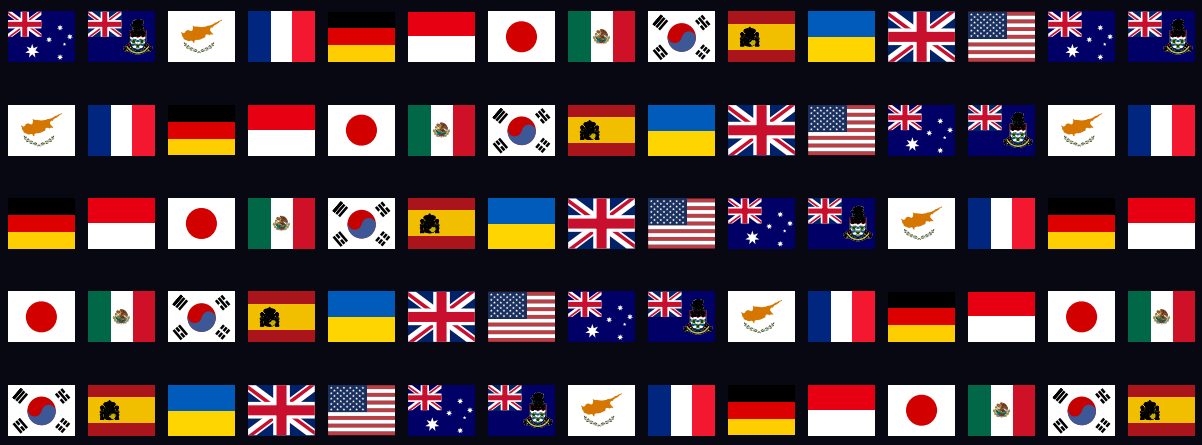
INSOLVENCY LITIGATION

Indonesia



LEXOLOGY
Getting The Deal Through

Consulting editor
Latham & Watkins LLP

Insolvency Litigation

Consulting editors

Suzzanne Uhland, George A. Davis, Adam J. Goldberg, Christopher Harris

Latham & Watkins LLP

Quick reference guide enabling side-by-side comparison of local insights, including into pre-litigation considerations; avoidance actions; claims against directors, officers and shareholders; creditor actions and strategic considerations; pre-insolvency debtor claims; other claims against creditors and debtors; cross-border considerations; remedies and enforcement; settlement and mediation; and recent trends.

Generated 17 February 2023

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Contributors

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Mr. Theodoor Bakker
tbakker@abnrlaw.com
ABNR

Kevin Omar Sidharta
ksidharta@abnrlaw.com
ABNR

Ulyarta Naibaho
unaibaho@abnrlaw.com
ABNR

Bilal Anwari
banwari@abnrlaw.com
ABNR

COMMENCING PROCEEDINGS

Litigation climate

How would you describe the general climate surrounding insolvency litigation in your jurisdiction? What are the most common sources of dispute? To what extent is litigation used as a pressure or delay tactic?

The general climate of insolvency litigation in Indonesia is dependent on many factors such as debtor cooperation, and whether the proposed composition plan is reasonable and fair. Also significant are whether a court-appointed administrator or receiver in bankruptcy has a reasonable commercial and legal approach, whether the supervisory judge plays their role properly, and if the law is implemented and interpreted strictly and reasonably, in the interests of creditors.

The willingness of a debtor to treat creditors fairly in a composition plan is also important. Although the majority of creditors would normally have influence over the process, this is sometimes insufficient to drive bankruptcy and suspension of payments proceedings towards a deal that is commercially satisfactory to the creditors. The law generally provides flexibility to a debtor to control the process to a greater extent than occurs in developed jurisdictions (regardless of the fact that it may appear to favour creditors).

In view of the complexities of court-sanctioned insolvency (which also includes restructuring), procedures for Indonesia insolvency can be divided into litigation: (1) for pre-insolvency or restructuring, (2) post-restructuring; and (3) during insolvency.

Pre-insolvency litigation or restructuring involves the filing of a petition for bankruptcy or suspension of payments (PKPU) by creditors and a petition for cassation or case review of a commercial court decision.

Post-restructuring litigation includes the following:

- challenge to the debtor's composition plan approved by the creditors and homologated by the commercial court (Homologated Plan) by dissenting creditors via a cassation or case review petition to the Supreme Court; or
- filing of petition to nullify a Homologated Plan by a creditor due to the debtor's subsequent default in performing its obligations cited in the Plan.

Litigation during insolvency includes the following:

- verification of claims;
- lifting of stay period;
- continuation of executory contract performance;
- distribution of liquidation proceeds;
- third-party opposition to confiscation;
- liability of the receiver;
- other disputes that concern the bankruptcy estate, to which the bankrupt debtor, creditor or receiver is a party; and
- receiver's initiated legal process to preserve or maximise the debtor's assets that include:
  - asset-related disputes;
  - contract-related disputes;
  - avoidance of fraudulent transfer; and
  - liability claim against directors, commissioners or shareholders of the debtor (of a limited liability company) arising from their action, which constitutes the fault or negligence that caused the debtor's bankruptcy.

Disputes over restructuring plans in insolvency or restructuring, other than challenges to a Homologated Plan are infrequent, particularly due to the absence of a route for (dissenting) creditors to challenge restructuring plans under the Indonesian Bankruptcy Law (IBL) other than outright rejection, which, following a quorate decision, may cause a debtor to be declared bankrupt.

Disputes that most often arise between creditors and debtors in the pre-insolvency litigation or restructuring phase are over unpaid debts before insolvency proceedings commence.

Creditors frequently use pre-insolvency or restructuring litigation to force a debtor to settle its outstanding debt during litigation (a fast-paced, maximum of 60 days) so that the debtor, if making payments, can avoid entry into the insolvency or restructuring process.

While the strategy can be successful, in some instances the debtor succeeds in having the petition rejected over technicalities; in another instance a debtor, surprisingly, agreed to enter into the insolvency or restructuring process.

Law stated - 10 February 2023

Sources of law

What key sources of law form the basis of claims arising from insolvency? How does the insolvency regime interact with other laws?

Law No. 37 of 2004 on Bankruptcy and Suspension of Payments (IBL) is the key source of law. Law No. 40 of 2007 on Limited Liability Companies as amended by Law No. 11 of 2020 on Job Creation (Indonesian Company Law, ICL), the Indonesian Civil Code (ICC), the Indonesian Commercial Code and the Indonesian Penal/Criminal Code complement and interact with the IBL as there are cross-references between this legislation.

