH., Nur Asiah, SH., Finda Mayang Sari, SH., Lucas, S.H.**, respectively Advocates from **Law Firm LUCAS & PARTNERS**, addressed at Wisma Metropolitan I 14th Floor, Jalan Jenderal Sudirman Kavling 29, South Jakarta 12920,

to act for and on behalf of **TOMMI S. SIREGAR, SH, LL.M.**

Hereinafter referred to as **PETITIONER**;

Having read the petition of the Petitioner;

Having heard the testimony of the Petitioner;

Having heard the testimony o the Government;

Having read the affidavit of the Government;

Having read the affidavit of the People's Legislative Assembly of the Republic of Indonesia;

Having read and examined written evidence of the Petitioner;

LEGAL CONSIDERATIONS

Considering whereas the purpose and objective of the Petitioner are as described above;

Considering whereas prior to further examining the substance of the Petitioner's petition, the Constitutional Court will first take the following matters into account:

1. Whether the Court has the authority to examine, hear and decide on the *a quo* petition;

2. Whether the Petitioner has the legal standing to act as Petitioner in the *a quo* petition;

With regard to the above mentioned two issues, the Court is of the following opinion:

1. Authority of the Court

Considering whereas, with respect to the authority of the Court, Article 24C Paragraph (1) of the 1945 Constitution states among others that the Constitutional Court has the authority to adjudicate at the first and final level, with a final decision, the review of laws against the Constitution. This provision is reasserted in Article 10 Paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court (hereinafter referred to as the Constitutional Court Law).

Considering whereas the *a quo* petition is a petition for judicial review of the Bankruptcy Law against the 1945 Constitution, and therefore the Court has the authority to adjudicate and decide on the *a quo* petition.

2. Legal Standing of the Petitioner

Considering whereas Article 51 Paragraph (1) of the Constitutional Court Law provides that, *"Petitioner is a party who claims that his/her constitutional right has been impaired by the coming into effect of a law, namely:*
An individual Indonesian Citizen;

a. *unit of customary law community insofar as it is still in existence and in line with the development of the society and the principles of the Unitary State of the Republic of Indonesia as regulated in law;*
b. *public or private institution; or*
c. *state institution"*.

Therefore, to be accepted as a Petitioner in a petition for judicial review of a law against the 1945 Constitution, a person or a party must first explain:

a. his/her qualification in the *a quo* petition, whether as an individual Indonesian citizen, a unit of customary law community (which fulfils the requirement as referred to in the aforementioned Article 51 Paragraph (1) Sub-Paragraph b), a legal entity (public or private), or a state institution;
b. his/her constitutional right/authority, in such qualification, is claimed to have been impaired by the coming into effect of a law;

Considering whereas based on the two standards to asses whether or not the Petitioner has the legal standing in the above mentioned judicial review of the law against the 1945 Constitution, the Court, through a number of its decisions namely, among others, Decision Number 006/PUU-III/2005 and Decision Number 010/PUU-III/2005, has also reasserted the requirements for impairment of constitutional rights which must be clearly described by the Petitioner in his petition, namely:

a. the Petitioner must have a constitutional right granted by the 1945 Constitution;

b. the Petitioner deems that his or her constitutional right is impaired by the coming into effect of the law being petitioned;

c. such impairment of the constitutional right is of specific and actual nature or at least potential in nature which, based on logical reasoning, will surely occur;

d. there is a causal relationship *(causal verband)* between the Petitioner's impaired constitutional right and the coming into effect of the law being petitioned for review;

e. if the petition is granted, it is expected that that such impairment of the constitutional right will not or does not occur any longer;

Considering whereas the Petitioner, Tommi S. Siregar, S.H., LL.M, has explained about his qualification in the *a quo* petition namely as an individual Indonesian citizen with the profession of receiver. The qualification as an Individual Indonesian citizen is evidenced by a photocopy of Resident Identity Card (Exhibit P-3), whereas the qualification as a receiver, in accordance with the provision of Article 70 Paragraph (2) Sub-Paragraph b of the Bankruptcy Law is evidenced by a Certificate of Registration as Receiver and Administrator Number C-HT.05.14-16 Year 2000 dated August 24, 2000 issued by the Department of Law and Human Rights, *c.q*. Director General of General Legal Administration (Exhibit P-4) and a Certificate from the Indonesian Association of Receivers and Administrators (IKAPI) Number 094/Peng-IKAPI/VI/05 dated June

13, 2005 which states that the Petitioner is truly an active member of the Indonesian Association of Receivers and Administrators (IKAPI) (Exhibit P-5);

Considering whereas one of the constitutional rights granted to every person is the right to just recognition, guarantee, protection and legal certainty and equal treatment before the law, as intended in Article 28D Paragraph (1) of the 1945 Constitution;

Considering whereas in his petition the Petitioner has explained that his constitutional right as receiver to the legal certainty is considered to have been impaired by the provisions of the Bankruptcy Law, namely Article 17 Paragraph (2), Article 18 Paragraph (3), Elucidation of Article 59 Paragraph (1), Article 83 Paragraph (2), Article 104 Paragraph (1), Article 127 Paragraph (1), Elucidation of Article 127 Paragraph (1), Elucidation of Article 228 Paragraph (6), and Article 244;

Considering whereas based on the above description, regardless of whether or not the Petitioner can prove his arguments, the Constitutional Court is of the opinion that the Petitioner has the legal standing to act as the Petitioner in the *a quo* petition;

Considering whereas as the Court is authorized to examine, hear and decide on the *a quo* petition and as the Petitioner has the legal standing to act as the Petitioner, the Court shall further consider the substance or the principal issue of the petition;

Principal Issue of the Petition

Considering whereas in examining the *a quo* petition, the Court has heard the testimony of the Government presented in the hearing on August 22, 2005 and in the hearing on October 11, 2005 and has also read the affidavit of the Government together with its supplementary statement received at the Registry Office of the Court respectively on September 7, 2005 and on October 26, 2005, which has been completely described in the Principal Case section of this decision;

Considering whereas the Court has also read the affidavit of the People's Legislative Assembly received at the Court Registry Office on September 27, 2005 which has been completely described in the Principal Case section of this decision;

