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JURIDICAL REVIEW OF THE BANKRUPTCY EXECUTION DECISION UNDER INDONESIAN COMMERCIAL COURT

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Abstract

Bankruptcy is a civil law institution as the realization of the two main principles contained in Article 1131 and Article 1132 of the Civil Code. The effect of bankruptcy is only on the assets of the debtor, where the debtor is not under supervision. The debtor does not lose his ability to carry out legal actions, unless the legal action involves the management and transfer of his existing property. Meanwhile, execution is the implementation of a Court Decision which has permanent legal (in kracht van gewijsde), after the debtor is declared bankrupt, the bankruptcy process will be carried out. The main purpose of conducting bankruptcy is to share the debtor's assets with its creditors and this must be done by the curator after there is a bankruptcy decision. This study uses a normative juridical approach, which means that this research is conducted by examining existing literature such as laws and regulations, related books, as well as dictionaries or encyclopedias. This approach is carried out with the intention that researchers get information from various aspects of the issue being tried to find answers. The Bankruptcy Law explains several factors regarding the need for bankruptcy regulations and postponement of debt payment obligations. The bankruptcy verdict greatly affects the execution. As a result of the declaration of bankruptcy, the entire determination of the debtor's assets obtained before being declared bankrupt must be terminated and since then no decision has been made. A bankrupt debtor may be subject to gijzeling action. This gijzeling institution is primarily shown if the bankrupt debtor is not cooperative in resolving bankruptcy as regulated in Articles 93-96 of the Bankruptcy Law. Legal remedies in bankruptcy proceedings did the abolition of appeal legal remedies is intended to cut the judicial pathway in the bankruptcy process to make it more effective.

Keywords: *Bankruptcy; Curator; Gijzeling*

INTRODUCTION

The term “bankruptcy” originates from the mixture of *bancus* and *ruptus*, Latin words for “bench or table” and “broken” respectively. This is, said to arise from the inability of a banker, who in the beginning transacted his business in the marketplace on a workbench, to meet

his contractual obligations. The term is, also believed to have roots in *banco rotto*, from the medieval Italy, roughly translated to mean "broken bank." Similar speculation on the origin word is, ascribed to the French expression *banque* route, a metaphorical practice of leaving a sign at the site of an abandoned banker's table.[1]

Bankruptcy is a civil law institution as the realization of the two main principles contained in Article 1131 and Article 1132 of the Civil Code.[2] Article 1131 of the Civil Code states that all goods (movable or immovable) belonging to the debtor, even though existing or new ones will be available at a later date, will become collateral for the debtor's individual engagement, while Article 1132 of the Civil Code states that these items become joint guarantees. -the same for all those who blame him; income from the sale of these objects shall be divided according to the size of the respective accounts receivable, unless there are valid reasons for prioritization among the debtors.

The effect of bankruptcy is only on the assets of the debtor, where the debtor is not under supervision. The debtor does not lose his ability to carry out legal actions concerning himself, unless the legal action involves the management and transfer of his existing property. If it is related to the assets that will be obtained by him, the debtor can still take legal actions to receive the assets that will be obtained then become part of the bankruptcy assets.[3]

Meanwhile, execution is the implementation of a Court Decision which has permanent legal force *(in kracht van gewijsde)* which is carried out by force in the event that the losing party in the case does not want to comply with the implementation of the Court Decision voluntarily. In the literature there are many definitions of execution. According to M. Yahya Harahap, execution is a forced act carried out by the Commercial Court against the party who loses in a case so that the party who loses in the case carries out the Court's Decision as appropriate.[4]

After the debtor is declared bankrupt, the bankruptcy process will then be carried out. Bankruptcy law is a legal product designed to provide a way out for a debtor who is experiencing financial distress so that his creditors are not continu-

[1]Adegbemi Babatunde Onakoya and Ayooluwa Eunice Olotu. (2017). "Bankruptcy and Insolvency: An Exploration of Relevant Theories". *International Journal of Economics and Financial Issues*, 7(3): 706

[2]Niru Anita Sinaga and Nunuk Sulisrudatin. (2014). "Hukum Kepailitan Dan Permasalahannya Di Indonesia". *Jurnal Ilmiah Hukum Dirgantara*, 7(1): 161

