



# Mediation as a Final Settlement in Bankruptcy Disputes

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## Abstract

This study seeks to examine the concept of final mediation in the settlement of bankruptcy disputes as a form of alternative dispute resolution which has been opted by the disputing parties outside of court. The study used a normative legal research approach by investigating legal rules, legal principles, and legal doctrines to answer the legal problems faced. The results of the study show that the mediation is only a voluntary option as the Supreme Court's Decree on Bankruptcy does not require any mediation in the settlement. It will be argued that the process of mediation is cheaper, faster, and simpler than the settlement process through the court. The implementation of mediation as a final settlement in bankruptcy disputes is a form of a person's civil rights that must be respected and upheld high as a form of agreement and contract made in accordance with Article 1320 in conjunction with Article 1338 of the Civil Code. The principle is an embodiment of the philosophy of natural law stipulating that rationally human being is given the right to freedom to perform acts. The final mediation for the settlement of bankruptcy disputes should be based on a peace agreement made by both creditors and debtors in good faith with reference to articles 1851, 1858 of the Civil Code and article 1338 in conjunction with article 1320 of the Civil Code. Thus, the study suggests that it is necessary to establish a national private mediation institution by the government or by the competent authorities.

**Keywords:** Bankruptcy dispute, Final mediation, Alternative dispute resolution

## 1 Introduction

Disputes can be resolved in court and outside through what is known in legal terms as Alternative Dispute Resolution (ADR). Disputes settlement outside the court can be done through various such as arbitration or mediation. Arrangements regarding arbitration are regulated in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution which specifically handles cases in the world of business or commerce [1]. Article 1 of this Law states that Arbitration in writing by the disputing parties. Meanwhile, the meaning of Alternative Dispute Resolution is a dispute or difference of opinion resolution institution through a procedure agreed upon by the parties, namely settlement outside the court by means of consultation, negotiation, mediation, conciliation, or expert judgment.

In the settlement of bankruptcy disputes as referred to in Law Number 37 Year 2004 on Bankruptcy and PKPU, the term mediation is not known as can be seen from the explanation PERMA No. 1 of 2016 concerning the mediation process in court. Article 4 of the Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 2016 concerning mediation in the court limits the mediation process such as the types of cases that may be mediated, cases that are resolved through commercial court procedures, industrial relations courts,

objections to decisions by dispute resolution bodies and objections against decisions. These rules have been restricting and prohibiting civil rights of citizens who encounter a civil problem disputes in particular the problem of bankruptcy. The explanation of the Supreme Court regulation above is also inconsistent with the spirit of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, especially in Article 6 paragraph 1 which states that "disputes or differences of opinion can be resolved by the parties through alternative dispute resolution based on good faith by setting aside litigation settlement in the District Court". Furthermore, paragraph 4 of the Law also explains that dispute resolution or differences of opinion in alternative business dispute resolution can be done through a mediator.

Settlement through mediation mentioned above must be conducted on the will of parties in the form of an agreement referring to Article 1320 of the Civil Code on the terms and conditions of a contract with due regard to the principle of freedom of contract or the principle of *consensualism* as stipulated in Article 1338 of the Civil Code paragraph 1 which reads "All approvals made legally in accordance with law apply as law for those who made it" whereas paragraph 2 reads agreement cannot be revoked except with the agreement of both parties, or for the reason specified by law, and paragraph 3 reads the agreement must be implemented in good faith.

The wording of Article 1338 of the Civil Code indicates that the agreement which gives birth to agreement of the parties must

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be obeyed by the parties and legally bind the parties who made it as a form of the principle of *Pacta Sun Servanda* which means that an agreement made is the same as a law. The importance of the *Pacta Sunt Servanda* principle implies that nobody can interfere or intervene in the terms of the agreement. This process is then outlined in the form of an agreement made by the disputing parties witnessed by a mediator. Furthermore, to strengthen the contents of the agreement above, it is necessary to register with the court in the form of a peace agreement as a final settlement in a bankruptcy dispute, so that no other legal remedy can be taken. The importance of the principle *Pacta Sunt Servanda* mentioned above in the field of civil law is concerned with the rights and obligations of the parties. As expected, all the agreements taken are binding on the parties who made it. In general, in a case proceeding in a civil court, peaceful efforts must be made by the judge who hears the peace efforts made before the judge. This is in line with the provisions of Article 130 paragraph 1 HIR which states that "... Before examining the case, the judges must try to reconcile the two parties" [2]. Peace process is also a form of mediation in the courts, which is a pattern of dispute settlement that gives a favorable decision to the disputing parties with a quick, simple and low cost process. It is in line with Article 2 paragraph 4 of Law Act 48 Year 2009 on the Power of Justice stipulating a quite well-known principle in handling cases in court that justice should be done with a simple, fast, and low cost. Law No. 37 of 2004 concerning Bankruptcy and PKPU also provides opportunities for debtors to pay off their debts as a form of peace known as temporary and permanent PKPU before the competent parties apply for bankruptcy.