Law stated - 10 February 2023

Procedure

What procedural rules govern insolvency litigation in your jurisdiction? What common procedural hurdles arise in practice?

The IBL clearly stipulates that unless it specifically regulates otherwise, the general civil procedural law, which includes Supreme Court Decree No. 109/MA/SK/IV/2020 on the Guidebook for Resolving Bankruptcy and PKPU Cases, dated 29 April 2020 (Supreme Court Manual), is applicable. Pending the enactment of a new civil procedural law still under discussion in the parliament, the Indonesian Civil Procedure Law consists of the Indonesian Procedural Code for the Islands of Java and Madura (HIR), the Procedural Code for the Outer Islands (RBG) and general ICC provisions on evidence. In addition, the colonial Code on Civil Procedure (RV), various Supreme Court Regulations and Circular Letter provide further guidance on implementation.

For certain proceedings specifically stipulated by the IBL, the short timeline provided may overcome the customary hurdles that exist under general civil procedural law, especially as most general civil procedural law timelines are not strictly specified.

Law stated - 10 February 2023

Courts

Which courts hear insolvency claims? How experienced are they with insolvency litigation?

The Commercial Court has jurisdiction over the legal domicile of the debtor. Currently, there are five Commercial Courts in Indonesia including the Commercial Court at the District Courts of Central Jakarta, Medan, Semarang, Surabaya and Makassar.

The Commercial Court was established to handle commercial law issues, and at the moment only handles cases relating to insolvency or restructuring, intellectual property and antitrust (at objection level).

While the judges sitting in the Commercial Court are provided with special training, they also handle other general matters dealt with by district courts. In addition, judges sitting in the Commercial Court are promoted to serve other courts (not necessarily commercial) periodically.

Law stated - 10 February 2023

Jurisdiction

Through what law do the relevant courts have jurisdiction to hear insolvency claims? Does jurisdiction differ for domestic and cross-border matters?

The commercial court has jurisdiction to hear insolvency claims based on the IBL and ICL. Cross-border matters are not specifically covered. In addition, Indonesia does not recognise or provide other relief in connection with restructuring or insolvency proceedings overseas, as it has not adopted the UNCITRAL Model Law, and it has not ratified an international treaty that would enable Indonesian courts to recognise restructuring or insolvency proceedings commenced or decisions issued in other jurisdictions.

Law stated - 10 February 2023

Limitation periods

What limitation periods apply to bringing insolvency-related claims? Are there any notable exceptions?

As the IBL does not stipulate a limitation period, the ICC rules on statute of limitations apply, which for claims in general is 30 years.

Law stated - 10 February 2023

Interim remedies

What interim remedies are generally available and commonly deployed in insolvency proceedings? How are these used as part of claimants' overall litigation strategy?

The IBL provides creditors the opportunity to request the Commercial Court to: (1) impose an attachment over a debtor's estate in part or entirely; or (2) appoint a provisional receiver to oversee the debtor's business management and payment to creditors, debtor's estate transfer or securitisation (which in bankruptcy falls within the receiver's authority), prior to the bankruptcy declaration being rendered. (However, we are not aware of a precedent to indicate that this feature has become Commercial Court policy.)

Law stated - 10 February 2023

Evidence

What rules and procedures govern the collection and admissibility of evidence in insolvency litigation? To what extent is expert witness testimony allowed? What common evidential issues should claimants be aware of?

The rules and procedures are stipulated in the IBL, Supreme Court Manual, HIR/RBG and general ICC provisions on evidence.

According to article 1886 ICC, the following constitute evidence:

- written evidence;
- testimony of factual witnesses;
- inferred matters;
- confessions; and
- sworn statements.

While expert witness testimony is allowed on the basis of article 154 (2) HIR and article 229 RV, it does not constitute evidence, so the panel of judges is free to decide whether or not to admit expert witness testimony. This is inadmissible as evidence and functions only to clarify the case under examination, or may complement or strengthen other means of evidence.

All documents submitted to court must be in Bahasa Indonesia or be accompanied by a Bahasa Indonesia translation. Therefore, unless the documents are already in English (or other foreign language) – Bahasa Indonesia bilingual format, documents written only in a foreign language or English must be translated into Bahasa Indonesia by a sworn translator.

With respect to pre-insolvency litigation, in accordance with IBL, a bankruptcy or PKPU petition must be granted if it can be summarily proven that the bankruptcy or PKPU requirements have been met. Often a bankruptcy or PKPU petition is rejected because the evidentiary requirements involved cannot be met.

To prove that more than two creditors exist (which is a bankruptcy or PKPU petition requirement), the petitioner may prove it with pre-existing evidence or request that other creditors attend court hearings (with the fee for summoning other creditors borne by the petitioner).

Creditor data obtained from the Financial Services Authority through the Financial Information Service System website (SLIK) is not considered to have sufficiently strong evidentiary value to prove the existence of creditors, unless supported by other evidence that indicates the existence of the debt.

Law stated - 10 February 2023

Time frame

What is the typical time frame for insolvency claims?

IBL provides the following time frame. For pre-insolvency/restructuring litigation:

- for a creditor-filed bankruptcy petition: 60 calendar days until the Commercial Court renders its decision (but in practice 60 business days may apply); and

- for a creditor-filed PKPU petition: 20 calendar days, but in practice more than 20 calendar days (which are of longer duration than business days).

For post-restructuring litigation:

- for a creditor-filed petition to nullify a Homologated Plan: 60 calendar days, but in practice 60 business days may apply.

Litigation during insolvency:

- IBL clearly requires that the timeframe applicable in the IBL mentioned above is also applicable. Therefore, 60-calendar days is applicable.

Law stated - 10 February 2023

Appeals

What are the requirements to appeal insolvency-related judgments? What is the typical time frame for appeals?

The requirements to appeal insolvency-related judgments are as follows:

In cassation relating to a homologation plan, a Commercial Court decision can be appealed against on the following grounds:

- the estate of the debtor, including goods for which a right of retention is exercised, is much larger than the amount agreed in the composition;
- implementation of the plan is not adequately is not sufficiently guaranteed; or
- the plan was concluded fraudulently or under undue influence of certain creditors;

For case review, an appeal can be made against a final and binding decision that is either: (1) a Commercial Court decision not appealed against within the Cassation Filing Period; or (2) a Supreme Court decision in cassation. Case review may only be filed with the Supreme Court on limited grounds:

- when decisive evidence is discovered after a final and binding decision has been rendered, which, at the time of the proceeding at the Commercial Court or Supreme Court in cassation, had not yet emerged. Here, a case review petition may be filed within 180 days of the date on which the court's decision being appealed against becomes final and binding.
- if an obvious mistake or error has been made by the judges in their decision; Here, the case review petition can be filed within 30 days of the court's decision being petitioned becomes final and binding.