[3]Sutan Remi Syahdeini, (2002). *Hukum Kepailitan*. Jakarta: PT. Pustaka Utama Grafiti p. 63

[4]M. Yahya Harahap. (1991). *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata*. Jakarta: PT. Gramedia, p. 5

ally charged with paying, and at the same time provide access to creditors to be able to control the remaining assets of the debtor as repayment of debts even though they are not fully paid.[5] The main purpose of conducting bankruptcy is to share the debtor's assets with its creditors and this must be done by the curator after there is a bankruptcy decision. Some efforts that can be made by creditors to recover their receivables can be carried out through the bankruptcy process by using *gijzeling* in settling bankruptcy decisions issued by the commercial court.[6]

Therefore, based on this description, the problem can be formulated by the nature of bankruptcy itself, the consequences of bankruptcy due to confiscation under Indonesian commercial court, the consequences of bankruptcy due to *gijzeling* execution, and any legal remedies that can be filed by an execution applicant who is executed in a state of bankruptcy.

RESEARCH METHOD

This research uses a normative juridical approach, which means that this research is conducted by examining existing literature such as laws and regulations, related books, as well as dictionaries or encyclopedias. This approach is carried out with the intention that researchers get information from various aspects of the issue being tried to find answers.

Of the several existing approaches, in this study the type of approach to be used is a statutory approach (statue approach) and a conceptual approach (conceptual approach). In conducting this research, using 3 (three) sources of legal materials, namely, primary legal materials, secondary legal materials, and tertiary legal materials. The research specification used is descriptive analysis, namely the research method by collecting data in accordance with the actual data then the data is compiled, processed and analyzed to provide an overview of the existing problems.[7] The secondary data obtained will be presented in the form of descriptions arranged systematically as a complete series.

ANALYSIS AND DISCUSSION

The Nature of Bankruptcy

Legal experts in Indonesia sometimes still argue about the bankruptcy ver-

[5]Sonyendah Retnaningsih. (2017). "PERLINDUNGAN HUKUM TERHADAP DEBITOR PAILIT INDIVIDU DALAM PENYELESAIAN PERKARA KEPAILITAN DI INDONESIA". *Jurnal Hukum Acara Perdata*, 3(1): 2

[6]Ernes Gabriel Sihotang and others. (2018). "DASAR PERTIMBANGAN HAKIM DAN UPAYA HUKUM DEBITOR PAILIT TERKAIT PENGGUNAAN PAKSA BADAN DALAM KEPAILITAN". *Kertha Semaya: Journal Ilmu Hukum*, 3(2): 5

[7]Soerjono Soekanto and Sri Mamudji. (2010). *Penelitian Hukum Normatif (Suatu Tinjauan Singkat).* Jakarta: Rajawali Pers, p.13

dict by the court. There is an assumption that the enactment of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations can injure as a business continuity which is the spirit of the law.[8]

The Indonesian Bankruptcy Law explains the factors of the need for regulation regarding bankruptcy and postponement of debt payment obligations, namely to avoid seizing the debtor's assets if at the same time there are several creditors who are collecting their receivables, to avoid the existence of creditors holding material security rights claiming their rights without regard to interests debtors or other creditors, to avoid fraud committed by one of the creditors or the debtor himself.

The task of the curator is to carry out the management and settlement of bankruptcy assets based on article 69, paragraph (1) Indonesian Bankruptcy Law.[9] The curator has the authority to carry out his duties since the bankruptcy decision is stipulated, even though there are attempts at cassation or reconsideration. In the event that the decision to declare bankruptcy is canceled as a result of cassation or review, all actions that have been carried out by the curator before or on the date the curator receives notification of the cassation decision or the decision for review shall remain valid and binding on the debtor.

According to Article 2, paragraph (1) Indonesian Bankruptcy Law, a person (individual or legal entity) may be declared bankrupt if he meets the requirements, which are a debtor that has at least two or more creditors, a debtor that does not pay off at least one of his debt to one of its creditors, and such debt is matured and become payable. In Article 2 paragraph (1) of Law Number 37 Year 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations states that the court's decision will bankrupt a debtor who has two or more if he does not pay in full at least one collectible debt and is due.