The procedural law that applies in PKPU commercial court can be carried out by PKPU temporarily with a grace period of 45 days. If it is not finished, then it can be continued through PKPU anyway with a grace period of maximum 270 days. One of the examples of the decision of the bankruptcy of Semarang Commercial No. 11/Pdt.Sus -PKPU/2018/PN. Smg dated 6 May 2018. The case is submitted to PKPU in August 2018 and the court declared bankruptcy in May 2019. This means that the process takes over eight months although legally did not pass the limits that have been determined by the Constitution Act Bankruptcy and PKPU.

This condition shows that the process of resolving bankruptcy disputes takes a relatively long time for the parties in the case. Therefore, we need other legal alternatives that can provide existing solutions, namely through final mediation. Decision of a mediation does not beat and wrong someone like the court in the form of winning and losing the case. Another advantage is that it can be done anywhere depending on the agreement of the parties. Its confidentiality can also be guaranteed, cases or disputes are also resolved more quickly, and psychologically.

The process of resolving insolvency and legal efforts of the disputing parties through final mediation outside of the court as a final decision that is made by the parties in the form of a "Peace Settlement" whose contents are binding and have the same force as the court's decision. A peace settlement that has been drawn up cannot be subject to legal action, either appeal or cassation, even a reconsideration. This can be seen from the meaning of the peace settlement in Article 1 paragraph (2) of the Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 2016 concerning the Mediation Process, which

reads, "The peace settlement is a settlement containing the contents of the peace agreement and a judge's decision which strengthens the peace agreement, which is not subject to ordinary or extraordinary remedies".

The importance of final mediation in the world of civil law greatly assists the smooth process of bankruptcy disputes, where the settlement process is faster compared to the commercial court process. The concept of final mediation is also a legal breakthrough that can realize legal objectives, namely the realization of legal justice for the disputing parties, and can provide a sense of benefit to citizens in solving problems, especially in resolving bankruptcy disputes. Basically, the law is also expected to meet the social needs of the community and the disputing parties. A good law does not merely formally meet legal elements or just rely on the mere legal procedure but must also be able to adjust to the dynamics of the community. Thus, a responsive law is needed which requires a legal pattern that can accommodate all the needs of society and the phenomena that develop in society.

There are still many rural communities who resolve their cases not at court but through peace deliberation mediated by traditional elders, community leaders, and village heads. Thus, the pattern or method of the mediation or peace process outside the court should be developed which is philosophically very consistent and relevant to the values of Pancasila as the philosophy of life of the Indonesian nation as well as the source of all sources of law in Indonesia where all legal products must be in accordance with its content, soul, and spirit.

### 1.1 Research Questions and Objectives

- 1 What is the legal concept of mediation as the final settlement of bankruptcy disputes?
- 2 How is the execution of mediation results in bankruptcy dispute resolution carried out?

Based on these research questions, this study seeks to meet the following objectives:

- 1 To investigate and analyse the concept of mediation law as the final settlement of bankruptcy disputes.
- 2 To investigate and analyse the execution of the results of mediation in the settlement of bankruptcy disputes.

### 1.2 Contribution of Research

Theoretically, the results of this study are expected to contribute knowledge in the field of law, particularly the bankruptcy law related to the role of mediation in resolving bankruptcy disputes. Practically, the study is expected to provide input to the relevant agencies such as the Commercial Court, Supreme Court and the disputing parties in mediation addressing the issue of bankruptcy.

## 2 Research Method

This study is a normative legal research which has a different method from other kinds of research. Normative legal research is a systematic way of conducting research in the form of a product of legal behaviour, for example examining legislation [3]. The main point of the study is that law is conceptualized as a norm or rule that applies in society and becomes a reference for everyone's behaviour, so that normative legal research focuses on written regulations in the form literature, legislation, norms and regulations, or principles

related to the subject matter. To answer the problem and achieve the objectives of this study, the researcher uses a type of normative research by looking at the law in its normative context. Studies in normative law focus more on library research. The approach used in this study is a process of finding legal rules, legal principles, and legal doctrines to answer the legal problems faced. This is in accordance with the perspective of legal character [3].

