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Global Restructuring & Insolvency Guide

Indonesia

Overview and Introduction

A bankruptcy system has long existed in Indonesia. Formally, it was first introduced in 1905 when the Dutch colonial authorities introduced *Faillisementverordening, Staatsblad* 1905 No. 217 (the "**1905 Bankruptcy Rules**"). After Indonesia became independent in 1945, the 1905 Bankruptcy Rules remained effective until 1998.

Applicable Legislation

In response to the need for a better bankruptcy mechanism, the government of the Republic of Indonesia has enacted Law No. 37 of 2004, dated 18 October 2004, on Bankruptcy and Suspension of Payment ("**Bankruptcy Law**"). The Bankruptcy Law consists of 7 chapters and 305 articles. It provides several changes to the Indonesian bankruptcy framework and attempts to provide a legal mechanism for the settlement of debts through the courts in an effective way.

Personal Bankruptcy, Corporate Restructuring and Insolvency

Under the Bankruptcy Law, two types of proceedings may be commenced:

- Bankruptcy proceedings, under which the debtor loses its power to manage and dispose of its assets; and

- Legal debt moratorium or suspension of payment proceedings, under which the debtor, upon request by the creditor or the debtor itself, is given temporary relief to restructure its debts and continue in business, and ultimately to satisfy its creditors.

The provisions on the bankruptcy proceedings are set out in Chapter II (Articles 2 to 215) of the Bankruptcy Law, while the provisions on the suspension of payment proceedings are set out in Chapter III (Articles 222 to 294).

In certain circumstances, bankruptcy proceedings can lead to a suspension of payment proceedings and vice versa. There is no distinction of rules between corporate and individual bankruptcy in Indonesia.

Court-based Insolvencies

The court having jurisdiction over bankruptcy and suspension of payment proceedings is the Commercial Court. The Commercial Court is a specialised court in the commercial field established within the framework of the court of general jurisdiction or *peradilan umum*. Initially, only the District Court of Central Jakarta had a separate chamber designated as the Commercial Court, but now the District Courts of Makassar (Ujung Pandang), Medan, Surabaya and Semarang also have Commercial Courts.

Filing a Bankruptcy Petition

Under the Bankruptcy Law, a debtor who has more than one creditor and who has failed to pay in full one of its debts which is already due and payable can be declared bankrupt by the Commercial Court upon petition of:

- The debtor itself (in the case of voluntary bankruptcy);

- Any of its creditors, whether domestic or foreign;

- The Indonesian Central Bank (Bank Indonesia, if the debtor is a bank) or the Indonesian Capital Market Supervisory Agency (*Badan Pengawas Pasar Modal* or "**BAPEPAM-LK**", if the debtor is a securities company, a stock exchange, a clearing and guarantee agency, or a depository and settlement agency);

- The public prosecutor (if the bankruptcy petition involves the public interest); or

- The Minister of Finance (if the bankruptcy petition is against an insurance company, a reinsurance company, a pension fund, or a state-owned company in the form of a *persero*).

It is now arguable whether Bank Indonesia, BAPEPAM-LK, and the Minister of Finance still have the authority to file bankruptcy petitions since the supervisory and regulatory functions and roles of the three bodies were moved to the Financial Services Authority (*Otoritas Jasa Keuangan*) as of 31 December 2012 (for BAPEPAM-LK and the Minister of Finance) and 31 December 2013 (for Bank Indonesia).

Commencement of Bankruptcy Proceedings

The Bankruptcy Law requires that a bankruptcy petition must be filed before the Commercial Court having jurisdiction over the debtor's legal domicile. If the debtor is a legal entity, the legal domicile of the debtor is that which is stated in its articles of association. If the debtor is not domiciled in the Republic of Indonesia, the petition must be filed with the Commercial Court having jurisdiction over the legal domicile of the debtor's office where it carries out its business in Indonesia. In other words, a branch office or factory establishment could be served with a bankruptcy petition.

Court Hearings

At the latest three days after the bankruptcy petition is registered, the Commercial Court will study the bankruptcy petition and schedule the first hearing. The first hearing must be held not later than 20 days after the registration date. Upon request of the debtor, the court may postpone the first hearing until at the latest 25 days after the registration date. In recent practice, the court, after registering bankruptcy petitions, immediately issues a summons to the debtor and its creditors, including the petitioning creditor(s) and other creditor(s) mentioned in the bankruptcy petition to attend the court hearing. The summons is physically delivered to the parties by the court's bailiff unless the party is domiciled in another country or the domicile/dwelling place of the party is unknown. The summons will only be deemed properly served to the debtor if it reaches the debtor at least seven days before the court hearing.