The Consequences of Bankruptcy due to Confiscation

In giving loans facility and to reduce the impact of the risk, banks usually require a guarantee. Before approving some loans, they always do a credit analysis in an effort to fulfill aspects of banking carefulness principles. The 5 C's analysis (character, capacity, capital, collateral, condition of economy) is actually one of

[8]Bambang Pratama. (2014). "Kepailitan Dalam Putusan Hakim Ditinjau Dari Perspektif Hukum Formil Dan Materil". *Jurnal Yudisial*, 7(2): 158

[9]Raden Besse Kartoningrat and Isetyowati Andayani. (2018). "Mediasi Sebagai Alternatif Dalam Pengurusan Dan Pemberesan Harta Pailit Oleh Kurator Kepailitan". *Halu Oleo Law Review*, 2(1): 293

the banking analysis system required by Article 8 of Law Number 7 of 1992 as amended by Law Number 10 of 1998 on Banking.[10]

Bankruptcy is expected to function as an alternative to financial conflict or stalemate. It is expected to more effectively, efficiently, and proportionately settle debtor's obligations to creditors. For the purposes of the business world in solving the problems debts in a fair, fast, transparent, and effective, there should be indispensable device that supports the law. There are several factors needed for regulation regarding bankruptcy and suspension of debt payments, namely:[11]

1. To avoid the seizure of property the debtor, if in the same time there are some creditors who collect receivables from debtors;
2. To avoid any collateral material creditor rights holders who are claiming rights by selling the debtor's property without regard to the interests of the debtor or other creditors;
3. To avoid any fraud committed by one of the creditors or the debtor itself. For example, the debtor seeks to provide benefits to one or several specific creditors so that other creditors are impaired, or any fraudulent act of the debtor to get all of their wealth with the intention to relinquish its responsibility towards the creditors.

The decision of bankruptcy will greatly affects the execution. There is a possibility that before the debtor was convicted of bankruptcy, he had litigated with another person (originating from the debtor's default). There is a possibility that in the dispute, the assets of a person who goes bankrupt will be subjected to bail or executorial confiscation. Collateral seizure is intended so that a person's rights are maintained so that the plaintiff is not harmed by the defendant's actions, while executorial seizure is a seizure related to the implementation of a decision because the defendant does not want to voluntarily enforce the decision which has permanent legal force even though the Court has warned that the decision should be implemented in an illegal manner voluntary as it should be. Execution seizures were often carried out against decisions requiring the plaintiff to pay a sum of money.

As a result of the declaration of bankruptcy, the entire determination of the debtor's assets obtained before being de-

[10] Nuruzzhahrah Diza and Imas Rosidawati Wiradirja. (2018). "The Bankruptcy of Personal Guarator'S Heirs Under Indonesia Legal System". *Jurnal Reformasi Hukum : Cogito Ergo Sum*, 1(1): 1 <https://e-journal.umaha.ac.id/index.php/reformasi/article/view/198>

[11] Arrisman (2017). "BANKRUPTCY LAW AND COMPANY'S RESPONSIBILITY TOWARDS DEBT PAYMENT". *Scientific Research Journal (SCIRJ)*, 5(2): 39

clared bankrupt must be terminated and since then no decision has been made. All confiscations that have been carried out shall be canceled and if necessary, the Supervisory Judge must order the removal as referred to in Article 31 paragraph (1) and (2) of Law Number 37 Year 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations.

This has a consequence that all Court decisions regarding confiscation, both those that have been or have not been implemented, are canceled by law, and if deemed necessary, the Supervisory Judge has the right to confirm this by ordering the removal of the confiscation.[12] The provisions of Article 31 paragraphs 1 and 2 of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Obligation to Pay Debt provide a special place for general confiscation, however this special position is limited by the explanation of Article 31 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations which state that without prejudice to the provisions of Article 56, 57 and Article 58, these provisions do not apply to creditors as referred to in Article 55.

Article 55 paragraph (1) of Law Number 37 Year 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations states that with due observance of the provisions as referred to in Articles 56, 57 and Article 58, every creditor who is a pledge holder, fiduciary security, mortgage, mortgages, or other collateral rights on property, can exercise their rights as if there was no bankruptcy. These creditors are more privileged than bankruptcy creditors.