### 3 Research Results and Discussion

Bankruptcy is a condition that results in a debtor going bankrupt, either individually or as a private legal entity, because of his inability to pay off or pay his debts to creditors. This condition could be caused by business decline or unfair business competition and other factors. Currently in Indonesia there are five commercial courts that specifically handle cases related to commercial court authority. The five commercial courts were established based on Government Regulation No. 97/1999 concerning the Establishment of Commercial Courts in the Padang, Medan, Surabaya, and Semarang District Courts. In this context, disputes between the bankrupt debtors and the existing creditors will be resolved through the commercial court located in each of the areas mentioned above, which is in charge of the relative competence according to their authority. According to M. Hadi Shubhaan, the term bankruptcy is often misunderstood by the general public, with some consider bankruptcy as a verdict that has a criminal dimension and is a legal flaw on a legal subject, and therefore, bankruptcy must be avoided as much as possible. Bankruptcy is apriori considered a failure caused by the fault of the debtor in running his business so that the debt cannot be paid [4].

As such, the failure to pay debts to creditors is not only influenced by internal factors of the entrepreneur or company, but maybe also influenced by external factors from other parties outside of business activities. The existence of the Bankruptcy Law and PKPU through Law Number 37 of 2004 offers a system of procedural law through this simple proof system considered by practitioners, academics and experts in a legal condition that makes it easy for a debtor to be bankrupt, especially in its simple proof system. In fact, it is not necessarily true that debtor is declared completely incapable of paying debt to the creditor. So, it needs to be audited by experts who has capacity in evaluating the debtor's business.

The bankruptcy process in the commercial court is presumed to be only a pattern of fulfilling its duties and functions formally to comply with the existing regulations. The justice of the commercial court also does not provide a positive solution for the disputing parties. There are so many costs, time and energy that are spent by the parties, especially the bankrupt debtor who must attend the bankruptcy trials. Another impact that was felt was the mischievous behaviour of curators who embezzled debtors' assets so that they were prosecuted based on creditor reports. In short, the current bankruptcy process carried out in the commercial court is less effective in providing solutions for the parties. On the other hand, the state will also lose a source of income both from the tax sector and other non-tax revenues as a form of state income. Based on the existing data, the process of bankruptcy in the judicial commerce since the initial process in PKPU until declaration of bankruptcy could take many months or even many years. Besides usual practice commercial court begins a process at PKPU suspended for 45 days and

PKPU has a maximum of 270 days, with longer period of cassation and reconsideration. With these conditions, it is necessary to find other legal solutions that can be taken by the disputing parties in solving the problem in a simple, fast and low cost as the court principle as desired in Article 4 Paragraph 2 of Law Number 48 Year 2009 concerning Judicial Power stipulating that "Courts help justice seekers and tries to overcome all obstacles and obstacles in order to achieve a simple, fast, and low cost trial. As it is known that the bankruptcy process in the commercial court does not only pursue legal certainty in fulfilling the interests of the formal legal aspects, by leaving the interests of the material legal aspects both aspects of legal justice, benefit and aspects of economic calculation.

Therefore, as suggested by Sutan Remy Sjahdeini, the Bankruptcy Law and PKPU should provide benefits not only to creditors but also to debtors. In this regard, the Bankruptcy and PKPU laws must also provide equal protection for creditors and debtors. With this Bankruptcy Law and PKPU, it is hoped that creditors can gain access to the assets of debtors who are declared bankrupt, due to the debtor's inability to pay their debts. In practice, however, the benefits and protections provided by the Bankruptcy and PKPU laws are only for the interests of creditors and debtor stakeholders concerned [5].

Although the Bankruptcy and PKPU law number 37 of 2004 provides opportunities for parties, both debtors and creditors, to carry out a peace process both at the PKPU stage itself and at peace after being declared bankrupt by the commercial court on the condition that they did not go through the PKPU peace process first. In reality, it is not as easy as the one being carried out because the peace process or getting along in bankruptcy is not a necessity as ordered by the Bankruptcy and PKPU law because it is voluntary. In addition, the peace or mediation provisions issued by the Supreme Court through Regulation No.1 of 2016 concerning mediation procedures in district courts also do not provide space for the parties, to mediate in the commercial court, so there is no opportunity for the parties to conduct peace or mediation which is required in commercial court as stipulated in articles 130 HIR and 154 RBg. Concerning the bankruptcy peace process, Article 144 of Law Number 37 of 2004 on Bankruptcy and PKPU states that the debtor has the right to offer a peace agreement to all creditors. However, a peace process can also be carried out after the debtor is declared bankrupt. In fact, based on the results of the previous studies, it is not as easy as expected because of the large number of creditors involved. Therefore, it must go through a creditor agreement with the procedures as stipulated in Article 151 to 152 of the Law on Property and PKPU number 37 of 2004.