The typical appeal time frame:

- for cassation: within 60 calendar days of the Supreme Court receiving the dossiers; and
- for case review: within 30 calendar days of the Supreme Court receiving the dossiers.

In practice, the timeline between registration of a cassation or case review petition has been registered until the Supreme Court receives the dossiers is not clear.

Law stated - 10 February 2023

Costs and litigation funding

How are costs handled and how are claims funded? Can claimants obtain third-party funding to finance the prosecution of claims?

Normally, the receiver will impose costs on the bankruptcy estate. It is still uncommon for third-party funding to be involved in this type of claim.

Law stated - 10 February 2023

AVOIDANCE ACTIONS

Fraudulent transfers and undervalue transactions

What are the essential elements of avoidance actions seeking to claw back fraudulent conveyances and transfers? Can actions be brought for transfers without fraudulent intent based on undervalue of the transfer?

Under articles 41 and 42 of the Indonesian Bankruptcy Law (IBL), and in the interests of bankruptcy assets, the receiver could request nullification of a transaction carried out by the debtor before declaring bankruptcy, if the transaction were considered detrimental to creditors. To nullify the transaction, the receiver must prove the following:

- the transaction was completed by the debtor before it was declared bankrupt;
- the debtor was not obligated by contract (an existing obligation) or by law to perform the transaction;
- the transaction was prejudicial to creditors' interests; and
- the debtor and third party had (or should have had) knowledge that the transaction would prejudice creditors' interests.

Furthermore, the IBL provides that if the transaction was concluded within one year of the bankruptcy declaration (when the transaction was not mandatory on the debtor, unless it could be proven otherwise), both the debtor and the third party with whom the transaction was concluded would be deemed to know that the transaction was detrimental to the creditors if:

- the consideration that the debtor received was substantially less than the estimated value of the consideration given;
- a payment or grant of security for a debt that was not yet due; and
- a transaction entered into by the debtor with a relative or related parties (eg, a member of the board of directors or commissioners (BoD or BoC), majority shareholder).

The IBL does not stipulate a specific period within which a claim can be made. However, a request for nullification of a transaction must be made by the receiver.

Payment of a debt that has become payable can only be nullified if it can be proven that:

- the recipient of the payment (the creditor) already knows that the bankruptcy petition of against the debtor has been registered; or
- payment was made because the debtor and creditors conspired to provide the creditors in question with greater privileges than other creditors.

The practical effect of a successful challenge is nullification of a related legal action or transaction in question (some court decisions have also included unlawful acts, based on a receiver's petition) and, thereby, restoration of the conditions that pertained prior to their execution.

The IBL specifically stipulates the consequences below, following a successful challenge:

- anyone who receives property or goods that constitute part of those assets of the debtor covered by the nullified legal action must return them to the receiver and report it to the supervisory judge; if that person is unable to return the goods or property before the legal action is taken, they must pay compensation to the bankruptcy estate; and
- the rights of third parties over property or goods obtained in good faith and not free of charge, (including the holder of security rights imposed on them) should be protected.

For goods under nullification received by a debtor, they or their value should be returned to the party with whom the debtor conducted the legal action, to the extent that the bankruptcy estate is not jeopardised. If there remains an outstanding difference that needs to be returned to that other party, it may verify the discrepancy as an unsecured claim.

Action brought for transfers without fraudulent intent based on an undervaluation of the transfer from the time the intent was assumed to exist, unless it can be proven otherwise by the debtor or that third party.

Law stated - 10 February 2023

Preference and improvement of position

What are the essential elements of avoidance actions seeking to claw back transactions and payments based on preference and improvement of position shortly before insolvency proceedings?

There is no specific differentiation under the IBL on the essential elements of avoidance actions based on fraudulent transfers and undervalue transactions and on the basis of preference and improvement of position. One may rely on article 41 and 42 of the IBL.

Payment of a debt that has become payable can only be nullified if it can be proven that:

- the recipient of the payment (the creditor) already knows that the bankruptcy petition of against the debtor has been registered; or
- payment was made because the debtor and creditors conspired to provide the creditors in question with greater privileges than other creditors.

If the transaction were considered detrimental to creditors, the receiver must prove the following to nullify the

transaction:

- the transaction was completed by the debtor before it was declared bankrupt;
- the debtor was not obligated by contract (an existing obligation) or by law to perform the transaction;
- the transaction was prejudicial to creditors' interests; and
- the debtor and third party had (or should have had) knowledge that the transaction would prejudice creditors' interests.

if the transaction was concluded within one year of the bankruptcy declaration (when the transaction was not mandatory on the debtor, unless it could be proven otherwise), both the debtor and the third party with whom the transaction was concluded would be deemed to know that the transaction was detrimental to the creditors if:

- the consideration that the debtor received was substantially less than the estimated value of the consideration given;
- a payment or grant of security for a debt that was not yet due; and
- a transaction entered into by the debtor with a relative or related parties (eg, a member of the board of directors or commissioners (BoD or BoC), majority shareholder).

Law stated - 10 February 2023

Liens and floating charges

What are the essential elements of actions for the avoidance of liens and floating charges on subsequently acquired property?

In general, in rem security rights (in the form of mortgage, pledges, hypothec, fiduciary security) may not be perfected after insolvency proceedings have commenced, unless approved by the court-appointed administrator in petition for bankruptcy or suspension of payments or receiver in bankruptcy.

Should a debtor, after commencement of insolvency proceedings, take action to perfect the in rem security right for the benefit of a specific creditor, the action cannot be imposed on the debtor's assets and would be subject to avoidance action.

Law stated - 10 February 2023

Process and resolution of avoidance actions

Through what process are avoidance actions litigated? What procedural issues often arise and how are avoidance actions usually resolved?

In insolvency proceedings, avoidance action is litigated in the Commercial Court and initiated by the court-appointed receiver in bankruptcy. The receiver will need to file a lawsuit against the party whose legal action with the bankrupt debtor is requested to be voided. The Commercial Court decision is subject to appeal in cassation and case review at the Supreme Court level.