Pending the court decision on the bankruptcy petition, any creditor may petition the court to put an attachment over a part of, or all of, the debtor's assets and to appoint a temporary curator (which is akin to a receiver or judicial manager). Theoretically speaking, the court is likely to grant an attachment order if there are reasonable grounds for believing that the debtor will dispose of its assets to avoid subjecting them to the bankruptcy procedure (if the petition is successful). The assets subject to the attachment order cannot be transferred, encumbered or leased by the debtor. In granting the attachment order, the court may require the petitioning creditor to provide security to the court.

The decision on the petition for the declaration of bankruptcy must be rendered by the court within 60 days after the date the petition is registered.

Appeal Process

The court's decision on the bankruptcy petition can be appealed to the Supreme Court by the debtor, any of the petitioning creditor(s), or any other creditor(s) by filing a request for cassation (*kasasi*), together with a memorandum of cassation containing the reasons for filing the request, with the Clerk of the Commercial Court within eight days after the decision is rendered. Within two days after the request for cassation is filed, the Clerk of the Commercial Court must deliver a copy of the request for cassation and the memorandum of cassation to the other party(ies) to give them a chance to file a response to the request for cassation (which in practice is called a "counter-memorandum of cassation") within seven days after the date they receive the copy of the request for cassation and the memorandum of cassation. Subsequently, the Clerk of the Commercial Court must deliver all documents relating to the request for cassation to the Supreme Court within 14 days after the date the

request for cassation is registered. The Supreme Court must commence adjudicating the request for cassation within 20 days as of the filing of the request for cassation, and give its decision within 60 days after the request for cassation is filed.

Civil Review Process

The Bankruptcy Law covers the process for civil review in Chapter IV (Articles 295 to 298). A request for civil review (*peninjauan kembali*) against a final and binding court decision can be made only if:

- There is new documentary evidence (*novum*), which is crucial and that could have reversed the previous court decision if it had been discovered during the court proceedings; or

- The court made a gross mistake in applying the law when rendering its decision. Similar to the request for cassation, the party filing a request for civil review must also submit a memorandum of civil review explaining the reasons for filing the request.

The request for civil review should be filed with the Clerk of the Commercial Court no later than 30 days after the decision to be reviewed is rendered in the event the request is made due to a gross mistake of the court, or 180 days after the date the decision is rendered in the event the request is made due to discovery of new evidence. Within two days after the filing date of the request for civil review, the Clerk of the Commercial Court must deliver a copy of the request and the memorandum of civil review to the other party(ies) to give them a chance to file a response to the request for civil review within 10 days after the date the request was registered. Subsequently, within 12 days after the date the request is registered, the Clerk of the Commercial Court must deliver all documents relating to the request for civil review to the Supreme Court to be adjudicated. The Supreme Court must give its decision on the request for civil review within 30 days after the date the request is registered.

Effects of Bankruptcy Declaration on the Debtor

After the court declares the debtor bankrupt, the debtor loses its capacity to manage and dispose of the bankruptcy estate, and all court enforcement procedures relating to security or other matters are postponed and any attachment order is lifted. The power to undertake any legal action in respect of the bankruptcy estate passes to the curator. The bankruptcy estate consists of all of the bankrupt debtor's assets at the time of the declaration of bankruptcy (including assets obtained during the bankruptcy but excluding assets stipulated in Article 22 of the Bankruptcy Law).

If a bankrupt debtor is not a natural person but a limited liability company, as a general rule the bankruptcy does not extend to its members (shareholders) because they are "protected" under the limited liability concept: the maximum they can be required to contribute is the remaining unpaid amount of their capital contribution.

Effects of Bankruptcy Declaration on the Creditors

Different Effects for Different Types of Creditors

The creditors affected by the bankruptcy are not all in the same position. Preferred or secured creditors have a priority claim on the proceeds of the sale of any assets that have been pledged as security in their favour, whether a pledge (*gadai*), fiducia (*fidusia*), mortgage (*hipotek*/*hak tanggungan*) or privilege (*hak istimewa*). Unsecured/concurrent creditors, on the other hand, share in the division of the remaining assets and obtain satisfaction of their debts in a proportionate percentage. Unsecured/ concurrent creditors will share the money proportionately, rather than having a situation where the first creditor to apply will be the first to receive payment. From the date of the declaration of bankruptcy, the unsecured/concurrent creditors can obtain satisfaction of their claims only in the bankruptcy procedure and not through individual enforcement proceedings.