So strict and difficult are the procedures for peace or harmony in the bankruptcy process so that there are many requirements that must be followed so that almost all cases or disputes that go to the commercial court end in failure with the debtor's decision to be bankrupt by the commercial courts.

According to Suyud Margono, criticisms concerning the high cost of litigation also affects the economic life, not only in America, but also in other countries [6]. Although the forms of criticism are almost the same, the most important ones are described as follows.

- 1 Slow dispute resolution
  - a. Settlement of cases through the litigation process is generally slow or a waste of time.

- b. This results in the examination process being very formalistic and very technical.
- c. The flow of cases is getting heavier so that the judiciary is overloaded.

## 2 The court fee is expensive

All parties consider the cost of the case to be very expensive, especially when it is related to the length of time for the settlement. The longer the settlement, the higher the costs that must be incurred, among others in the form of official fees, attorney's fees that must be borne. In most cases, the court fee makes people paralyzed and drained of all resources, time and thoughts.

### a. Justice is unresponsive

Another general criticism that is shown to the court is the fact of experience and observation that the court is not responsive in the form of behaviour:

- 1. Less responsive in defending and protecting public interests, courts often ignore public protection and the needs of society,
- 2. Courts are often considered to be unfair because it tends to offer service, opportunities, and privileges to large institutions and the rich.

### b. The court ruling did not solve the problem

The objective fact that the court's decision is unable to provide a satisfactory solution to the parties includes:

- 1. One party will win, and the other must lose;
- 2. A win-win situation in a case never brings peace, but grows seeds of revenge and enmity and hatred;
- 3. Court rulings are confusing;
- 4. Court decisions often do not provide legal certainty and are unpredictable.

### c. The ability of the judges is generalist

Judges were thought to have very limited knowledge. At most, the knowledge they have is only in the field of law. Beyond that their knowledge is general. Considering that judges are only human generalists, it is impossible to be able to resolve disputes that contain complexity.

This is in line with M. Yahya Harahap's statement: "However, bitter experience has affected people, showing an ineffective and inefficient judicial system. Settlement of cases took decades. It is a lengthy process, wrapped in an endless circle of legal efforts, starting from appeals, cassations, and reconsiderations" [7].

The expert's opinion show that the interests of the parties are less accommodated in the court process which is too convoluted, especially for business activities that are considered not beneficial for parties engaged in business in the context of investment, preferring to settle their disputes through arbitration or mediation or other possible alternatives.

The term mediation first appeared in the United States in around 1970. Robert D. Benjamin, a Director of Mediation and Conflict Management Service in St. Louis Missouri, stated that mediation was known since around 1970 which was formally applied in the alternative dispute resolution (ADR) process in California. The emergence of alternative dispute resolution is motivated by the dissatisfaction of the American public with the dispute resolution administration system implemented in the judiciary which is considered to take too long and is expensive so that the disputing parties and the public have difficulty getting access to justice.

In the case of the mediation process that has been applied so far in Indonesia, the only thing that applies is in the district court guided by the Supreme Court Regulation No.1 of 2016 concerning the mediation procedure in the District Court. Regarding the meaning of mediation, it can be seen in article 1 No 7 Perma No. 1 of 2016 that states that: "Mediation is a way of resolving disputes through the negotiation process to obtain an agreement between the parties assisted by a mediator".

The explanation above shows how important it is to empower mediation issues inside and outside the court in resolving civil cases. Therefore, in the effort to implement mediation as a settlement of business disputes both inside and outside the court, it is necessary to analyse the comparison of the process of implementing mediation carried out in various countries that have implemented mediation. The use of court mediation methods in the international community has a long history that can be traced back to the Middle Ages in the Anglo-Saxon legal system. At that time, one of the popular dispute resolution methods used was the combined arbitration-mediation method carried out by judges. However, the role of judges as peaceful settlement of cases is more dominant in countries that adhere to the Continental European legal system. Today, in the international world, the role of judicial mediator is the latest development in the Anglo-Saxon legal system. The development of judicial mediation is an attempt by courts to provide a one-stop legal forum for all types of disputes and the needs of the parties. By doing so, the parties can save time, money and effort without the need to find alternative ways to resolve disputes outside the court [7].