The receiver normally would focus in avoiding legal action taken by the debtor during the year before the bankruptcy is declared because the burden of proof to establish the 'knowledge' would lie with the debtor's counterparty. If the legal actions were taken by the debtor in the period longer than one year before the bankruptcy declaration, the burden of proof to establish the knowledge would lie with the receiver.

Law stated - 10 February 2023

CLAIMS AGAINST DIRECTORS, OFFICERS AND SHAREHOLDERS

Breach of fiduciary duty

What are the essential elements of a claim for breach of fiduciary duty against directors and officers in the context of corporate insolvency?

The Indonesian Company Law (ICL) states that in the event the bankruptcy of a company resulting from fault or negligence by the board of directors or commissioners (BoD or BoC), and the assets of the company are insufficient to cover the damage caused by the bankruptcy, each member of the BoD or BoC is jointly and severally liable for the damage, unless a director or commissioner can prove that:

- the bankruptcy is not attributable to their fault or negligence;
- they managed (for a director) or supervised (commissioner) in good faith, with prudence, and full responsibility in the interests of the company, and within the objectives and purposes of the company;
- they do not have conflict of interest either directly or indirectly over the management actions that have been performed (by the BoD; and
- they have taken measures to prevent the bankruptcy occurrence (for director) or advised the BoD to prevent the bankruptcy (for commissioner).

This provision also applies to former members of the BoD or BoC proven at fault or negligent who were appointed within the five years prior to the bankruptcy declaration.

In order to substantiate culpability or negligence of the BoD, the lawsuit must be filed with the commercial court under Indonesian Bankruptcy Law (IBL) provisions, and initiated by the court-appointed receiver.

Law stated - 10 February 2023

Protection from liability

To what extent does the law in your jurisdiction protect directors and officers from liability for decisions made in connection with the restructuring or insolvency?

Concepts such as the business judgement rule and rejection of the deepening insolvency theory are unfamiliar in Indonesia.

Under Indonesian law, directors and officers may be held liable toward third parties, jointly and severally, for tort if they act beyond their authority and capacity (which would also be determined by the objectives and purposes of the company under its articles of association).

Further, under the ICL, every member of the BoD or BoC is fully personally liable for the losses of the company if a director or commissioner is at fault or negligent in the performance of their duty to (1) manage the company in good faith and with full responsibility as a director; (2) supervise and advise the BoD (for a commissioner). In the event that the BoD or BoC contains two members or more, personal liability and responsibility is jointly and severally applicable to every board member.

A member of the BoD may not be held liable for losses if they can substantiate that:

- the losses are not attributable to their own fault or negligence;

- they managed the company in good faith and prudence in its interests, and within its objectives and purposes;
- they have no conflict of interest, directly or indirectly, in management action that resulted in losses; and
- they took preventive measures against the occurrence or continuation of losses. (This also includes steps to ensure access to information about management action that resulted in losses, inter alia, via a BoD meeting.)

A member of the BoC may not be held liable for losses if they can substantiate that:

- they supervised with good faith and prudence in the interests of the company and within the objectives and purposes of a subsidiary;
- they had no personal interest, directly or indirectly, in management action by the BoD that resulted in losses; and
- they advised the BoD to prevent the occurrence or continuation of losses.

Based on the above, apart from shareholders, creditors may also bring a lawsuit against directors and officials personally, including for breach of a contract (entered into by the company) that contains breach of fiduciary duties provisions.

Law stated - 10 February 2023

Converting credit to equity

Can credit extended by an insider or shareholder be recharacterised as equity? If so, what is the mechanism by which such an action is brought, and what elements are required to prevail?

In essence, a loan from an insider or shareholder will not automatically be re-characterised as equity. Nonetheless, in a court-sanctioned or restrictive petition for bankruptcy or suspension of payments situation, the composition plan may contain provisions to convert an insider or shareholder loan into equity. However, this is subject to approval from the creditors based on the requisite quorum under the IBL and the shareholders on the implementation of the plan. The interest on the loan or other associated fees, however, may not be converted. (Only the loan principal may be converted into equity.) The conversion of the loan must also be published in two newspapers.

Law stated - 10 February 2023

Illegal dividends

Can dividends received by shareholders be prosecuted as illegal?

The ICL identifies various circumstances under which dividend may be distributed to the shareholders:

- the company records a profit in the financial year in which the dividend is distributed;
- the company maintains a positive balance of profit or retained earnings;
- the mandatory reserve has been established from the profit; and
- the distribution of dividend is approved by the company's shareholders.

A company may distribute interim dividend before the company's financial year end, provided that it is stipulated in the company's articles, determined by the BoD, and approved by the BoC.

Interim dividend can be distributed if the net assets of the company are not less than the issued and paid-up capital

plus mandatory reserves. It must not disrupt or lead to the company's failure to fulfil its obligations to creditors, or disrupt the activities of the company. If after the financial year has ended the company suffers losses, distributed interim dividend must be refunded by the shareholders to the company in the amount at which retained earnings could not cover the losses. If the shareholders fail to return interim dividend, BoD and BoC members will be jointly and severally liable.

Dividend paid to shareholders that breaches the above requirements would therefore be challengeable on grounds of non-compliance.

Law stated - 10 February 2023

Trading while insolvent

How is trading while insolvent treated in your jurisdiction? If actionable, what mechanisms apply and what are the elements of a successful claim?

No specific rules govern this matter. Before formal insolvency proceedings can commence, the BoD is still fully active and continues to manage in good faith, prudence, and with full responsibility in the interests of the company, and within its objectives and purposes. Although not explicitly stipulated, the BoD should avoid transactions that might be subject to preferential transfer or render them personally liable.

The IBL recognises 'insolvency' (also known as insolvent at law) as a certain moment in bankruptcy proceedings at which a debtor is declared bankrupt. Not all bankruptcy declarations automatically render a bankruptcy estate insolvent. However, under the IBL, bankruptcy arising from nullification of petition proceedings would automatically render a bankruptcy estate insolvent.

Insolvency under the IBL is defined simply as inability to repay a debt. Therefore, the state of insolvency is not concerned with whether or not a bankruptcy estate is sufficient to settle all creditors' claims.

Law stated - 10 February 2023

Equitable subordination

Is equitable subordination of shareholder claims allowed? If so, what requirements and mechanisms apply?

Indonesian law does not recognise the concept of equitable subordination of shareholder claims, although in practice a restructuring plan proposed may incorporate the concept.

Law stated - 10 February 2023

Other claims

Are any other claims commonly brought against shareholders, directors and officers in your jurisdiction? If so, what mechanisms are used to raise these claims and what elements are required to prevail?