Considering whereas petitions for judicial review of the *a quo* law have been filed and have been decided by the Court as indicated in Decision Number 071/PUU-II/2004 and Number 001-002/PUU-III/2005, such that all statements in such decisions of the Court, insofar as they are relevant to the substance of the *a quo* petition, shall also be incorporated as considerations in this decision;

Considering whereas the Petitioner argues that Article 127 Paragraph (1) of the Bankruptcy Law which reads as follows: *"In the event of any denial while the Supervisory Judge can not reconcile both parties, even though such dispute has been submitted to the court, the Supervisory Judge shall order both parties*

to settle such dispute at the court", and Elucidation of Article 127 Paragraph (1) of the Bankruptcy Law which reads as follows: *"'court' in this paragraph refers to a district court, high court, or the Supreme Court",* are contradictory to the 1945 Constitution as they do not provide legal certainty for the Petitioner as Receiver, by the following arguments:

- Whereas according to Article 3 Paragraph (1) of the Bankruptcy Law, the decision on a petition for bankruptcy declaration and other matters relevant to/regulated in the Bankruptcy Law shall be decided over by a Court within the jurisdiction where the Debtor is domiciled. Whereas according to the Elucidation of Article 3 Paragraph (1) of the Bankruptcy Law, the aforementioned "other matters" refer to, among others, *actio pauliana*, third party opposition to seizure, or cases where either the Debtor, Creditor, Receiver or Administrator becomes a party in a case related to bankruptcy assets, including Receiver's petition against the Board of Directors by whose negligence or fault a company has been declared bankrupt. The Law of Procedures applicable in adjudicating cases referred to by "other matters" is similar to the Law of Civil Procedures applicable to a petition for bankruptcy declaration, including the time frame limitation for its settlement;
- Whereas Article 1 Sub-Article 7 of the Bankruptcy Law states that, *"Court shall be the Commercial Court within the jurisdiction of the general judicature"*;
- Whereas *"disputes arising from the existence of a denial while the Supervisory Judge can not reconcile both parties"*, as provided for in Article

127 Paragraph (1) of the Bankruptcy Law, are included in the understanding of *"other matters relevant to/regulated in this Law"* as regulated in Article 3 Paragraph (1) of the Bankruptcy Law;

- Whereas in the event that a dispute occurs due to denial by a party and that such dispute can not be amicably settled by the Supervisory Judge, the Petitioner as Receiver needs to submit this dispute to the court. However, with the provision of Article 127 Paragraph (1) of the Bankruptcy Law along with its elucidation, the Petitioner as Receiver does not get the legal certainty as to which court has the competence to settle the intended dispute: is it the Commercial Court or the District Court? The reason is that if the dispute is filed to the District Court [based on Article 127 Paragraph (1) of the Bankruptcy Law] while it should have been filed to the Commercial Court [based on Article 3 Paragraph (1) of the Bankruptcy Law], this matter will render the Decision of the District Court invalid as it has violated the absolute competence to adjudicate, and so is the reverse;

With respect to the above argument of the Petitioner, the Court will give the following considerations:

- Whereas from a grammatical structure view point, the wording of the article concerned bears the understanding that the Supervisory Judge still has the authority to reconcile disputing parties (namely in the event of denial) even though such a dispute has been submitted to the court (in lower case "c"). The existence of the words "has been submitted" clearly indicates that the

court referred to in this context is not the Commercial Court. In other words, the authority of the Supervisory Judge to bring amicable settlement for the disputing parties shall not be abolished for the reason that such dispute has been submitted to the court (in lower case “c”). With this understanding, it would be illogical if the “court” (in lower case “c”) in the wording of the article concerned were construed as referring to the Commercial Court. The reason is that such understanding would be illogical besides that there is no need to affirm the authority of the Supervisory Judge to amicably settle the dispute since such authority has been inherently attached to the position of the Supervisory Judge in the proceedings at the Commercial Court. However, if the effort to bring amicable settlement by the Supervisory Judge is to no avail, while the dispute must be settled so as to keep the proceedings at the Commercial Court going, the Supervisory Judge shall then order the related parties to settle the dispute in the Court (in capital “C”), namely the Commercial Court. Thus in this respect the *renvoi procedure* shall apply so that the word “court” in Article 127 Paragraph (1) namely the clause which reads “ the Supervisory Judge shall order both parties to settle such dispute at the court” should have been written as “Court” (with a capital “C”);

- Whereas nevertheless, the elucidation of Article 127 Paragraph (1) is not mistaken as it refers to the word “court” in Article 127 Paragraph (1) namely the clause which reads *“even though such dispute has been submitted to the court”*, whereas the mention of the word “court” in lower case “c” in Article 127 Paragraph (1) namely in the clause which reads *“...the Supervisory Judge*

shall order both parties to settle such dispute at the court", is, according to the Court, a clerical error by the legislators where the word "court" in the intended clause should have used a capital "C" as it refers to the Commercial Court, pursuant to the definition provided by Article 1 Sub-Article 7 of the Bankruptcy Law. The evidence that it is a *clerical error* is the provision of Article 127 Paragraph (2) which reads, *"Advocates representing the parties must be the advocates referred to in Article 7"*, while in general the aforementioned Article 7 provides for the proceedings at the Commercial Court. Article 7 completely reads as follows: *"(1) The petition as referred to in Article 6, Article 10, Article 11, Article 12, Article 43, Article 56, Article 57, Article 58, Article 68, Article 161, Article 171, Article 207, and Article 212 must be submitted by an advocate; (2) The provision as referred to in Paragraph (1) shall not apply in the event the petition is filed by public prosecutor's office, Bank Indonesia, Capital Market Supervisory Board and the Minister of Finance"*. This means that had the word "court" in the above clause not referred to the Commercial Court but to the district court or the high court or the Supreme Court, there would be no such need to formulate the above provision as set forth in Article 127 Paragraph (2);

- Whereas the provision of Article 127 Paragraph (3) of the Bankruptcy Law makes it clearer that the word "court" concerned in Article 127 Paragraph (1) in the clause which reads *"the Supervisory Judge shall order both parties to settle such dispute at the court"* refers to the Commercial Court. Article 127 Paragraph (3) of the Bankruptcy Law reads, *"Case as referred to in*