From a global development perspective, Nurnaningsih Amriani asserts that most developed countries have developed mediation [8]. These countries develop mediation either alone or connected to the court as an alternative dispute resolution. Indonesian must consider this development if it does not want to be left behind in global development in alternative business (civil) dispute resolution. This precaution must be anticipated as soon as possible. As Susanti Adi Nugroho suggests, Indonesia economic community demand speed, secrecy, efficiency and affectivity as well as sustained existing relationships [9]. The existing litigation institutions cannot respond to this, which has been criticized for being slow, expensive, wasteful of energy, time, money. Developed countries in general, including America, Japan, Australia, Singapore, have mediation institutions both outside and within the court. The terms of mediation or peace settlement provide an opportunity for the use of mediation as a medium for resolving business disputes in bankruptcy. A peace agreement must be strengthened through a court decision so that it has executorial power. Disputes or problems faced by the community, especially in business matters, from time to time will increase and if all these cases are brought to the court it will hugely increase the number of cases in the court. This will affect proceedings relating to the bankruptcy in the commercial courts. In this case, mediation offers a simpler, shorter and cheaper final settlement of bankruptcy disputes and can provide greater access to the parties with the discovery of a dispute resolution that can satisfy the sense of justice and mutually benefit the parties (win-win solution). The Supreme Court itself as the highest judicial institution in Indonesia which is also the supervisor of the judiciary in Indonesia is not fair and consistent

in implementing the Supreme Court's regulation Number 1 of 2016 which prohibits mediation in bankruptcy disputes making it difficult for the disputing parties to resolve the bankruptcy dispute faster. If analysed, the Supreme Court Regulation number 1 of 2016 is very inconsistent and even a form of deviation from the provisions of the civil procedural law in force in court as stipulated in Article 130 HIR and Article 154 RBg which obliges judges to reconcile the litigating parties before the case is examined. There are two main reasons for considering mediation as a form of alternative dispute resolution in Indonesia, namely [10].

- 1 In Indonesian society, which is known as a consensus society, this method of dispute resolution involving a neutral third party has a strong social base, both in the rural and urban communities;
  - 2 By looking at the experience in America as a country where the people are known for their fairly high tendency to use court (litigation minded), it turns out that mediation has developed very rapidly. Until 1996, there were 220 public mediation networks operating in all 40 states, which handled around 250,000 cases per year, with a total of 1.5 million people involved in them.
- A peace process through a mediation process outside the court has great potential to be developed when viewed from the following supporting factors [8]:

#### **Legal culture**

The use of mediation as a medium for dispute resolution has been known for a long time. Known in our customary law, the pattern of dispute resolution through peace judges is in principle the same as the pattern of dispute resolution through mediation. Likewise, Muslims have a legal culture of reconciliation (*istlah*) and mediation (*hakam*) in dispute resolution. As such, in terms of legal culture, the opportunity to develop mediation as an alternative to resolving civil (business) disputes is quite large. The problem is now how to maintain this legal culture so that it becomes a real legal culture in society.

#### **Government support**

Civil (business) dispute resolution through alternative dispute resolution (mediation) has strong government support. This can be seen from the statement that ADR is needed to reduce the unnecessarily huge number of cases in court. The government strongly supports the development of ADR (including mediation) as a medium for dispute resolution both in public and private spheres.

#### **Laws and regulations**

Although there is no law that specifically regulates mediation and arbitration, the existing regulations can be used as a legal basis for the application of mediation. One of these is Article 130 HIR and 154 RBg 1338. Within the circles of legal practitioners, there is a growing understanding that only peace decision in the court that has the power of execution while outside the court peace agreement has only the power as ordinary agreement. However, there are also practitioners who found peace agreement both inside and outside the court shall have the same execution power based on Article 1858 of the Civil Code which does not differentiate between peace agreement decisions and peace agreement approvals. This article only states that peace has the power of the judge's

final decision. According to Article 1851 of the Civil Code, peace can occur to end a case (after being submitted to court) and to prevent a case from occurring (before it is submitted to court). Even an out-of-court bill can be strengthened into a judicial decision if the parties so wish.

This legal measure is a solution in realizing the principle of resolving disputes more quickly, simply and at low cost so that it aligns with what is intended in Article 4 paragraph 2 of Law No. 48 Year 2009 on Judicial Power that explains that the court helps the search for justice and seeks to overcome all the obstacles and barriers to a simple, fast, and low cost trial can be achieved.

