The International Comparative Legal Guide to:

Corporate Recovery & Insolvency 2017

11th Edition

A practical cross-border insight into corporate recovery and insolvency work

Published by Global Legal Group, in association with INSOL International, with contributions from:

Ali Budiardjo, Nugroho, Reksodiputro
Barun Law LLC
BlackOak LLC
BonelliErede
Bredin Prat
Campbells
De Brauw Blackstone Westbroek N.V.
Dhir & Dhir Associates
Gall
Gilbert + Tobin
Gorrissen Federspiel
Hannes Snellman Attorneys Ltd
Hengeler Mueller Partnerschaft von Rechtsanwälten mbB
INFRALEX
Knowles Husain Lindsay Inc
Kubas Kos Gałkowski
Kvale Advokatfirma DA
Lenz & Staehelin
McCann FitzGerald
McDermott Will & Emery UK LLP
Nishimura & Asahi
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Pekin & Pekin
Pinheiro Neto Advogados
Schindler Attorneys
Sedgwick Chudleigh Ltd.
Slaughter and May
SOG / Samardžić, Oreški & Grbović
Soteris Flourentzos & Associates LLC
Sullivan & Cromwell LLP
Thornton Grout Finnigan LLP

INSOL International™
CDR Commercial Dispute Resolution
glg global legal group

global legal group

Contributing Editor
Tom Vickers, Partner, Slaughter and May

Sales Director
Florjan Osmani

Account Director
Oliver Smith

Sales Support Manager
Paul Mochalski

Editor
Sam Friend

Senior Editors
Suzie Levy, Rachel Williams

Chief Operating Officer
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Stephens & George Print Group
June 2017

ISBN 978-1-911367-58-1
ISSN 1754-0097

Strategic Partners

Editorial Chapter:

General Chapters:

Country Question and Answer Chapters:

Chapter 18

Indonesia

Theodoor Bakker

Herry N. Kurniawan

Ali Budiardjo, Nugroho, Reksodiputro

1 Overview

1.1 Where would you place your jurisdiction on the spectrum of debtor to creditor-friendly jurisdictions?

Restructuring and insolvency proceedings in Indonesia are regulated under Law No. 37 of 2004 concerning Bankruptcy and Suspension of Payments ("**Bankruptcy Law**"); the term used is bankruptcy and suspension of payments.

We would consider the Bankruptcy Law to be a creditor-friendly, subject to proper implementation of the law; in both bankruptcy and suspension of payments proceedings, the creditors play key roles to determine/decide on key issues, which substantially affect the result of such proceedings. Whether or not bankruptcy or suspension of payments proceedings could be successfully concluded will be subject to the agreement and participation of the creditors, including but not limited to the following:

1. the creditors have the right to file a petition for bankruptcy or a petition for suspension of payments against the debtor;
2. if the company proposes a composition plan, the creditors have voting rights to approve or reject the composition plan. In the event of rejection, the company will be declared bankrupt (in suspension of payment procedures) and declared insolvent (in bankruptcy procedures); and
3. if deemed necessary, the creditors may request the supervisory judge to establish a creditors' committee to work with the administrator or the receiver/curator.

1.2 Does the legislative framework in your jurisdiction allow for informal work-outs, as well as formal restructuring and insolvency proceedings, and are each of these used in practice?

Indonesian law allows for informal work-outs to restructure a company's debt through mutual agreement between the company and the creditor(s).

As for formal restructuring and insolvency proceedings, the Bankruptcy Law provides two procedures for companies having financial difficulties; namely:

a. bankruptcy procedures; and

b. suspension of payments procedures.

Both formal and informal work-outs are commonly used in practice.

2 Key Issues to Consider When the Company is in Financial Difficulties

2.1 What duties and potential liabilities should the directors/managers have regard to when managing a company in financial difficulties? Is there a specific point at which a company must enter a restructuring or insolvency process?

In bankruptcy procedures, upon the declaration of the company's bankruptcy, the directors lose the power to manage the company. The power is transferred to the court-appointed receiver, who then manages the bankruptcy estate and the settlement of the company's debts.

In suspension of payments procedures, the company is still entitled to carry on its business activities. The directors of the company, jointly with the court-appointed administrator and supervised by the supervisory judge, run the management of the company.

Directors are personally liable for the losses suffered by the company if both:

- the company is declared bankrupt and the bankruptcy is the result of the directors' fault or negligence; and
- the company's assets are not sufficient to cover the company's obligations.

There is no specific point at which a company must enter a restructuring or insolvency procedure.

2.2 Which other stakeholders may influence the company's situation? Are there any restrictions on the action that they can take against the company?

There is no other stakeholder who may influence the company situation during the suspension of payments or bankruptcy procedures. During the bankruptcy and suspension of payments procedures, there should be no action that the creditors take against the company.

2.3 In what circumstances are transactions entered into by a company in financial difficulties at risk of challenge? What remedies are available?