Paragraph (1) shall be examined in a simple proceeding". It will be impossible for a simple proceeding to be conducted if the word "court" (in lower case "c") in the aforementioned clause is understood as referring to the district court, high court or the Supreme Court (general judicature);

- Whereas from the *legal drafting* viewpoint, every word "court" which is intended to refer to the Commercial Court, as intended in Article 1 Sub-Article 7 of the Bankruptcy Law shall always be written in capital C, wherever it is mentioned, for instance in Article 15 Paragraph (1), Article 99 Paragraph (1), Article 225 Paragraphs (2), (3), (4), and (5), without complying with grammatical rules regarding the usage of capital letters based on the Revised Spelling Rules (EYD). If the word "court" is intended to refer not to the Commercial Court, the usage should have complied with grammatical rules of the Revised Spelling Rules (EYD). In such case, an elucidation must be given, as is with the word "court" (in lower case "c") in Article 127 Paragraph (1) of the Bankruptcy Law in the clause *"even though such dispute has been submitted to the court"*;
- Whereas therefore, the Court can accept the testimony of the Government to the effect that the substance of Article 127 Paragraph (1) of the Bankruptcy Law provides for disputes which arouse previously between the parties which must be settled first, either through deliberations to reach a consensus or by filing a petition to the court (General Judicature), and that they are not disputes in bankruptcy cases which are automatically subject to the jurisdiction of the Commercial Court, on the understanding that this only

applies to the word “court” in the clause which reads *“even though such dispute has been submitted to the court”* in the above mentioned Article 127 Paragraph (1) of the Bankruptcy Law;

- Whereas, although the Court is of the opinion that there has been a *clerical error* in mentioning the word “court” in the clause of Article 127 Paragraph (1) of the Bankruptcy Law which reads *“the Supervisory Judge shall order both parties to settle such dispute at the **[c]ourt**”,* based on the above considerations, such clerical error does not necessarily create legal uncertainty as argued by the Petitioner. If the word “court” in the clause which reads *“the Supervisory Judge shall order both parties to settle such dispute at the **[c]ourt**”* is construed as not referring to the Commercial Court, then the matter will in fact create legal uncertainty by creating unnecessary delays in the proceedings at the Commercial Court which is, in this way, not in line with one of the basic ideas underlying the establishment of the Commercial Court, as, among others, described in the General Elucidation of the Bankruptcy Law which reads as follows: *“For the interest of business world in the just, speedy, open and effective settlement of debt matters, supporting legal instruments are much needed”*;
- Whereas therefore, the provision of Article 127 Paragraph (1) of the Bankruptcy Law and its Elucidation are not contradictory to the Constitution insofar as they are understood in the way as intended in the above mentioned considerations of the Court.

Based on the above consideration the Court is of the opinion that Article 127 Paragraph (1) and elucidation of Article 127 (1) of the Bankruptcy Law, to the extent as argued by the Petitioner, are not proved to have been contradictory to the 1945 Constitution, and accordingly, such argument of the Petitioner is not sufficiently grounded;

Considering whereas the Petitioner argues that Article 17 Paragraph (2) of the Bankruptcy Law which reads, *"The Panel of Judges canceling the decision of bankruptcy declaration shall also stipulate bankruptcy costs and remuneration of the Receiver"* and Article 18 Paragraph (3) of the Bankruptcy Law which reads *"The Panel of Judges ordering the revocation bankruptcy shall stipulate bankruptcy costs and remuneration of the Receiver"* are contradictory to the 1945 Constitution as they do not provide legal certainty for the Petitioner as Receiver, with the following arguments:

- Whereas based on the provision of Article 69 Paragraph (1) *juncto* Article 21 of the Bankruptcy Law, a Receiver is the appointed party to control bankruptcy assets and to conduct management and/or settlement of bankruptcy assets so controlled. However, Article 17 Paragraph (2) and Article 18 Paragraph (3) provide that the stipulation of bankruptcy costs and remuneration of receivers shall be conducted by the panel of judges;
- Whereas therefore, the provision of Article 17 Paragraph (2) and Article 18 Paragraph (3) of the Bankruptcy Law concerned are clearly contradictory to the essence of the receiver's task namely as the one responsible for the

bankruptcy assets (*boedel*), because as the person in charge of the *boedel*, the Receiver should have the authority to expend bankruptcy assets (*boedel*) to pay for bankruptcy costs in a similar way to the authority of the Board of Directors to expend a company's funds to finance operational costs of the company;

- Whereas besides, Receivers do not obtain legal certainty as to which panel of judges the application for the stipulation of bankruptcy costs and remuneration of the receive must be submitted to, whether to the Commercial Court [as provided for in Article 18 Paragraph (3) of the Bankruptcy Law] or to the justices of the Supreme Court level [as provided for in Article 17 Paragraph (2) of the Bankruptcy Law];
- Whereas, if the Petitioner as Receiver is not authorized to expend the bankruptcy assets directly for the payment of bankruptcy costs (without any stipulation of the panel of judges being required) and the Petitioner as Receiver does not obtain the legal certainty as to which judge has the authority to stipulate bankruptcy costs and receiver's remuneration, then the payment of the costs during the process of management and/or settlement of bankruptcy assets can not be guaranteed as it is unclear who is authorized to stipulate such costs. Non payment of such bankruptcy costs will cause the Petitioner as Receiver to be considered negligent in performing his tasks of managing and/or settling bankruptcy assets, which negligence must be accounted for by the Petitioner as Receiver as provided for in Article 72 of the Bankruptcy Law;