Mediation as the final settlement in a dispute over bankruptcy is a form of civil rights of a person to be protected and upheld and respected by everyone. It is also due to the form of the agreement and a pact that is made under applicable laws and rules as described in Article 1320 in conjunction with Article 1338 concerning the principle of freedom of contract. Therefore, person's right is protected and guaranteed by the constitution to avoid forms of irregularities and violations, and discrimination against his/her rights. This is an embodiment of the legal philosophy of the natural law which gives freedom to everyone to exercise their rights. The settlement of bankruptcy disputes between individuals and private legal entities in the form of a legal settlement through mediation is a form of respecting the rights of the disputing parties in having legal protection that is fairer and more balanced. In this kind of dispute settlement, the level of seriousness and honesty of the parties to realize the peace agreement that has been made in good faith is very important. The issue of good faith in particular should not only discussed at the time of the agreement as discussed in Article 1338 of the KUH in conjunction with Article 1320 of the Civil Code, but also permeates its implementation after the peace agreement is made. This is because the issue of good faith is also related to a person's morale in relation to the level of honesty, which can contain the contents of the agreements that must be observed and implemented.

The principle of good faith which is only a principle that applies in the field of contract law has developed and is accepted as a principle in other fields or branches of law, both within the private law family and in the field of public law. In other words, the principle of good faith has developed from a specific legal principle to a general law principle. As a universal principle, it applies anytime and anywhere, regardless of time and place. This is also evidenced by the fact that the principle of good faith is also adopted in Article 2 paragraph (2) of the UN Charter, which states that "*All members, in order to ensure to all of them the right and benefit resulting from membership, shall fulfill in good faith the obligation assumed by them in accordance with the percentage charter.*" Article 26 of the 1969 Vienna Convention also states that "*Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*"

Bankruptcy dispute resolution through final mediation outside the court with a peace agreement has a permanent legal force which is equated with a court decision so that execution can be carried out. This executorial power is enforced in the decision by force by state officials. And based on the principle "for the sake of justice based on the one and only Godhead" it will provide executorial legal force for the court decisions being petitioned.

Furthermore, the explanation of Article 195 of the Revised

Indonesian Reglemen (“HIR”) as the provisions of civil procedural law in Indonesia states the following:

“In a civil case because the winning party has obtained the decision of the judge who punishes his/her legal opponent then he/she is entitled to use tools that are allowed by the rules or laws to compel the resisting parties or did not meets the existing peace accord in order to comply with the judge's decision. Therefore, in using this right already should be given to creditors, because if there is no possibility to force a person convicted if the judiciary is not functioning then it will do no good as an institution or the institution authorized and legitimate”.

A peace agreement that is made clearly shows something that is certain and has legal force because there are no more legal remedies. Therefore, based on the provisions in Article 224 HIR, the execution must fulfill the contents of the agreement made by the parties to fulfill the contents of the agreement made by the parties as outlined in the form of gross acta and notary debts because this has executive power, that is, if the debtor does not fulfill and implement the contents of the agreement, then he can be forced to carry out the contents of the agreement through an application to the court [11].

Based on the explanation of Article 195 HIR in conjunction with Article 54 paragraph (3) of Law Number 48 of 2009, it states that court decisions are carried out with due regard to human values and justice. The execution of district court executions as required in Article 54 paragraph (2) of Law Number 48 of 2009 concerning Judicial Power which states that the implementation of court decisions in civil cases is carried out by the Registrar and the Bailiff is led by the Chair of the court.

In the execution, there are several administrative requirements that must be met before the execution, namely:

Warning (*aanmaning*) is a basic requirement in an execution because without a warning prior execution, the execution cannot be executed and results in legal flaws. An *aanmaning* is a legal form or action usually taken by the Chairman of the Court in the form of a warning to the debtor, so that the debtor implements a decision or a voluntary peace agreement.

The procedure that is usually carried out based on the provisions of article 196 HIR or 207 RBg is based on the request of the creditor and the mediator as a basis or condition for *anmaning*. A petition in court it can be done either orally or in writing. If the time limit is given and has exceeded the period of 8 (eight) days, then the chairman of the local district court can carry out the execution by force. Therefore, the decision of the chairman of the district court to be conveyed to the clerk or bailiff to carry out the execution with the decision of the head of the court that is imperative means an imperative to be carried out. District court decisions are made in a written ruling and may not be oral because it is a form of administrative law requirement by referring to article 197 paragraph 1 or article 208 paragraph 1 RBg. Execution is in accordance with the procedures of the provisions stipulated in the Law Number 48 of 2009 in Article 54 paragraph 2 of the judicial authorities that forcefully argues that the implementation of the court decision is made by the clerk or bailiff led by the Chairman of the court and supervised by court head in accordance with Article 55 Paragraph 1. This arrangement is intended because the actual and physical execution of the object to be confiscated is led directly by the head of the court concerned. Therefore, in carrying out the execution, the function of the head of the court

is to order the execution and at the same time lead the execution of the execution. After completing this execution order, the next step is to make an execution report which is also a formal requirement for the validity of the execution as stipulated in article 197 paragraph (4) HIR or article 209 paragraph 4 RBg which explicitly orders the official who carries out the execution to make an official report. If not made, the execution will be declared invalid. In the validity of the minutes of execution, the parties must sign it by including two witnesses to strengthen the report. Therefore, if during the execution or confiscation of this guarantee, it is possible that undesirable things will occur for the parties to the dispute in the case of a bankruptcy dispute, especially in carrying out this execution.

