CONSTITUTIONAL COURT DECISION: SUSPENSION OF DEBT PAYMENT OBLIGATION MAY BE SUBJECT TO CASSATION

An Overview

On 15 December 2021, the Constitutional Court issued Decision No. 23/PUU-XIX/2021 (Decision 23) regarding the judicial review of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligation (Law No. 37/2004). Under Law No. 37/2004, Suspension of Debt Payment Obligation (Penundaan Kewajiban Pembayaran Utang/PKPU) decisions are not subject to any legal remedies. Decision 23, in essence, ruled that a PKPU decision may be subject to cassation if it concerns a PKPU petition initiated by the creditor and concerns the rejection of the composition plan submitted by the debtor.

This article will discuss the Constitutional Court’s rationale in issuing Decision 23 and its effects on the practice of PKPU in the future.

Background

The judicial review was initiated by a company that was subject to a PKPU process and whose composition plan was rejected by the creditors. The petitioner argued that PKPU, due to the lack of legal remedies against its decisions, can be misused by creditors to obtain a bankruptcy decision by way of initiating a PKPU process and then rejecting the composition plan. The petitioner argued that like bankruptcy decisions, all PKPU decisions should be subject to legal remedies. The articles that are under review are Articles 235, 293, and 295 of Law No. 37/2004, which stipulate:

Article 235 paragraph (1): Against PKPU decisions no legal remedies are available.
Article 293 paragraph (1): Against court decisions based on the provisions in Chapter III no legal remedies are available, unless otherwise stipulated in this Law.

Article 295 paragraph (1): Against a judge’s decision that is final and binding, a civil review can be submitted to the Supreme Court, unless otherwise stipulated in this Law.

Thus, the main issue brought before the Constitutional Court was whether PKPU decisions should be subject to any legal remedies (namely, cassation and civil review).

The Constitutional Court’s Decision

The Constitutional Court ruled that a PKPU decision may be subject to legal remedies if the decision, cumulatively, concerns:

(i) a PKPU petition that was initiated by the creditor; and
(ii) the rejection of the composition plan submitted by the debtor.

The rationale is that the likelihood of a dispute on or mistake in the issuance of the PKPU decision approving the rejection of the composition plan is higher given the contentious nature of creditor-initiated PKPU processes. Furthermore, the Constitutional Court opined that legal remedies should be available as a means to control creditor-initiated PKPU processes, such that they are used as intended under Law No. 37/2004, i.e., to avoid bankruptcy and obtain settlement, rather than to obtain a non-appealable bankruptcy decision.

As the Constitutional Court opined that the control is only needed as a means to control more contentious PKPU processes, other PKPU decisions (e.g., on PKPU processes initiated by the debtor or where the composition plan is approved) remain the same and are not subject to legal remedies. Interestingly, the Constitutional Court did not discuss cases where the PKPU process is initiated by the debtor, but the creditor in bad faith uses the PKPU process to bankrupt the debtor by rejecting the composition plan.

The Constitutional Court ruled that the legal remedy that should be available is only cassation (without any opportunity to file a civil review).
The Constitutional court cited legal certainty as well as pragmatic reasons for this, i.e., to prevent bottlenecks of cases at the Supreme Court and to implement the “speedy trial” principle in Law No. 37/2004.

In conclusion, the Constitutional Court ruled that Article 235 paragraph (1) and Article 293 paragraph (1) of Law No. 37/2004 are declared unconstitutional, unless it is interpreted as allowing the submission of cassation against a PKPU decision that concerns a PKPU petition initiated by the creditor and concerns the rejection of the composition plan submitted by the debtor. Article 295 paragraph (1) of Law No. 37/2004 is not declared unconstitutional.

**Previous Constitutional Court Decision on Legal Remedies against PKPU Decisions**

Before Decision 23, the Constitutional Court issued Decision No. 17/PUU/XVIII/2020 (Decision 17) regarding Article 235 paragraph (1) and Article 293 paragraph (1) of Law No. 37/2004. Decision 17 declared these articles to be constitutional, meaning that no legal remedies are available against PKPU decisions. The Constitutional Court in Decision 17 opined that PKPU processes provide sufficient time for the parties to deliberate and reach a settlement on the debt. Furthermore, the court opined that allowing legal remedies against PKPU decisions will result in legal uncertainty for the parties and will violate the principle of speedy trial in PKPU.

However, the Constitutional Court in Decision 23 opined that the principle of double jeopardy (or *ne bis in idem*) does not apply because: (i) the basis of the petition in Decision 23 is not only the violation of the principle of fairness but also the principle of legal certainty and non-discrimination, which are also enshrined in Article 28D paragraph (1) of 1945 Constitution; (ii) the relief requested in Decision 23 is for the relevant articles to be declared conditionally unconstitutional, instead of unconstitutional as requested in Decision 17; and (iii) the petition in Decision 23 also concerns another article that was not the subject matter in Decision 17, namely Article 295 paragraph (1) of Law No. 37/2004.
Supreme Court Implementing Regulation

As a consequence of the above considerations and verdict, the Constitutional Court ordered the Supreme Court to issue a regulation on the procedure for submitting a cassation against a PKPU decision that concerns a PKPU petition initiated by the creditor and concerns the rejection of the composition plan submitted by the debtor.

Currently, the implementation of PKPU processes is governed under Chief Justice of the Supreme Court Decree No. 109/KMA/SK/IV/2020 on Implementation of Guidelines for Settlement of Bankruptcy and Suspension of Debt Payment Obligation Cases (KMA 109/2020). Amendments to KMA 109/2020 will likely need to be implemented to accommodate Decision 23 or the Supreme Court may issue a new regulation altogether.

Conclusion

Decision 23 minimizes the possibility of PKPU to be used by creditors as a “shortcut” to obtain a bankruptcy decision. Creditors can no longer obtain a bankruptcy decision by initiating a PKPU process and then rejecting the composition plan – at least not until it is reviewed by the Supreme Court if the debtor files a cassation. It is hoped that through the issuance of Decision 23, PKPU petitions initiated by creditors will only be done in good faith in order to restructure the debt, which is the main purpose of PKPU.

Under Decision 23, legal remedies remain unavailable to debtor-initiated PKPU processes. Thus, debtors may need to think twice before initiating a PKPU process as creditors can still in bad faith reject the composition plan in order to obtain a bankruptcy decision, which is not subject to legal remedies.