- Whereas bankruptcy costs may be incurred every day when the bankruptcy is underway, and if fact such bankruptcy costs may be incurred on the day following the pronouncement of bankruptcy declaration. In this situation, the Petitioner as Receiver does not know whether the related bankruptcy case will end: whether with the revocation at the Commercial Court level [as provided for in Article 18 Paragraph (3) of the Bankruptcy Law] or with the cancellation of the decision on bankruptcy declaration by the justices of the appeal to the Supreme Court level or by a Case Review [as provided for in Article 17 Paragraph (2) of the Bankruptcy Law]. Therefore, during the process, the Petitioner as Receiver will not obtain any legal certainty as to where must the application for the stipulation of bankruptcy costs be submitted to or who has the authority to stipulate such bankruptcy costs. If the Petitioner as Receiver then pays the bankruptcy costs directly (without any stipulation of bankruptcy costs), the Petitioner can be deemed to have committed embezzlement of bankruptcy assets or at least misused his authority for which he can be sued;
- Whereas besides, Article 17 Paragraph (2) of the Bankruptcy Law and its elucidation provide contradictory regulations since on the one hand Article 17 Paragraph (2) of the Bankruptcy Law provides that the panel of judges canceling the decision of bankruptcy declaration (or in other words referring to the panel of justices at the appeal to the Supreme Court or Case Review level) shall be the party authorized to stipulate the bankruptcy costs and Receiver’s remuneration, while on the other hand the elucidation of this article

provides that the authorized party shall be the panel of judges of the Court deciding over the bankruptcy case (or in other words referring to the panel of judges of the Commercial Court level);

- Whereas in addition, the Elucidation of Article 17 Paragraph (2) of the Bankruptcy Law only provides for the stipulation of bankruptcy costs without regulating Receiver's remuneration, and as such the elucidation of the article has lead to the interpretation that the definition of bankruptcy costs also include Receiver's remuneration;

With respect to the above argument of the Petitioner, the Court will give the following considerations:

- Whereas pursuant to Article 1 Sub-Article 5 of the Bankruptcy Law, Receiver refers to "A Probate Court or an individual person appointed by the Court to manage and settle the assets of the Bankrupt Debtor under the oversight of the Supervisory Judge pursuant to this Law". Therefore, the duty of a Receiver is to manage and settle the bankruptcy assets. With this understanding, it is true that it contains the meaning of Receiver's right "to control bankruptcy assets (*boedel*), however it does not refer to a control which is as free as possible in the manner he controls his own assets. In this connection, a Receiver who is basically granted with authority by the law, shall perform his duties in compliance with the mandate of the source of his authority, which is, in this respect, the Bankruptcy Law, and that it is not right to consider that the Receiver controls bankruptcy assets as freely as possible

by stipulating his own remuneration as Receiver. The terms “to manage” and “to settle” basically refer to the granting of authority to the Receiver to safeguard, settle, and to allocate such bankruptcy assets to entitled parties as provided for in the *a quo* law, and that for his service the Receiver shall obtain remuneration all of which shall be determined by the panel of judges handling the case concerned the schedule of which has been submitted by the Receiver and after hearing the considerations of the Supervisory Judge [Elucidation of Article 17 Paragraph (2)]. Therefore, the opinion of the Petitioner which has treated the position of Receiver equally with that of the board of directors of a company – which is a legal entity – having the authority to expend the company’s money to pay for the operational costs of the company, is not correct;

- Whereas, the expenses for bankruptcy costs without the knowledge of or without the Stipulation of the Court will give an extremely extensive authority to the Receiver so as to be contradictory to the essential meaning of the word ”administrator” as the title of the Receiver and may in this way open up the chance for misuse which is harmful to related parties, particularly the debtor and creditors. The concern of the Petitioner that the Elucidation of Article 17 Paragraph (2) of the Bankruptcy Law only provides for the stipulation of bankruptcy costs without regulating the remuneration of the Receiver so that the article elucidation will lead to the interpretation that bankruptcy costs shall also include the remuneration of the Receiver, is not sufficiently grounded because Article 76 of the *a quo* law expressly states that the amount of

remuneration which must be paid to the Receiver shall be stipulated based on the guidelines stipulated by a Decree of the Minister whose duties and responsibilities are in field of law and legislations. In this respect, such Ministerial Decree has been issued, namely the Decree of the Minister of Justice of the Republic of Indonesia Number: M.09-HT.05-10 Year 1998 concerning the Guidelines for the Amount of Remuneration of Receivers and Administrators. Hence, the Judge – as intended in Article 17 Paragraph (2) of the *a quo* law and its elucidation – shall, in stipulating the bankruptcy costs and remuneration of the Receiver, be bound by this provision and that it is impossible to make any interpretation other than that about which the Petitioner is concerned;

- Whereas in addition, even if the Petitioner were correct with respect to the contradiction between Article 17 Paragraph (2) and its elucidation, the matter would not harm the Petitioner, in the meaning that he does not obtain legal certainty about his right to receive remuneration as Receiver. The reason is that, regardless of who stipulates it, the right of the Petitioner to receive remuneration remains guaranteed as provided for in Article 75 and Article 76 of the *a quo* law.

Based on the above considerations, the Court is of the opinion that the Petitioner's argument, insofar as it pertains to Article 17 Paragraph (2) and Article 18 Paragraph (3) which are deemed to be contradictory to the 1945 Constitution, is not sufficiently grounded;

Considering whereas the Petitioner argues that the elucidation of Article 59 Paragraph (1) of the Bankruptcy Law which reads *"Referred to as 'must exercise their rights' shall be that the Creditors have commenced exercising their rights"* is contradictory to the 1945 Constitution as it does not provide legal certainty for the Petitioner as Receiver in performing his profession, based on the following arguments:

- Whereas Article 59 Paragraph (1) of the Bankruptcy Law provides that within a period of 2 (two) months following the commencement of insolvency the entitled creditors (separate creditors) must exercise their rights. Elucidation of Article 59 Paragraph (1) concerned provides that referred to as 'must exercise their rights' shall be that the Creditors have commenced exercising their rights, Article 59 Paragraph (2) of the Bankruptcy Law provides that following the elapse of the period of 2 (two) months the Receiver shall require the delivery of property being the collateral for sale in accordance with the method as determined by law without prejudice to the rights of entitled Creditors (separate creditors) on the proceeds of sale of such collateral;
- Whereas basically, Article 59 Paragraph (2) of the Bankruptcy Law is intended to provide legal certainty for concurrent creditors in particular and in the bankruptcy process in general, as in the sale of collateral by separate creditors there may be any balance of sale proceeds which is the right of concurrent creditors. Therefore, Article 59 Paragraph (2) of the Bankruptcy Law provides a time frame (namely two months following the insolvency) for separate creditors to conduct the sale of collateral. Upon the elapse of such

time frame, Article 59 Paragraph (2) of the Bankruptcy Law obligates the Receiver to require the delivery of collateral for the interests of concurrent creditors (however without prejudice to the rights of separate creditors on the proceeds of the sale of collateral) without giving any exception to separate creditors who have not put the collateral on sale but have 'commenced exercising their rights'.