Under Indonesian law, shareholders, directors and officers may be held liable toward third parties, jointly or severally, based on a tort claim, if each acts beyond the limits of their authority, capacity and competence.

The ICL further provides the following:

- any shareholder has the right to file a lawsuit against a company with the court for damage caused by an act of the company that is considered to be unfair and unreasonable, and results from decisions of a general meeting of shareholders, the directors, or the commissioners.
- shareholders representing at least one-tenth of the total number of issued shares with valid voting rights may, on behalf of the company, file a lawsuit with the district court against a member of the BoD or BoC, whose fault or negligence has resulted in a loss to the company.

Law stated - 10 February 2023

Risk mitigation

How can shareholders and sponsors mitigate the risk that claims against them will be successful, and minimise the accompanying financial burden?

Under the ICL, the liability of the shareholders is limited to the capital injection for the shares that they own and should not cover their personal assets. Nevertheless, the concept of piercing the corporate veil is recognised under the ICL – albeit applied in very rare circumstances only – in the following situations:

1. the requirements for company's existence as a legal entity have not been or are not fulfilled, for example, in the event the company's deed of establishment has not been approved by the Minister of Law and Human Rights;
2. a shareholder, directly or indirectly, in bad faith uses the company solely for personal purposes;
3. a shareholder is involved in an unlawful act committed by the company; or
4. a shareholder, directly or indirectly, unlawfully uses the company's assets, which causes the company's assets to be insufficient to settle company's debts.
5. In (2), (3) and (4) above, the ICL provides that the burden of proof lies with the third party intending to raise a claim against the shareholders of the company concerned.

Further, the ICL also provides that upon a company receiving legal entity status and its shareholders becoming less than two persons, within six months of that occurrence, the relevant shareholder must transfer part of their shares to other people, or otherwise the company must issue new shares to other people. If the period expires, and the shareholders remain at less than two, the remaining shareholder will be personally liable for any binding agreement and loss of the company, and, at the request of an interested party, the district court may dissolve the company.

Based on the foregoing, the shareholders should ensure that none of the above occurs in order to mitigate the risk that claims against them would be successful.

Law stated - 10 February 2023

CREDITOR ACTIONS AND STRATEGIC CONSIDERATIONS

Contesting restructuring plans

Can creditors bring actions contesting the restructuring plan? If so, what law governs such actions? What must the creditor show to succeed and what must the debtor show to successfully defend? How are these actions usually resolved?

Under Indonesian law, creditors can bring an action to contest a restructuring plan by filing a cassation petition against a homologated plan.

In a scenario featuring cassation related to a homologation plan, an appeal can be made against a Commercial Court

decision on the following grounds:

- the estate of the debtor, including goods for which a right of retention is exercised, is much larger than the amount agreed in the composition;
- implementation of the plan is not adequately assured; or
- the plan was concluded fraudulently or under undue influence of certain creditors.

Most petitions for cassation on this issue are rejected by the Supreme Court, as evidence to prove the issues above is difficult to produce.

Law stated - 10 February 2023

Winding-up petitions

Do creditors apply for winding-up orders? If so, what law governs these actions? What must the creditor show to succeed and what must the debtor show to successfully defend? How are these actions usually resolved?

The Indonesian Bankruptcy Law (IBL) enables a creditor to file either for bankruptcy or petition for bankruptcy or suspension of payments (PKPU). Creditors must prove that the debtor has more than one creditor and at least one due and payable debt, and the foregoing must be summarily proven. The debtor must be able to prove either that it does not have due and payable debt or the petitioner's arguments cannot be summarily proven.

Apart from the bankruptcy and PKPU process under the IBL, the Indonesian Company Law (ICL) also recognises dissolution and liquidation. Pursuant to article 146 ICL:

The district court may dissolve a company based on:

- a District Attorney's request, for the reason that the company has violated the public interest or the company has committed acts that violate law and regulations;
- an application from interested parties due to legal defects alleged in the Deed of Incorporation; and
- a request from the shareholders, the board of directors or commissioners (BoD or BoC) on the grounds that the company's existence is unlikely to continue.

In a court decision, the appointment of a liquidator is also stipulated.

However, a creditor may try to request dissolution of a company by the court, alleging a defect in the company's deed of incorporation.

The company must contest the challenge by proving that the deed of incorporation is not legally defective and made in accordance with applicable law and regulation.

Law stated - 10 February 2023

Stays of proceedings – scope and exceptions

Does the insolvency regime stay any creditor collection actions? If so, what are the parameters of such a stay? Are there any notable or commonly used exceptions?

A bankruptcy declaration triggers the automatic stay of the bankruptcy estate upon issuance of a Commercial Court

decision declaring the bankruptcy of the debtor. The rights of secured creditors to enforce security (and the rights of a third party to claim its assets that are under the control of the bankrupt debtor or the receiver) are subject to an automatic stay of up to 90 days (article 56 (1) IBL). Under bankruptcy proceedings, the automatic stay period may be less than 90 days if they are terminated earlier, or if the debtor enters a state of insolvency.

The automatic stay in this provision is aimed at:

- increasing the possibility of composition;
- increasing the possibility of optimising the bankruptcy estate; or
- enabling the receiver or curator to perform its duties optimally.

During the stay period, no legal action to obtain payment in respect of receivables may be brought before a court, and the creditor and third parties are prohibited from executing or requesting attachment in respect of collateral.

The stay above, however, is not applicable to a creditors' claim that is secured with cash, and the right of creditors to apply for set-off. This should include the right of creditors to apply for set-off that is part of or results from a transaction that occurs in the Stock Exchange and Futures Trading Exchange.

During the stay period, the receiver may use movable or immovable assets from the bankruptcy estate or sell movable assets under the control of the receiver to continue the business of the bankrupt debtor, once the interests of secured creditors or relevant third parties have been reasonably protected.

The elucidation of the IBL further provides that the bankruptcy estate's assets that can be sold by the receiver are limited to the inventory or current (movable) assets, although these are encumbered by in rem security rights. Further, 'reasonable protection' means what must be provided to protect the interests of secured creditors or other third parties whose rights are stayed. The transfer of such assets by the receiver results in a condition in which an in rem security right over assets is deemed as terminated by the operation of law.

The protection may include:

- compensation for a decrease in value of the bankruptcy estate;
- net proceeds from the sale;
- replacement of in rem security rights; or
- reasonable and fair compensation, as well as other cash payments (of the debt being secured).