Based on the explanation of Article 56 paragraph (1) of Law Number 37 Year 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations, the objective of the suspension is to increase the possibility of achieving peace, increase the possibility of optimizing bankruptcy assets, to enable curators to carry out their duties optimally.

During the postponement period, all legal claims to obtain settlement of a receivable cannot be filed in a trial by a judicial body, and neither the creditor nor the said third party shall execute or seek confiscation of the collateralized object.

The period of adjournment ends when the bankruptcy ends sooner or when the state of insolvency starts if a settlement plan is not offered at a meeting to match the accounts, or the peace plan is

[12]Ahmad Yani and Gunawan Widjaja. (2004). *Kepailitan*. 4th edn. Jakarta: PT Raja Grafindo Persada p. 48

rejected based on a decision which has permanent legal force for the sake of the law that the bankruptcy property is in a state of insolvency as referred to in Article 173 of the Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations.[13] Creditors whose rights are deferred can submit a request to the curator to cancel the suspension or change the terms of the suspension.

The special position of general confiscation is also regulated in Article 34 of Law Number 37 Year 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations, which states that unless otherwise stipulated in this Law, agreements intended to transfer rights to land, transfer of ship names, assignment of rights dependents, mortgages, or fiduciary guarantees that have been agreed upon in advance, cannot be implemented after the pronouncement of the bankruptcy declaration. The provisions of Article 34 of Law Number 37 Year 2004 concerning Bankruptcy and Postponement of Obligation to Pay Debt regulates the principles of general confiscation in bankruptcy, general confiscation has a special position and *lex specialis* applies to other confiscations.

[13]Rahayu Hartini (2007). *Hukum Kepailitan*. 2nd edn. Malang: UMM Press. p 107

The result of Bankruptcy on Forced Bodies Execution *(Gijzeling)*

In bankruptcy law globally, some of the principles commonly adopted include *paritas creditorium* (equality of creditors), *pari passu pro rata parte* (equally managed without preference), debt collection and pooling, debt forgiveness, universal principles, territorial principles, and principles regarding commercial exit from financial distress.[14]

The Indonesian Bankruptcy Law does not recognize the principle of debt forgiveness, which means that bankruptcy is a legal means to alleviate the debtor's burden due to financial difficulties rendering it unable to repay its debts that are due, by providing debt relief through the elimination of remaining debts, so that the debtor can resume its business without being burdened by other debts

As mentioned above, principle of debt forgiveness is not recognized in the Indonesian Bankruptcy Law. Pursuant to Article 204 of the Bankruptcy Law, after the closure distribution list becomes binding, creditors regain property rights against the debtor regarding the execution of their unpaid receivables. Under the Bankruptcy Law, if following the comple-

[14]M. Hadi Shubhan. (2019). "Misuse of Bankruptcy Petitions by Creditors: The Case of Indonesia". *International Journal of Innovation, Creativity and Change*, 10(6): 196

tion of the liquidation process carried out by the curator there are debts remaining unpaid even though the bankruptcy estate has been sold and divided, the debtor remains obligated to repay such remaining debts to creditors, and the creditors are entitled to collect the remaining portion of the receivables.[15]

A bankrupt debtor may be subject to *gijzeling* action (forcing the body). This *gijzeling* institution is primarily shown when the bankrupt debtor is not cooperative in dealing with bankruptcy. *Gijzeling* is a legal measure used to ensure that a company that has been declared bankrupt will be represented by bankrupt debtors (directors and commissioners) in order to truly assist the curator's duties in managing and resolving bankruptcy assets.