- Whereas therefore, Elucidation of Article 59 Paragraph (1) of the Bankruptcy Law has been contradictory to legal certainty which is to be provided by Article 59 Paragraph (2) of the Bankruptcy Law because the elucidation of Article 59 Paragraph (1) enables separate creditors who have commenced exercising their rights, not to deliver the collateral to the Receiver although the time frame of two months following insolvency has elapsed. Whereas in fact, Article 59 Paragraph (2) of the Bankruptcy Law obligates the Receiver to require delivery of collateral from separate creditors upon the elapse of the time frame of 2 (two) months following insolvency. If such mandate of Article 59 Paragraph (2) is not performed, the Petitioner as Receiver can be sued as he is considered negligent in performing his duties and considered as having impaired the interests of concurrent creditors.

With respect to the above argument of the Petitioner, the Court will give the following considerations:

- Whereas the Court can accept certain parts of the above arguments of the Petitioner and that the matter is also parallel to the testimony of the

Government to the effect that the provision of Article 59 Paragraph (1) of the Bankruptcy Law is related to the right to conduct execution on the object of property collateral right which is part of bankruptcy assets, so that if the execution is not conducted by Separate Creditors and a period of 2 (two) months has elapsed, then the Receiver shall have the right to sell and/or transfer the object of the property collateral right as part of the bankruptcy assets to another party pursuant to the provision of Article 185 of the Bankruptcy Law without prejudice to the right of Separate Creditors to the sale proceeds of the collateral right object after deducted with the bankruptcy costs. In other words, Article 59 Paragraph (1) and Paragraph (2) of the Bankruptcy Law has clearly provided legal certainty guarantee for the Receiver in performing his tasks;

- Whereas the existence of Elucidation of Article 59 Paragraph (1) of the Bankruptcy Law which reads: *"Referred to as 'must exercise their rights' shall be that the Creditors have commenced exercising their rights"* can not in any way be interpreted as diminishing the legal certainty provided by the *a quo* law for the Petitioner as Receiver. The reason is that even if the situation about which the Petitioner is concerned occurs, namely that separate creditors who have commenced exercising their rights are not willing to surrender the collateral property to the Receiver despite the elapse of the period of two months following the insolvency, it is not the fault on the part of the Receiver, insofar as the Receiver concerned has complied with the requirement set forth in Article 59 Paragraph (2) of the *a quo* law. Therefore,

the Petitioner's concern that he can be sued for negligence in performing his tasks so as to inflict losses on the Concurrent Creditors is exaggerated. Or, if it occurs at all, the issue will be more about law of substantiation than an issue of constitutionality.

Based on the above considerations, the Court is of the opinion that the Petitioner's argument, insofar as it pertains to the Elucidation of Article 59 Paragraph (1) of the Bankruptcy Law which is deemed contradictory to the 1945 Constitution, is not sufficiently grounded.

Considering whereas the Petitioner argues that Article 83 Paragraph (2) of the Bankruptcy Law which reads *"Provisions as intended in paragraph (1) shall not apply to any dispute regarding receivables verification, continuance or non-continuance of company in bankruptcy, in cases as intended in Articles 36, 38, 39, 59 paragraph (3), Article 106, Article 107, Article 184 paragraph (3), and Article 186, regarding methods of the settlement and sale of bankruptcy assets, and the time as well as amount of distribution to be conducted",* is contradictory to the 1945 Constitution as it does not provide legal certainty for the Petitioner as Receiver, based on the following arguments:

- Whereas pursuant to Article 83 Paragraph (2) of the Bankruptcy Law, the Receiver is not obligated to ask for the opinion of the creditors' committee, but on the contrary, Article 104 Paragraph (1) of the Bankruptcy Law provides that the Receiver needs to request for an approval from the creditors' committee to continue the Debtor's business operation;

- Whereas the task of the Petitioner as Receiver shall be to carry out the management and/or settlement of bankruptcy assets (*boedel*), and in performing the task the Petitioner may continue the business operation of the Debtor. The existence of contradictory provisions of Article 83 Paragraph (2) and Article 104 Paragraph (1) of the Bankruptcy Law has caused the Petitioner as Receiver to no longer have legal certainty, whether the Petitioner as Receiver does not request for an approval from the creditors' committee on the basis of the provision of Article 83 Paragraph (2) of the Bankruptcy Law while in fact he should have requested for an approval from the creditors' committee, the action of the Petitioner in continuing the business operation of the Debtor shall be illegal, and the Petitioner as Receiver may be sued for the fault of continuing the business operation of the Debtor without the approval from the creditors' committee;
- Whereas on the contrary, if based on the provision of Article 104 Paragraph (1) of the Bankruptcy Law, the Petitioner as Receiver needs to obtain an approval from the creditors' committee to continue the business operation of the Debtor. However, if such request is rejected by the creditors' committee, the Petitioner as Receiver shall not continue the business operation of the Debtor. Against the decision not to continue the business operation of the Debtor based on the rejection by the creditors' committee, a legal action can be filed if it transpires that such decision has inflicted losses on the bankruptcy assets (*boedel*) and that it is evident that the provision determines

that the Receiver shall not need any approval from the creditors' committee to continue the business operation of the Debtor;

With respect to the above arguments of the Petitioner, the Court will give the following considerations:

- Whereas even if it seems to be logical, the argument prepared by the Petitioner by relating the provision of Article 83 Paragraph (2) to the provision of Article 104 Paragraph (1) is actually inaccurate. In general, Article 83 contains the provision on the creditors' committee, which, in the systematization of the Bankruptcy Law, is included in Part Three on the Management of Bankruptcy Assets, from Article 65 through Article 92, which is divided into 5 (five) Paragraphs namely Paragraph 1 on the Supervisory Judge (Article 65 through Article 68), Paragraph 2 on the Receiver (Article 69 through Article 78), Paragraph 3 on the Creditors' Committee (Article 79 through Article 84), Paragraph 4 on the Creditors' Meeting (Article 85 through Article 90), and Paragraph 5 on the Judge's Stipulation (Article 91 through Article 92). Whereas Article 104 contains the provision which is included in the scope of regulation of Part Four of the Bankruptcy Law concerning Measures following the Bankruptcy Declaration and Duties of Receiver (including Article 93 through Article 112).
- Whereas if Article 83 Paragraph (2) of the Bankruptcy Law is described, it will be read as follows: *"Provisions as intended in paragraph (1) shall not apply to any dispute regarding:*

- *receivables verification,*
- *continuance or non-continuance of company in bankruptcy, in cases as intended in Articles 36, Article 38, Article 39, Article 59 paragraph (3), Article 106, Article 107, Article 184 paragraph (2), and Article 186*
- *methods of the settlement and sale of bankruptcy assets, and*
- *the time as well as amount of distribution to be conducted"*

- Whereas the wording of Article 83 Paragraph (2) of the Bankruptcy Law clearly refers to the situation before the existence of a bankruptcy declaration or during the process leading to a bankruptcy declaration. In the event that in such process the Receiver, according to his duties, is of the opinion that the company in bankruptcy shall be continued or not, the provision of Article 83 Paragraph (1) shall not be applied. However, this is still limited insofar as pertaining to the matters as referred to in Article 36, Article 38, Article 39, Article 59 Paragraph (3), Article 106, Article 107, Article 184 Paragraph (2), and Article 186.

Based on the above considerations, the Court is of the opinion that the argument of the Petitioner insofar as it pertains to Article 83 Paragraph (2) of the Bankruptcy Law deemed to be contradictory to the 1945 Constitution, is not sufficiently grounded.

Considering whereas the Petitioner argues that the provision of Article 244 of the Bankruptcy Law which reads as follows: *"With due observance of the*

provisions in Article 246, postponement of debt settlement obligation shall not apply to:

a. *invoices secured with pledge, fiduciary guaranty, security right, mortgage, or other collateral rights on property;*
b. *invoices of costs for maintenance, supervision, or education payable and the Supervisory Judge shall determine the amount of existing and unpaid invoices before postponement of debt settlement obligation not constituting invoices with privileged right; and*
c. *privileged invoices on certain property owned by Debtor or on all Debtor's assets not included by Paragraph (1) Sub-Paragraph b."*

and the elucidation of Article 228 Paragraph (6) of the Bankruptcy Law which reads *"Those entitled to determine whether Debtor will be given permanent Postponement of Debt Settlement Obligation shall be concurrent Creditors, whereas the Court shall only have the authority to stipulate it based on the approval of concurrent Creditors",* are contradictory to the 1945 Constitution as they do not provide legal certainty for the Petitioner as Receiver, based on the following arguments:

- whereas pursuant to Article 222 Paragraph (2) of the Bankruptcy Law, the Debtor that can not or who estimates that he will be unable to continue paying his matured and collectable debts, may apply for the postponement of debt settlement obligation, for the purpose of proposing a plan for amicable settlement including the offer of payment of a part of or the entire debts to

creditors, including to separate creditors and preferred creditors. Therefore, pursuant to Article 222 Paragraph (2) of the Bankruptcy Law, it is clear that separate creditors and preferred creditors are the parties in the Postponement of Debt Settlement Obligation (PKPU);

- whereas the status of separate creditors and preferred creditors as parties in the Postponement of Debt Settlement Obligation (PKPU), particularly in the stipulation for granting a permanent Postponement of Debt Settlement Obligation (permanent PKPU) to the Debtor, is affirmed by Article 228 Paragraph (4), as well as Article 229 Paragraph (1) of the Bankruptcy Law which expressly and specifically provide for the voting for separate creditors in the stipulation for granting a permanent Postponement of Debt Settlement Obligation (permanent PKPU) for the Debtor;
- whereas the status of separate creditors as parties in the Postponement of Debt Settlement Obligation (PKPU), particularly in determining the plan for amicable settlement, is also affirmed by Article 281 Paragraph (1) of the Bankruptcy Law which provides that separate creditors have the right to participate in determining the plan for amicable settlement;
- whereas therefore, it can be concluded that Article 222 Paragraph (2) of the Bankruptcy Law and its elucidation, which constitute the basic provision on the Postponement of Debt Settlement Obligation (PKPU), have affirmed the status of separate creditors and preferred creditors as parties in the Postponement of Debt Settlement Obligation (PKPU), as supported by Article

228 Paragraph (4) and its elucidation, Article 229 Paragraph (2), and Article 281 Paragraph (1) of the Bankruptcy Law;

- whereas nevertheless, Article 244 of the Bankruptcy Law, in fact, provides that separate creditors and preferred creditors are not parties in the Postponement of Debt Settlement Obligation (PKPU), as supported by the Elucidation of Article 228 Paragraph (6) of the Bankruptcy Law which provides that separate creditors do not have the right to participate in determining the granting of a permanent Postponement of Debt Settlement Obligation (permanent PKPU) for the Debtor;
- whereas therefore, if the Petitioner as Receiver performing his duties to organize the voting to determine the granting of a permanent Postponement of Debt Settlement Obligation (permanent PKPU) does not involve the separate creditors and preferred creditors pursuant to Article 244 and the elucidation of Article 228 Paragraph (6) of the Bankruptcy Law, then the Petitioner may be sued by separate creditors and preferred creditors on the basis of Article 222 Paragraph (2) and its elucidation, Article 228 Paragraph (4) and its elucidation, and/or Article 229 Paragraph (1) of the Bankruptcy Law and that the *voting* can be deemed invalid;
- whereas therefore, the application of Article 244 and the elucidation of Article 228 Paragraph (6) of the Bankruptcy Law has caused the Petitioner as Receiver not to have legal certainty as to whether or not the separate creditors and preferred creditors are parties in the Postponement of Debt Settlement Obligation (PKPU) and whether or not in the *voting* organized to

determine the granting of a permanent Postponement of Debt Settlement Obligation (permanent PKPU) separate creditors and preferred creditors have the right to participate in the voting;