The bankrupt estate will be in a state of insolvency if:

- no composition plan is submitted at a creditors' meeting for verification of claims;
- the composition plan is rejected after voting by the creditors;
- the composition plan is approved by the creditors but not confirmed by the Commercial Court; or
- a final and binding confirmed composition plan is nullified by the Commercial Court.

Once the bankruptcy estate is declared to be in a state of insolvency, secured creditors must complete the exercise of their privileged right over the collateral within two months of the bankruptcy estate being declared in a state of insolvency. Otherwise, the appointed receiver is required to request delivery of the collateral, to be sold by the receiver.

If the receiver has enforced the collateral, the proceeds that will be distributed to secured creditors needs first to be reduced by not only the amount of the mandatory preferred claims (which will also apply if the secured creditors enforced the collateral themselves), but also the bankruptcy costs (including the receiver's fee).

Further, the IBL provides secured creditors with a set of procedures for seeking relief from an automatic stay. Article 57 of the IBL provides creditors or third parties whose rights have been stayed the opportunity to file a petition to the receiver for lifting of the stay, or to amend the conditions of the stay (a Lift of Stay Petition). If the receiver rejects a Lift of Stay Petition, that creditor or the third party may file the Lift of Stay Petition with the supervisory judge.

The Supervisory Judge must, no later than one day after receipt of the petition, order the receiver immediately, by registered mail or courier, to summon the creditor and third party to be heard at the hearing on the Lift of Stay Petition. The supervisory judge must render a decision upon the lift of stay petition within 10 days of its submission to the supervisory judge. in rendering the decision, the supervisory judge must take into consideration the following:

- the length of the stay period that has already elapsed;
- the protection of the interests of the creditor and any related third party;
- the possibility of composition being reached; and
- the impact of the stay on the operation and management continuity of the debtor's business and the settlement of claims against the bankrupt estate.

The elucidation of article 57 of the IBL further provides that the matters to be considered by the Supervisory Judge do not preclude them from considering other matters, to the extent it is necessary to safeguard and optimise the value of the bankruptcy estate.

The decision of the supervisory judge on the Lift of Stay Petition may take the form of either: the lifting of the stay for one or more creditor, or the imposition of conditions concerning (1) the length of the stay period or (2) one or more security rights that may be enforced by the creditors.

If the supervisory judge refuses to lift or amend the conditions of the stay, they are obligated to order the receiver to take adequate measures to protect the interests of the petitioners. Against this decision of the supervisory judge, the creditors or the third parties submitting the Lift of Stay Petition, or the receiver, may submit an objection to the Commercial Court within five days of the rendering of the decision.

The Commercial Court is obligated to decide on this objection within 10 days of the date of the objection being received. No appeal (either for cassation or a case review petition) may be submitted against a decision of the Commercial Court.

Further to the above, within the framework of the continuation of the bankrupt debtor's business (as a going concern), the receiver may utilise or sell the assets within the bankruptcy estate that are under the receiver's possession during the stay period. The assets concerned may be: (1) movable assets (for usage and sale) or immovable assets (for usage only, sale not permitted), (2) in the form of inventory or other current assets, irrespective of whether or not these assets are encumbered by security rights.

In so doing, the receiver must provide adequate protection of the interests of creditors or other third parties. 'Adequate protection' means the protection required to be given to protect the interests of creditors or third parties whose rights are stayed. Upon the transfer of the assets concerned, the in rem rights will be deemed to expire by operation of law.

The protection intended may, inter alia, consist of:

- compensation for the diminution in value of the bankruptcy estate;
- the net proceeds of a sale;
- replacement in rem rights; or
- fair and reasonable remuneration and other cash payments.

Law stated - 10 February 2023

Stays of proceedings – strategy

How do creditors navigate stays in practice? How do stays generally affect their litigation strategy?

In court-supervised restructuring or insolvency proceedings, secured creditors' rights to enforce their security and the rights of third-party owners of assets in the possession of the debtor are subject to a stay of up to 90 days from a bankruptcy declaration being rendered in bankruptcy proceedings, and during the entire period of the PKPU proceedings, which can be up to 270 days from a PKPU decision being granted.

Upon expiry of the stay period in bankruptcy, a secured creditor may initiate enforcement of their security right over collateral, but must be able to complete enforcement within two months of the bankruptcy estate being declared in a state of insolvency. Otherwise, the receiver will take over security enforcement, and the bankruptcy costs (including the receiver's fee) will need to be deducted from the sale proceeds. The automatic stay in this provision is aimed at:

- increasing the possibility of composition;
- increasing the possibility of optimising the bankruptcy estate; or
- enabling the receiver or curator to perform its duties optimally.

During the stay period, legal action to obtain payment in respect of receivables may not be put before a court.

In practice, there is some uncertainty and conflicting views as to whether a secured creditor holding collateral that is provided by a non-debtor third party would be considered a secured creditor in PKPU proceedings, given: (1) the lack of clarity on the term 'secured creditors' in the IBL and (2) conflicting practice in different PKPU case precedents.

Normally, the creditors navigate stays in practice by amicably reaching a commercial arrangement between the receiver or administrator and the debtor.

Law stated - 10 February 2023

Stays of proceedings – effect on emergence from insolvency

How do stays affect the debtor's emergence from insolvency?

During the stay period the debtor cannot be forced to make payment upon outstanding debt obligation without the approval of administrator or receiver, unless the payment is made to all creditors pro-rata. Secured creditors are also not permitted to enforce their security rights against a debtor's encumbered assets. Therefore, the stay would preserve the debtor's enterprise as a going concern and provide the debtor with time and breathing space to prepare a draft composition plan that contains comprehensive restructuring terms, either in bankruptcy or PKPU proceedings, to be offered to and voted on by the creditors.

Law stated - 10 February 2023

Subordination and disallowance of creditor claims

Are the courts in your jurisdiction empowered to punish creditors' bad acts or inequitable conduct by pushing their claims down the priority waterfall? Can they void the claims altogether?

Yes, the criminal court has authority to punish a creditor's bad act. In article 400 of the Indonesian Penal/Criminal

Code, a creditor who is found guilty of filing a false claim or whose amount is increased in bankruptcy proceedings can be sentenced to five years and six months' imprisonment. This is a separate to commercial court bankruptcy or PKPU proceedings.

During examination of PKPU or bankruptcy proceeding, if the claim is not agreed during a verification meeting, the decision on the amount to be acknowledged by the administrator in PKPU or the receiver in bankruptcy will be determined by the administrator or receiver and ultimately, at the request of the creditor, the supervisory judge.