It is important to note that only creditors having a claim against the bankrupt debtor at the time of the bankruptcy declaration may claim payment from the proceeds of the bankruptcy estate. Also note that the payment obligations of the debtor that arise after the bankruptcy declaration cannot be paid from the proceeds of the bankruptcy estate, unless the fulfilment of the payment obligations brings benefits to the bankruptcy estate.

Auctio Pauliana

The Indonesian Bankruptcy Law and Civil Code provide general protection to the interests of creditors. Under those laws, a creditor has the right to request the court to annul any voluntary legal acts of a debtor if the creditor can show that the debtor and its counterparty, when doing those voluntary acts, had knowledge that the action would jeopardise the creditor's interests. This protection is known as *auctio pauliana*.

The burden of proof in the action would rest on the debtor if the voluntary act that jeopardises the creditor's interest was carried out within one year before the date of the bankruptcy declaration. If the act was done earlier than one year before the date of the bankruptcy declaration, the burden of proof in the action would rest on the creditor.

Administration and Liquidation of the Bankruptcy Estate

One of the purposes of bankruptcy is the orderly liquidation of the debtor's assets and satisfaction of the unsecured/concurrent creditors' claims on a proportional footing or percentage. The basic principle for the distribution of the proceeds of the bankruptcy estate to the creditors is the equality of the creditors (*paritas creditorium*), meaning that all creditors have an equal right to payment and the proceeds of the bankruptcy estate must be distributed in proportion to the size of their respective claims.

If the court declares the debtor bankrupt, a curator and a supervisory judge will be appointed.

Supervisory Judge

The supervisory judge is responsible for supervising the actions of the curator with respect to administration and liquidation of the bankrupt estate. Most of the curator's major decisions are subject to the approval of the supervisory judge. Further, the supervisory judge is empowered to examine witnesses or order an investigation by experts in order to obtain any information on the bankruptcy proceeding. The court is obliged to hear the advice of the supervisory judge before deciding any matters related to the administration and liquidation of the bankruptcy estate.

Curator

The curator acts as the official receiver of the debtor and administrator and liquidator of the bankruptcy estate in consultation with and under the supervision of the supervisory judge. One of the main duties of the curator is to transform the bankruptcy estate into cash (by selling the bankruptcy estate through public auction or private sale) to be then distributed to the creditors.

The curator may either be a certain person(s) or firm(s), having the required skills and experience, who is an active member of a curators' association and registered with the Minister of Law and Human Rights, or, in the absence of a specific request for such a firm or person, the *Balai Harta Peninggalan* ("**BHP**", the probate court), which is a special agency under the Ministry of Law and Human Rights. The curator is nominated by the party filing the petition for declaration of bankruptcy. If there is no such nomination in the petition, and the petition is granted, BHP will act as the curator. To be appointed, the nominated curator must be independent (i.e. does not have any relationship with either the debtor or any creditor of the debtor) and does not have any conflict of interest.

The court may also appoint an additional curator at any time upon request of the (existing) curator, the supervisory judge or the bankrupt debtor (in the two latter instances, after hearing the opinion of the (existing) curator). The curator's fees will be based on the guidelines issued by the Minister of Law and Human Rights' Decree No. M.09-HT.05.10, dated 22 September 1998.

Creditors' Committee

Besides appointing a curator and a supervisory judge, the court may also appoint a temporary creditors' committee consisting of three members selected from the creditors that have registered themselves for verification in the bankruptcy declaration or by a later decision if it is deemed necessary or if it is desirable for the interests of the bankruptcy estate; and a permanent creditors' committee after the verification. The main duty of the creditors' committee is to provide advice to the curator. The curator, however, is not bound by the committee's advice or recommendation. In

practice, the creditors' committee is rarely established except in cases where the debtor's assets are substantial and the creditors are numerous.

Completion of the Bankruptcy

After all acknowledged creditors have received the full amount of their claims or as soon as the final distribution plan (made by the curator) has become binding, the bankruptcy will end. The completion of the bankruptcy must be announced by the curator in the same manner as the announcement of the declaration of bankruptcy (through newspapers). Thirty days after the end of the bankruptcy, the curator will account for its administration and liquidation of the bankruptcy estate to the supervisory judge.