- whereas in addition, the provision of Article 244 Sub-Article (c) of the Bankruptcy Law also creates legal uncertainty for the Petitioner in performing his duties as Receiver because the provision contains the words "... Paragraph (1) Sub-Paragraph b" while such Paragraph (1) Sub-Paragraph b does not exist in Article 244 of the Bankruptcy Law;

With respect to the above argument of the Petitioner, the Court will give the following considerations:

- Whereas Article 244 questioned by the Petitioner clearly refers to the provision of Article 246 of the Bankruptcy Law. Meanwhile, Article 246 concerned provides for the application *mutatis mutandis* to the exercise of Creditors' rights as referred to in Article 55 Paragraph (1) of the Bankruptcy Law and the privileged Creditors. Article 246 concerned completely read as follows: *"Provisions as intended in Article 56, Article 57, and Article 58 shall apply mutatis mutandis to the exercise of Creditors' rights as intended in Article 55 Paragraph (1) and to the privileged Creditors, provided that postponement shall apply during the progress of the postponement of debt settlement obligation"*. Whereas Article 55 Paragraph (1) concerned reads *"With due observance of the provisions as intended in Articles 56, 57 and 58, any Creditors holding pledge, fiduciary guaranty, security right, mortgage, or*

other collateral rights on property, may exercise their rights as if bankruptcy did not occur". Therefore, all the above arguments of the Petitioner, except for those pertaining to the words "Paragraph (1)" in Article 244 Sub-Article c, becomes irrelevant to be considered any further because the rights or receivables of the Creditors (*c.q.* Separate Creditors and Preferred Creditors) questioned by the Petitioner have been automatically fulfilled as they are guaranteed by Article 55 Paragraph (1), so that basically there is no need to participate in discussing the Postponement of Debt Settlement Obligation (PKPU) any more;

- Whereas nevertheless, if the fulfillment or settlement of such receivables of separate Creditors and preferred Creditors as guaranteed by Article 55 Paragraph (1) is evidently insufficient, then based on the provision of Article 246 *juncto* Article 60 and Article 138 of the Bankruptcy Law, the shortage shall remain collectible with the security right **as concurrent creditors** including the voting rights during the valid term of Postponement of Debt Settlement Obligation (PKPU). The unpaid debt can be submitted in the debt verification meeting **as concurrent Creditors** which in the *a quo* law is regulated in Part Five on Receivables Verification (Article 113 through Article 143). Therefore, the provision of Article 222 Paragraph (2) is in fact consistent with the understanding concerning the parties in the Postponement of Debt Settlement Obligation (PKPU), as provided for in Article 228 Paragraph (4) and its elucidation. Elucidation of Article 224 Paragraph (4) states that the meeting participants in considering and approving the plan for

amicable settlement, in addition to the Debtor, shall be *"concurrent Creditors, separate Creditors, as well as other Privileged Creditors."* Both articles – Article 222 Paragraph (2) and Article 228 Paragraph (4) – are the provisions concerning **the plan for amicable settlement**, and not concerning a permanent Postponement of Debt Settlement Obligation (permanent PKPU);

- Whereas to become a permanent Postponement of Debt Settlement Obligation (permanent PKPU), the aforementioned plan for amicable settlement requires a Court stipulation. This is provided for in Article 229 Paragraph (1) Sub-Paragraph b of the Bankruptcy Law which includes the voting rights of separate Creditors and preferred Creditors in the process of stipulating a permanent Postponement of Debt Settlement Obligation (permanent PKPU) and its extension by the Court;
- Whereas furthermore, upon the completion of the process referred to in the above mentioned Article 229 Paragraph (1) Sub-Paragraph b of the Bankruptcy Law, namely with the stipulation of a permanent Postponement of Debt Settlement Obligation (permanent PKPU) by the Court, which constitutes an agreement of the parties, namely, in this respect, the parties as intended in the aforementioned Article 229 Paragraph (1) Sub-Paragraph b, then at this stage all Creditors have become concurrent Creditors, and there is no longer the qualification of separate Creditors or preferred Creditors. This is the intention of the provision of Article 228 Paragraph (6) the elucidation of which accordingly affirms that *"Those entitled to determine whether Debtor will be given permanent Postponement of Debt Settlement*

Obligation shall be concurrent Creditors, whereas the Court shall only have the authority to stipulate it based on the approval of concurrent Creditors";

- Whereas the above considerations do not merely prove that the Petitioner's arguments insofar as they pertain to Article 244 and Elucidation of Article 228 Paragraph (6) of the Bankruptcy Law are groundless but at the same time reflect the consistency of the *a quo* law in regulating both the bankruptcy and Postponement of Debt Settlement Obligation;
- Whereas in addition, the issue raised by the Petitioner does not bear any interest which is related to the constitutional right of the Petitioner as a Receiver, despite the Petitioner's considerable effort to construct his legal arguments so as to make the issue appear to be related to his constitutional right as a Receiver by relating the issue to the possibility that the Petitioner as a Receiver can be sued by separate Creditors and preferred Creditors based on Article 222 Paragraph (2) and its elucidation, Article 228 Paragraph (4) and its elucidation, and/or Article 229 Paragraph (1) of the Bankruptcy Law;
- Whereas nevertheless, with respect to the inclusion of the word "Paragraph (1)" in the wording of the aforementioned Article 244 Sub-Article c, the Court is of the opinion that a clerical error has occurred with the mention of the word "Paragraph (1)" in Article 244 Sub-Article c concerned, which has been confessed by the Government in its testimony on October 11, 2005. However, such inaccuracy is not sufficient to establish that the substance of Article 244 does not provide legal certainty for the Petitioner as Receiver, and does not

necessarily render the provision unconstitutional. Nevertheless, the Court is of the opinion that the word “Paragraph (1)” must be deemed nonexistent.

Therefore, the argument of the Petitioner, insofar as it pertains to Article 244 and the Elucidation of Article 228 Paragraph (6) of the Bankruptcy Law claimed to be contradictory to the 1945 Constitution, is not sufficiently grounded.

Considering whereas based on all the above considerations, the Court is of the opinion that the petition the Petitioner is not based on sufficient grounds and must accordingly be rejected .