The administrator or receiver will examine the creditor's claim and decide whether it: (1) is valid and enforceable; and (2) can be verified as correct against the debtor's book and records. If it is not valid, the claim can be rejected. Therefore, the claim might not be included in the restructuring plan of the debtor.

Aside from the foregoing, the Indonesian courts are not empowered to punish a creditor's bad acts or inequitable conduct by pushing their claims down the priority waterfall, unless the claims are not recognised.

Law stated - 10 February 2023

Vote designation

Can creditors be disenfranchised based on bad-faith conduct?

Unless the underlying agreement between relevant creditor and debtor raising the creditors' claims are nullified by a final and binding court decision that results in the claim no longer being admissible, no rules exist that would disenfranchise creditors.

Law stated - 10 February 2023

PRE-INSOLVENCY DEBTOR CLAIMS

Available claims

To what extent can claims existing before insolvency be pursued against shareholders and their affiliates and agents during an insolvency proceeding – including any contractual, tort and misfeasance claims and claims for the recovery of company property?

In bankruptcy proceedings

Pursuant to article 28 Indonesian Bankruptcy Law (IBL), claims initiated by a debtor against any party, including shareholders, affiliates and agents as defendant, prior to the commencement of bankruptcy proceeding and during the course of the bankruptcy proceeding, must be suspended, at the defendant's request, to allow the defendant to summon the receiver and request that they take over the case, within a time period determined by the judges.

If the receiver fails to appear in response to the summons, or if the receiver refuses to take over the case, the defendant may submit a petition for the claim to be dismissed. If the defendant does not request dismissal of the claim, the case between the debtor and defendant may be continued, beyond the scope of the debtor's estate. The receiver at any time is authorised to take over the case and request that the debtor be expelled from the case.

In PKPU proceedings

Pursuant to article 243 IBL, commencement of a petition for bankruptcy or suspension of payments (PKPU) proceeding would not prevent continuation of an existing ongoing claim or the commencement of a new claim, provided that the debtor did not become an applicant or defendant in a (new) claim regarding a right or obligation that

relates to its assets, without the administrator's approval.

The elements to succeed are the same as those applicable had the debtor brought the claims before the insolvency.

Law stated - 10 February 2023

Procedure and resolution

What procedural mechanisms and issues should be considered when bringing pre-existing claims? How are they usually resolved?

A debtor may pursue claims that existed before the commencement of PKPU or bankruptcy proceedings subject to the mechanism provided in the provisions of articles 28 and 243 IBL.

Law stated - 10 February 2023

Standing and assignment of claims

Who controls the pursuit of pre-insolvency debtor claims? Can creditors or other stakeholders pursue them derivatively if the debtor or trustee refuses to do so?

Prior to a Commercial Court judgment that declares the debtor bankrupt or under PKPU, control pursuit of debtor claims remains with the debtor.

While there is no prohibition on creditors or other stakeholders for trying to pursue a claim derivatively if a debtor or the receiver or administrator refuse to do so, the lack of direct nexus between the claim against the shareholders and the pursuing creditors or other stakeholders may cause the attempt to be dismissed by an Indonesian court.

Law stated - 10 February 2023

Risk mitigation for creditors

How can creditors mitigate the risk that pre-insolvency debtor claims and remedies will be successful?

Commencement of bankruptcy or PKPU proceedings would not prevent a debtor from initiating claims and remedies against any party, including creditors. However, as the debtor would usually be in an unfavourable financial situation, a debtor, receiver or administrator would usually prefer to avoid full-blown litigation against a creditor (due to their substantial legal costs) and debtors would usually be more open to out-of-court settlement with creditors.

Law stated - 10 February 2023

Minimising costs for creditors

How can creditors reduce the costs of litigation associated with these claims? What procedures are commonly used?

The cheapest and easiest way to reduce litigation costs would be to negotiate directly with the debtor or receiver (in bankruptcy proceedings), or the administrator (in PKPU proceedings). Creditors could also consider pursuing alternative dispute resolution methods, such as mediation, hopefully to resolve the claim and avoid costly litigation.

Law stated - 10 February 2023

OTHER CLAIMS

Other claims against creditors

Are there any other major categories of claims that may be pursued against creditors during insolvency proceedings in your jurisdiction? If so, what are the essential elements of such claims?

No.

Law stated - 10 February 2023

Other claims against debtors

Are there any other major categories of claims that may be pursued against debtors during insolvency proceedings in your jurisdiction? If so, what are the essential elements of such claims?

No.

Law stated - 10 February 2023

CROSS-BORDER PROCEEDINGS

Parallel proceedings and international judgments

Are parallel proceedings and international judgments recognised in your jurisdiction? What are the requirements for recognition? Can recognition be challenged? On what grounds?

Parallel proceedings are not recognised under Indonesian law. Judgments of foreign courts are generally not recognised in Indonesia, unless the government of the state in which the judgment was rendered has entered into a bilateral or multilateral agreement on reciprocal recognition of court judgments with the government of Indonesia.

In the absence of an agreement, if a creditor wishes to enforce a judgment of a foreign court in Indonesia, the creditor must re-litigate it by initiating a separate legal proceeding in Indonesia. In this instance, a judgment of a foreign court could be submitted as evidence in a separate legal proceeding at the Indonesian court.

Law stated - 10 February 2023

Judicial cooperation

To what extent if any will there be judicial cooperation with other courts in relation to insolvency proceedings?

Indonesian law operates on a generally exclusive territorial basis, so there is virtually no scenario in which an Indonesian court would be required to have any form of judicial cooperation with a foreign court. Consequently, there are no precedents of judicial cooperation with other courts in relation to insolvency proceedings.

Law stated - 10 February 2023

REMEDIES AND ENFORCEMENT

Remedies for debtors

What legal remedies are broadly available to successful debtor-claimants? Have the courts awarded any notable remedies recently?

The available remedies would depend on the type of claim filed by debtor-claimants. Indonesian law recognises two types of claim: contractual and tort.

The generally available remedies for contractual claims are compensation for losses, interests and costs incurred. Compensation for loss of expected profits, or opportunity costs may be claimed, if the debtor-claimant can provide sufficient evidence to substantiate the amount claimed.

For tort claims, remedies are compensation for material and non-material losses.

Law stated - 10 February 2023

Remedies for creditors

What legal remedies are available to successful creditor-claimants? Have the courts awarded any notable remedies recently?