In relation to the confiscation of the guarantees mentioned above, M. Yahya Harahap argues in his book Civil Procedure Law that the purpose of the guarantee seizure was so that the defendant would not embezzle or alienate the goods during the trial process, so that when the verdict was carried out, the repayment of the debt demanded by the plaintiff could be fulfilled, by selling the confiscated goods. Thus, the act of confiscating the property of the defendant was not to be delivered and owned by the plaintiff (the applicant for confiscation), but to pay off the defendant's debt payment to the plaintiff [12]. The debtor is obliged to be responsible up to all his personal assets for the engagement he has made with creditors in accordance with the peace deed agreement with due observance of the provisions of articles 1338, 1320 and Article 1131 of the Civil Code.

To ensure the smooth execution of collateral for physical goods in the field so that it runs in an orderly manner, safe and smooth. Then the creditors and facilitated by the mediator can ask the security forces, in this case the Republic of Indonesia Police, to assist in this matter of security. Therefore, as a reference or guideline used in its implementation, creditors facilitated by the mediator can refer to the Chief of Police Regulation number 8 of 2011 concerning securing the execution of fiduciary collateral. Therefore, the police as an organ of this state has the authority to assist in securing the implementation of judicial decisions and/or the execution of fiduciary guarantees, activities of other agencies, and community activities. This receivable or bankruptcy which has the same binding legal force as the court verdict which has permanent legal force (*incraht*). The involvement of security for execution as referred to in this regulation is a police action in order to provide security and protection for the execution of the execution, the applicant for execution, the respondent is executed at the time of the execution that is to be carried out.

## 4 Closing

### 4.1 Conclusion

- 1 The legal concept of final mediation for the settlement of bankruptcy disputes is a pattern of agreement between creditors and debtors with a mediator outside the court in the form of a peace agreement has the legal force of execution such as a court decision, and is carried out in good faith based on the provisions of Article 1338 Jo Article 1320 Civil Code. This effort is also in line with the principle of a court that adheres to a fast, simple and low-cost trial as referred to in Article 4 paragraph (2) of Law Number 48 of 2009.
- 2 The execution of mediation results in the bankruptcy dispute settlement process is a method of forced execution through a

decision of the local district court if the execution of its own power by creditors is not successful under the applicable civil procedural law. For the smooth execution of the security assistance, security assistance can be requested by referring to the National Police Chief Regulation Number 8 of 2011 concerning Security of Fiducia Collateral Goods.

#### 4.2 Suggestions

- 1 To facilitate the bankruptcy process as regulated in Law Number 37 Year 2004 concerning Bankruptcy and PKPU, the Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures needs to be reviewed or revised to provide opportunities for disputing parties in a commercial court both inside and outside the court. If possible, new regulatory policies through the mediation law as positive law that applies and can be applied in the legal system in Indonesia could be made.
- 2 It is necessary to establish a national private mediation institution appointed by the government or by the competent authorities in assisting the process of resolving bankruptcy disputes through certified mediators, or advocates, former judges, and academics. And this institution is also authorized to carry out executions as is the case with court decisions that have legal force in deciding the bankruptcy stage.

#### Ethical issue

Authors are aware of, and comply with, best practice in publication ethics specifically with regard to authorship (avoidance of guest authorship), dual submission, manipulation of figures, competing interests and compliance with policies on research ethics. Authors adhere to publication requirements that submitted work is original and has not been published elsewhere in any language.

#### Competing interests

The authors declare that there is no conflict of interest that would prejudice the impartiality of this scientific work.

#### Authors' contribution



All authors of this study have a complete contribution for data collection, data analyses and manuscript writing.