In view of Article 56 Paragraph (5) of the Law of the Republic of Indonesia Number 24 Year 2003 concerning the Constitutional Court;

PASSING THE DECISION

To declare the Petitioner’s petition is rejected in its entirety.

With respect to this decision, one Justice expresses a dissenting opinion as follows:

Dissenting Opinion of Constitutional Court Justice, Prof. Dr. H.M. Laica Marzuki, SH:

It is deemed necessary to conduct in-depth consideration on one of the issues of the Petitioner’s petition with respect to the application of Article 127 Paragraph (1) of Law Number 37 Year 2004 concerning Bankruptcy and

Postponement of Debt Settlement Obligation, which provides as follows: ”In the event of any denial while the Supervisory Judge can not reconcile both parties, even though such dispute has been submitted to the court, the Supervisory Judge shall order both parties to settle such dispute at the court”. Elucidation of Article 127 Paragraph (1) states that: “Referred to as "court" in this Paragraph shall be district court, high court, or the Supreme Court”.

Elucidation of Article 127 Paragraph (1) concerned states that in the event of any denial that the Supervisory Judge can not reconcile, even though such dispute has been submitted to the court, the Supervisory Judge shall order both parties to settle such dispute at the district court, high court or the Supreme Court, in accordance with the court proceeding beyond the absolute competence (‘*absolute competentie’*) of the Commercial Court, pursuant to Law Number 37 Year 2004. Whereas in fact, Article 1 Sub-Article 7, CHAPTER I on *General Provisions* provides that the Court – as intended by Law Number 37 Year 2004 – shall be the Commercial Court within General Judiciary.

The regulation of General Provisions constitutes an essential part of the Corpus of Law, being placed in Chapter I, or first articles thereof. General Provisions part is linked with the *begripsbepalingen* of a law which, among others, provides for definitions, acronyms and other matters of general nature, as they apply to subsequent articles.

Therefore, General Provisions part of a law constitutes a fundamental part of the substance of a law, in meaning of *het eigenaardig, onderwerp der wet*, as intended by J.R. Thorbecke (1798-1872) *vide* A. Hamid S. Attamimi, 1990: 194.

Moreover in substance, the content of Article 127 Paragraph (1) of Law Number 37 Year 2004 does not evidently guarantee the legal certainty for justice seekers (‘*justiciabellen*’), *in casu* the Petitioner as Receiver. It is unclear as what is referred to by denial, whether in the meaning of *rechtsmiddel*, or ordinary denial which has not become a legal measure in a judicature, whether it can be made as *fundamentum petendi* beyond the general judicature with civil nature (*civiele rechtelijk proceduur*), or it is still related to the assets of the Bankrupt Debtor, or whether the existing denial is related to the Decision of the Commercial Court upon a petition for bankruptcy declaration and *other matters* relevant to/regulated in Law Number 37 Year 2004, as indicated in Article 3 Paragraph (1). Elucidation of Article 3 Paragraph (1) of Law Number 37 Year 2004 states that “referred to as “other matters” shall be, among others, *actio pauliana*, third party opposition to seizure, or cases where either the Debtor, Creditor, Receiver or Administrator becomes a party in a case related to bankruptcy assets, including Receiver’s petition against the Board of Directors by whose negligence or fault a company has been declared bankrupt”.

Legislators (‘*de wetgever*’) should have explained the matter, determining whether the nature of the existing denial pursuant to Article 127 Paragraph (1) is related or not related at all to *de merites van een zaak* of the Commercial Court,

although there is in fact a contradiction (‘*contradictief* ’) between the Elucidation of Article 127 Paragraph (1) and Article 1 Paragraph (7).

Elucidation of a Law, commonly referred to as *memorie van toelichting*, is outside of the Corpus of law and generally consists of General Provisions part and Article by Article elucidation. A law is enacted (‘*afkondiging*’) in the State Gazette while Elucidation of law is published in the Supplement to the State Gazette. In the event of any contradiction between the Elucidation and the text of the Corpus of Law, the text of the Corpus of Law shall supersede the Elucidation of Law.

Civilians (‘*burgers*’) are only bound by laws (*wet, Gezetz*). They do not have to know all elucidation and discussion of such laws, as expressed by Irawan Soejito, quoting *Rapport wetgevingstechniek*, 1948.

Based on the above opinion, it would be proper that Article 127 Paragraph (1) Law Number 37 Year 2004 concerning Bankruptcy and Postponement of Debt Settlement Obligation be declared not legally binding as it is contradictory to Article 28D the 1945 Constitution.

* * * * * * * * *

Hence this decision was made in a Consultative Meeting of Justices attended by 9 (nine) Constitutional Court Justices on **Monday, December 12, 2005** and was pronounced in a Plenary Meeting of the Constitutional Court open for the public on this day, **Wednesday, December 14, 2005** by us, eight

Constitutional Court Justices, **Prof. Dr. Jimly Asshiddiqie, S.H.** as the Chairperson and Concurrent Member and **Prof. Dr. H.M. Laica Marzuki, S.H., Prof. H.A.S. Natabaya, S.H., LL.M, H. Achmad Roestandi, S.H., Dr. Harjono, S.H., M.C.L., Prof. H. Abdul Mukthie Fadjar, S.H., M.S., I Dewa Gede Palguna, S.H., M.H.,** as well as **Soedarsono, S.H.**, respectively as Members, assisted by **Sunardi, SH** as Substitute Registrar, and in the presence of the Petitioner/the Petitioner's Attorneys-in-Fact, the Government and the People's Legislative Assembly of the Republic of Indonesia;

CHIEF JUSTICE

Signed

Prof. Dr. Jimly Asshiddiqie, S.H.

JUSTICES

Signed	**signed**
Prof. Dr. H.M. Laica Marzuki, S.H.	**Prof. H.A.S. Natabaya, S.H., LL.M**
Signed	**signed**
H. Achmad Roestandi, S.H.	**Prof. H.A. Mukthie Fadjar, S.H.,M.S.**
Signed	**signed**
Dr. Harjono, S.H., M.C.L.	**I Dewa Gede Palguna, S.H., M.H.**

Signed

Soedarsono, S.H.

SUBSTITUTE REGISTRAR,

Signed

Sunardi, S.H.