The remedies available to debtor-claimants are also available to creditor-claimants. Alternatively, creditors could also file a bankruptcy or petition for bankruptcy or suspension of payments (PKPU) against their debtor, provided the creditor manages to satisfy the requirements for submission of a bankruptcy or PKPU petition.

However, enforcement rights that creditor-claimants obtain from legal proceedings would be relinquished when a bankruptcy declaration is rendered. Creditor-claimants would need to submit their claims during the bankruptcy proceedings.

Law stated - 10 February 2023

Court enforcement mechanisms

What tools are available to the court to enforce its rulings? Are there any jurisdictional limits to the court's enforcement powers?

Once a judgment becomes final and binding, the winning party must submit an application for execution at the district court with jurisdiction over the losing party's legal domicile. An application for execution must be specific with regard to the assets, their nature and location.

The district court will then issue a written warning that orders the losing party to carry out the final and binding judgment within eight days. The court will typically issue up to three warnings to allow sufficient opportunity for the losing party to comply with the judgment.

If the losing party still fails to comply with the judgment, the court may proceed to enforce its ruling by issuing an execution order on the losing party's assets or property identified in the judgment or application for execution. The court will then confiscate the assets or property with police assistance. Liquidation of assets would finally be achieved via an auction, carried out in accordance with Indonesian Civil Procedural Law.

Law stated - 10 February 2023

SETTLEMENT AND MEDIATION

General court approach

Are the courts in your jurisdiction generally amenable to settlements?

Yes, and they could even be said to encourage parties to agree to settlement instead of litigation. This is most clearly illustrated in enactment of Supreme Court Regulation No. 1 of 2016 on Procedure for Mediation in Courts, which requires disputing parties to initially undergo court-supervised mediation prior to proceeding to court hearings, in the hope that mediation will produce a settlement. However, insolvency proceedings are excluded from the mediation requirement.

Law stated - 10 February 2023

Timing

When in the course of litigation are settlements most likely to be sought out?

Disputing parties are encouraged to settle at any time before a judgment is rendered by the court. As stated above, disputing parties in a contractual or tort lawsuit are required by law to initially undergo court-annexed mediation prior to proceeding with court hearings. However, there is often a wide gulf between the parties' stances at this point.

As litigation proceeds, the parties might consider settling to avoid costs escalating too much. Settlement may also be sought by the disputing parties at any time during litigation. If this is successful, the claimant may withdraw the lawsuit unilaterally at any time before the defendant submits their statement of defence. Should settlement only be reachable after submission of the defendant's statement of defence, the claimant may still withdraw the lawsuit, with the defendant's approval.

Law stated - 10 February 2023

Court review and approval

How do courts review settlements? What is the legal standard for entry into and approval of a settlement?

In general, all agreements entered into under Indonesian law must satisfy the general requirements for the validity of an agreement under the Indonesian Civil Code. There must be:

- consent of the individuals who are bound by them;
- adequate capacity to conclude an agreement;
- a specific subject; and
- admissible cause.

If a settlement is reached during court-annexed mediation, the court will also check and ensure that the settlement agreement:

- does not violate law, and public order or decency;
- does not harm or prejudice a third party; or
- is enforceable.

Law stated - 10 February 2023

Mediation clauses

Will courts enforce mandatory or voluntary mediation clauses in pre-existing contracts?

Disputing parties are required to undergo court-annexed mediation prior to proceeding with court hearings. Therefore, the existence of a mediation clause would not have an impact on the requirement to mediate.

However, the requirement to mediate does not apply to disputes that fall within the jurisdiction of the Commercial Court (which includes bankruptcy and PKPU proceedings).

Law stated - 10 February 2023

UPDATE AND TRENDS

Recent developments

What have been the most notable recent developments in insolvency litigation in your jurisdiction, including any key cases and legislative changes?

On 15 December 2021, the Indonesian Constitutional Court held, in decision No. 23/PUU-XIX/2021 (Judgment) that articles 235 (1) ['No legal remedy can be raised in respect of a PKPU decision'] and 293 (1) Indonesian Bankruptcy Law (IBL) ['In respect of a Court decision based on Chapter III (PKPU), no legal remedy is available, except as otherwise regulated by the IBL'] were against the meaning intended in the 1945 Indonesian Constitution, and did not have binding effect, to the extent that they were not imbued with the following meaning: 'the filing of a cassation petition is permissible against a PKPU decision filed by a creditor and rejection of the composition plan offered by a debtor.'

According to article 285(4) IBL, filing for cassation by a creditor is only possible when the composition plan is approved by creditors and confirmed by the Commercial Court. Should the composition plan be rejected by creditors, no cassation filing is possible. Under article 290 IBL, should the Court have declared a debtor bankrupt, all bankruptcy provisions, as stated in Chapter II (Bankruptcy), except for the cassation filing provision, would apply.

Further, article 293(1) IBL provides that in respect of a court decision based on Chapter III (petition for bankruptcy or suspension of payments (PKPU), no legal remedy is available, except as otherwise regulated by the IBL. Based on the foregoing, the provision in article 285(4) IBL is effectively an exception to article 293(1) IBL.

It is viewed that the judgment indirectly caused the provision under article 285(4) and 290 IBL to be amended such that a petition for cassation may be filed against a court decision that declares a debtor in PKPU bankrupt following rejection of a proposed composition plan. How the Supreme Court might decide contrariwise, and how a final settlement would be reached for all creditors, given that the new norm set out in the Judgment has not yet been tested, may give rise to some uncertainty.

New Indonesian Criminal Code

Law No. 1 of 2023 on Indonesian Criminal Code (Law 1/2023) was promulgated on 2 January 2023. Law 1/2023 replaces the previous Criminal Code, which dated back to the Dutch colonial era.

One of key features of Law 1/2023 is the recognition of the concept of corporate crime. The former Criminal Code did not recognise corporations as legal subjects that can be liable for crimes: previously, the definition of criminal perpetrators covered individuals only. Law 1/2023 will enter into force three years after 2 January 2023.

Law stated - 10 February 2023

Jurisdictions

Australia	Ironbridge Legal
Cayman Islands	HSM Chambers
Cyprus	Patrikios Pavlou & Associates LLC
France	Latham & Watkins LLP
Germany	Latham & Watkins LLP
Indonesia	ABNR
Japan	Mori Hamada & Matsumoto
Mexico	Mañón Quintana Abogados
South Korea	Bae, Kim & Lee LLC
Spain	Latham & Watkins LLP
Ukraine	GOLAW
United Kingdom	Latham & Watkins LLP
USA	Latham & Watkins LLP