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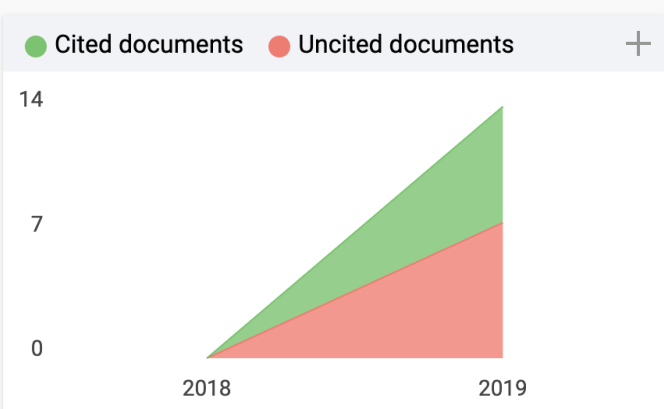
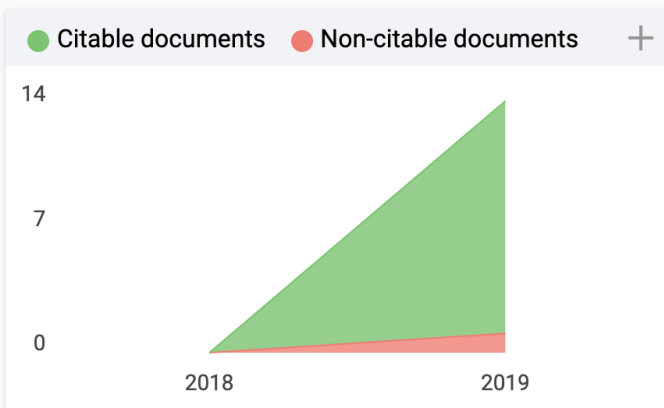
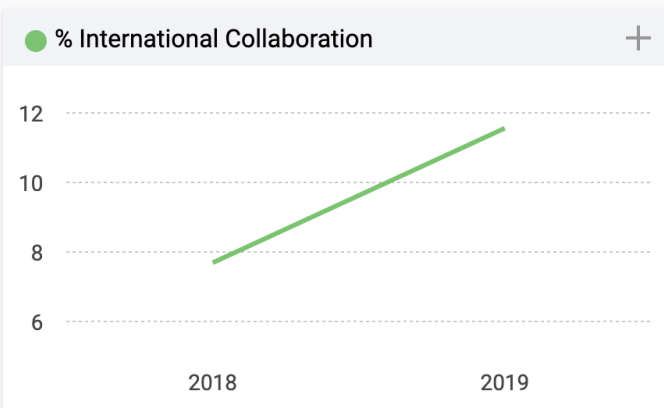
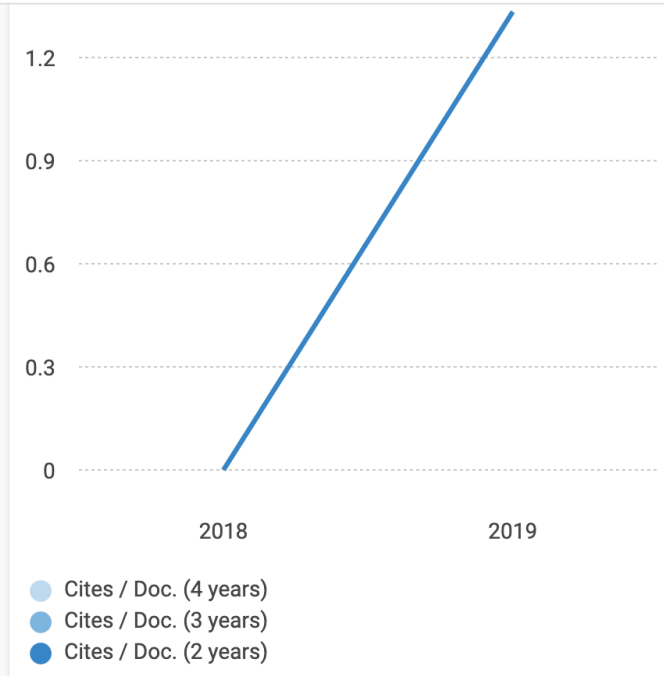
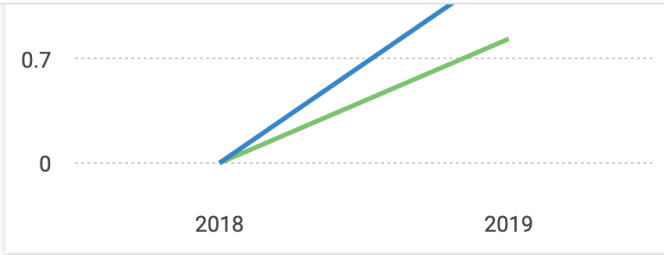
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