Suspension of Payment Proceedings

Another feature of the Bankruptcy Law is the suspension of payment proceedings. A creditor that foresees its debtor will not be able to continue to pay its debts when they become due and payable, and a debtor that is unable, or predicts that it will be unable to pay its debts when they become due and payable, may file a petition for suspension of payment of debts with the relevant Commercial Court.

The aim of the suspension of payment is to provide the debtor with more time either to meet its obligations or to come to an agreement with its creditors to restructure the debts. Please note that a suspension of payment can be converted into a bankruptcy if it is clear that the suspension will not be successful, as will be discussed below.

Commencement of Suspension of Payment Proceeding

The petition for suspension of payment must be signed by the petitioner and its legal counsel admitted to practice before the court. If the petitioner is the debtor itself, the petition must be accompanied by a schedule comprising the nature of its debts/claims and the creditors to whom these debts are owed (i.e. the creditors' names, addresses, and the amount of receivables), as well as other relevant documentary evidence. If the petition is filed by the creditor, the court must summon the debtor (through the court bailiff) by registered mail at the latest seven days before the hearing.

Under the Bankruptcy Law, a debtor may also file a petition for suspension of payment after a petition for bankruptcy declaration has been filed against it. If petitions for both suspension of payment and bankruptcy are reviewed by the court at the same time, the petition for suspension of payment prevails and must be decided first. Although it is not a legal remedy as such (i.e. appeal or civil review), a petition for suspension of payment will effectively postpone the bankruptcy process for a certain period of time.

Composition Plan

The Bankruptcy Law requires the debtor petitioning for the suspension of payment (the "**Applicant**") to submit its settlement or composition plan with its creditors at the time or after the debtor files the petition for suspension of payment. A composition plan with creditors is an agreement made between the Applicant and its creditors for the settlement or arrangement for a discharge of the debts of the Applicant. The composition plan should set out the proposed timetable under which the Applicant will repay its debts and also whether the debts will be fully or partially repaid. The Applicant and all of its creditors are free to agree to the terms of payment they choose. The Bankruptcy Law does not contain any requirements with respect to the contents of the composition plan.

The composition plan will be automatically aborted if, after its submission but before its approval by the creditors, the suspension of payment is terminated (at the end of its intended period or earlier, by the court upon its own initiative, or upon request of either the supervisory judge, the Administrator, or one or more of the creditors, on any of grounds stipulated in Article 255 of the Bankruptcy Law).

The suspension of payment may also be terminated by the court upon request of the Applicant on the grounds that the assets of the Applicant are sufficient to allow it to undertake repayment of its debts again.

Pre-Submission Workout

The Bankruptcy Law includes a specific provision on pre-submission workouts, but, in practice, these normally occur in well planned suspension of payment proceedings.

Effectiveness and Effects of the Composition Plan

In order to be valid and effective, a composition plan must be approved in a creditors' meeting by:

- Affirmative votes of more than half of the concurrent creditors which are present at the meeting, provided that the concurrent creditors voting in favour hold at least two-thirds of all accepted or provisionally accepted unsecured claims held by the concurrent creditors present; and

- Affirmative votes of more than half of the secured creditors which are present at the meeting, provided that the secured creditors voting in favour hold at least two-thirds of all claims held by the secured creditors present.

Please note that votes are only taken from the creditors present in the meeting. The ratified composition plan will bind all of the unsecured creditors. It also binds those unsecured creditors who voted against the acceptance of the composition plan and those unsecured creditors who were not present or represented at the voting hearing.

Effects of Suspension of Payment

One effect of a suspension of payment is that the debtor cannot be forced to pay its debts within the suspension of payment period. Unlike in bankruptcy, a debtor in suspension of payment may still manage or dispose of its assets and even obtain loans and secure its unsecured assets, provided that those acts have been authorised by the administrator and/or the supervisory judge.

Termination of Suspension of Payment

A suspension of payment may be terminated by the Commercial Court on a request submitted by the administrator, the supervisory judge or any of the creditors, or on the Commercial Court's own initiative, if:

- The Applicant, in bad faith, takes action during the suspension of payments which is detrimental to its assets or the interests of its creditors;

- During the suspension of payment, the Applicant performs actions of management or transfers rights to any part of its assets, without authorisation from the Administrator;

- The Applicant neglects to do what the court ordered at the time or after the suspension of payment was granted, or neglects to do what the Administrator requires in the interests of the debtor's assets;

- The Applicant's assets are in such a state that a suspension of payments would no longer be feasible; or

- The Applicant is in such a condition that it cannot be expected to fulfil its obligations towards the creditors on time.

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