The Bankruptcy Law regulates *gijzeling* institutions as stipulated in Article 93 to Article 96. Meanwhile, the technical provisions for agency forced institutions refer to Supreme Court Regulation No.1 of 2000 on Forced Institutions. On June 30, 2000, the Supreme Court issued Supreme Court Regulation No. 1 of 2000 concerning Agency Force. The Supreme Court Regulation revokes the Supreme Court Circular No. 2/1964 and No. 4/1975. According to the Supreme Court Regulation, the translation of the term *gijzeling* with the word "hostage" or "hostage" is as contained in the Supreme Court Circular No. 2 of 1964 dated 22 January 1964 and Circular of the Supreme Court No. 4 of 1975 dated December 1, 1975 is deemed inaccurate, because it does not cover the definition of a debtor who is capable but unable to fulfill his obligations in paying debts, so that the translation needs to be refined into a forced body, as contained in the definition of "imprisonment for civil debts" which applies universally.

In Article 2 of Perma No.1 of 2000 it is stated that the enforced execution of the body against debtors with bad intentions is carried out based on the provisions referred to in Article 209 to Article 224 HIR. According to the considerations of the Supreme Court Regulation, the act of a debtor, guarantor or debt guarantor who does not fulfill his obligation to pay back his debts, even though he is able to do so, constitutes a violation of human rights whose value is greater than a violation of human rights for the forced execution of the body against the person concerned.

The definition of forced agency according to Article 1 letter a of Perma No.1

[15]Sonyendah Retnaningsih and Isis Ikhwansyah. (2017).“Legal Status of Individual Bankrupt Debtors After Termination of Bankruptcy and Rehabilitation Under Indonesian Bankruptcy Law”. *Indonesia Law Review*, 7(1): 80 <https://doi.org/10.15742/ilrev.v7n1.289>

of 2000, Forced Agency is a forced attempt determined by the court to the debtor to fulfill his obligations and serve his sentence in a correctional facility. A debtor with bad faith is a debtor, guarantor or guarantor of debt who is able but does not want to fulfill his obligations to pay his debts. From this understanding, it can be concluded that it is not possible to apply forcibly by a body against a debtor who has good faith.

According to Article 3 paragraph (1) Perma No.1 of 2000, forcibly the body cannot be imposed on a Debtor with bad intentions who has reached the age of 75 years, however the body force can be imposed on the heir who has received an inheritance from the Debtor as regulated in Article 3 paragraph (2) Perma No.1 of 2000. In connection with this provision, if the heir wants to avoid the possibility of being forced by the body, the heir concerned should refuse to acquire a share of the inheritance when the inheritance is open for distribution. If a Debtor has a debt of less than Rp. 1 billion, the body cannot force him to do so, even if he is a Debtor who does not have good intentions as stipulated in Article 4 Perma No.1 of 2000.

The duration of the agency's forced execution is not unlimited. However, according to Article 5 Perma No.1 of 2000, the body force is stipulated for 6 (six) months, and can be extended every 6 (six) months with a maximum total of 3 (three) years. Based on Article 6 paragraph (2) Perma No.1 of 2000, against debtors with bad intentions who have debts to the state or are guaranteed by the state, decisions related to forcible entities will still be implemented immediately. This means that forcing the agency to be implemented immediately, even though the debtor in question makes other legal remedies (appeal or cassation). The execution will be carried out immediately after the Decision of the Head of the District Court.

However, even so, seen from the normative provisions governing gijzeling, both those regulated in the Bankruptcy Law, Perma No.1 of 2000, and in HIR, there are still disharmonies in regulations related to body coercion such as the minimum amount of debts from debtors with bad intentions that can be executed, the period for *gijzeling* execution, the age of the debtor that can be subjected by *gijzeling* execution, the scope of the debtor who has bad intentions and the purposes of *gijzeling* itself.

The party that has the right to apply for coercion to the body is based on the recommendation of the supervisory judge,

the request of the curator, or more and after hearing the Supervisory Judge. Applications are submitted to the Commercial Court. Meanwhile, the enforcer of this agency is a prosecutor appointed by the supervisory judge. The enforced execution of this body is carried out both in the detention center and in his own house, under the supervision of a prosecutor appointed by the supervisory judge.

Legal Remedies in Bankruptcy

Legal remedies in bankruptcy proceedings are different from those regulated in ordinary civil procedural law. In civil law proceedings, the applicant usually submits legal remedies that are carried out in stages, namely through appeal, cassation and reconsideration (extraordinary legal action), so in bankruptcy procedural law there are only two legal remedies, namely cassation and reconsideration.[16]

The abolition of appeal legal measures is intended to cut the judiciary in the bankruptcy process so that it is more effective than ordinary civil procedural law processes. The two legal remedies are clearly written in Article 8, Article 11, and Article 286 paragraph (1) of the Bankruptcy Law.

The reasons for petitioning for cassation or declaration of bankruptcy are not much different from the reasons related to civil case decisions as stipulated in Article 30 of Law Number 14 of 1985 concerning the Supreme Court, such as not being authorized or exceeding the limits of authority, incorrectly implementing or violating laws that applies, fails to fulfill the requirements required by laws and regulations which threatens negligence with the cancellation of the decision concerned.

The application for cassation against the Decision of the Commercial Court can be filed within a period of no later than 8 days from the date the decision requested for cassation is stipulated and register it with the clerk in which the Commercial Court which determines the decision on the application for bankruptcy is located. The Bankruptcy Law also regulates the parties who can file cassation, which is stated in Article 11 Paragraph (3) which states that the request for cassation does not have to be submitted by a creditor or debtor who is a disputing party at the first level trial but other creditors who are not satisfied with the decision. It also apply for a bankruptcy statement even though they are not parties to the first instance of court. Meanwhile, the cassation decision must be made no later than 60 days after

[16]M. Hadi Shubhan. (2008). *Hukum Kepailitan: Prinsip, Norma Dan Praktik Di Pengadilan*. Jakarta: Prenada Media Grup. p. 127

the application was registered. This relatively long period of time is given to anticipate bankruptcy cases with complex dimensions, especially those that are classified as complex and very important business transactions.

The reconsideration is an extraordinary legal effort against a decision in a bankruptcy case that has obtained permanent legal force. The reasons for the review of the decision in the bankruptcy case are regulated in article 286 paragraph (2) of the Bankruptcy Law which states that an application for reconsideration can be made if there is new evidence and it is classified as important which can give a different decision if it is known in the previous trial, then there is a serious error in apply the law enforced by the Commercial Court.

The period of time for submitting a petition for reconsideration of the decision of the Commercial Court can be made no later than 180 days after the decision requested is obtained permanent legal force. In relation to the review process, based on the provisions of Article 66 of Law Number 14 Year 1985, it is stated that a request for review can only be submitted once and this cannot delay or stop the implementation of court decisions. This application for reconsideration can also be withdrawn as long as it has not been decided and in the event that the application for reconsideration has been revoked it cannot be filed again.

An application for a bankruptcy statement can also be checked free of charge and revoked by the applicant. This is written in Article 15 paragraph (1) and Article 17 of the Bankruptcy Law. According to article 15 paragraph (1) of the Bankruptcy Law, the District Court may order an examination for free after hearing the testimony of the creditor committee and after hearing or calling the bankrupt debtor legally then the bankruptcy can be revoked. The application for the withdrawal of the bankruptcy declaration must be made in a legal ruling pronounced in a session open to the public.

Regarding the revocation of the application for a bankruptcy statement, the judge ordering the termination of bankruptcy must also determine the large amount of bankruptcy fees and fees for curatorial services and charge it to the debtor. Regarding this matter, no legal remedy can be filed and must take precedence over all debts that are not secured by collateral. For the payment of fees and

fees for curator services, the judge will issue a *fiat executie*.[17]

CONCLUSION

Thus it can be concluded that bankruptcy according to Law Number 37 Year 2004 concerning Bankruptcy and Postponement of Debt Payment Obligation Article 1 point 1 states that Bankruptcy is general confiscation of all assets of the Bankrupt Debtor whose management and settlement is carried out by the Curator under supervision of judges. The word bankruptcy indicates the inability to pay a debtor for his debts that are due because the debtor is in a state of insolvency. After the issuance of a bankruptcy decision against a debtor, it will result in all court decisions regarding confiscation, whether existing or not implemented, are declared completely null or void. However, creditors whose holds pledge, fiduciary security, mortgage or other collateral rights are still entitled to execute or get their rights first (they have more privileged than other creditors).

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[17]Rachmadi Usman. (2004). *Dimensi Hukum Kepailitan Di Indonesia*. Jakarta: PT. Gramedia Pustaka Utama. p. 43

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