Certain transactions favouring one creditor over other creditors, entered into before the bankruptcy declaration, can be set aside under the fraudulent conveyance (*actio pauliana*) principles set out

in the Bankruptcy Law. For a pre-bankruptcy transaction to be set aside, all of the following requirements must be met:

- **The transaction was voluntary.** This means that the transaction did not arise from a contractual obligation. Examples of voluntary transactions include the:
  - granting of security to one particular creditor;
  - payment of a debt that is not yet due and payable; and
  - sale of an asset against non-cash payment or with set-off of the purchase price against a debt.
- **The transaction harmed creditors' interests.** This includes most situations where the condition of the bankrupt estate would have been better if the transaction had not been entered into; for example:
  - a sale of goods below their fair market value; or
  - transactions resulting in the increase of the company's liabilities (for example, the granting of a guarantee or other form of security by a subsidiary for the debt of its parent company).
- **The company and the contracting party had knowledge of the harm caused to other creditors.** Knowledge of harm to other creditors is presumed in a number of circumstances. Generally, there is a rebuttable presumption of knowledge where the following categories of transaction are performed less than one year before the bankruptcy:
  - transaction for which the value received by the company is substantially less than the value of the asset sold;
  - payment of a debt that is not yet due and payable, or granting security for such debt;
  - transaction between the company and related parties (that is, relatives or companies controlled by relatives, insiders and legal entities belonging to the same group); and
  - donations.

  The payment of a debt that was due and payable can also be set aside if it is shown that either:
  - the recipient of the payment knew that, at the time of receipt, a bankruptcy petition had been submitted; or
  - payment was the result of a consultation between the company and the creditor with the intention of preferring that creditor over other creditors. It is generally believed that this requirement is only fulfilled if some measure of collusion between the parties is established.

3 Restructuring Options

3.1 Is it possible to implement an informal work-out in your jurisdiction?

Yes. It is possible to implement an informal work-out in Indonesia.

3.2 What formal rescue procedures are available in your jurisdiction to restructure the liabilities of distressed companies? Are debt-for-equity swaps and pre-packaged sales possible?

The suspension of payments procedure is the formal procedure to achieve a restructuring of debts. The suspension of payments procedure is provided for a company that faces temporary liquidity problems and is unable to pay its debts but may be able to pay them some time in the future. It gives the company temporary relief in order for it to reorganise and continue its business, and ultimately to satisfy the creditors' claims.

A debt-for-equity swap is possible to be offered by the company in a composition plan to be agreed by the creditors in the suspension of payment procedure. The debt-for-equity swap requires the approval of the existing shareholders, and thus the approval is required to be obtained before the debt-for-equity swap proposal is offered to the creditors.

Pre-packaged sale is also a possible scheme. An approval from the supervisory judge (who supervises the suspension of payments procedure) is required for the sale of the company's assets.

3.3 What are the criteria for entry into each restructuring procedure?

The company or the creditors can apply for a suspension of payments if:

- the company either cannot pay its debts; or
- the company or the creditors foresee that the company will not be able to pay its debts.

3.4 Who manages each process? Is there any court involvement?

The suspension of payment procedure is managed by the court-appointed administrator, who is supervised by the supervisory judge.

The company (or its creditors) must file a petition for suspension of payment with the relevant Commercial Court. The Commercial Court must: (i) grant a temporary suspension of payment; (ii) appoint an administrator who, together with the directors of the company, will manage the assets of the company; and (iii) appoint a supervisory judge to supervise the suspension of payment process.

3.5 How are creditors and/or shareholders able to influence each restructuring process? Are there any restrictions on the action that they can take (including the enforcement of security)? Can they be crammed down?

Creditors' Influence

The creditors play substantial roles in a suspension of payment procedure, as follows:

a. the creditors can file a suspension of payments petition against the company with the Commercial Court; and

b. the creditors have voting rights to agree or not with the proposal/composition plan offered by the company; the rejection of the composition plan by the creditors will result in a bankruptcy declaration by the company.

The secured creditors could not enforce its security right during the stay period in bankruptcy procedure.

Unsecured creditors who vote against the composition plan are crammed down if the composition plan is approved by the secured and unsecured creditors and ratified by the Commercial Court.

Shareholders' Influence

The Bankruptcy Law does not specifically discuss the powers of the shareholders during the suspension of payment procedure, but it is understood that the shareholders are still entitled to pass resolutions with respect to the company's matters except for those which pertain to assets and management. Moreover, shareholders' approval is required for voluntary filing petition for suspension of payment and for the debt-for-equity swap.

3.6 What impact does each restructuring procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?

The granting of a suspension of payment does not change the validity of a contract which has been validly entered into by the company; it only stays the obligations of both parties for a maximum period of 270 days. Therefore, except for the stay period, the company is still obligated to continue performing its obligations under the contract.

Notwithstanding the foregoing, if the contract expressly stipulates that the contract will be expired or terminated in the event of company's suspension of payment, then such provision will prevail.

In a suspension of payment procedure, the creditors can set off sums owed by them to the company against amounts owed by the company to them. However, the said set-off right can only be exercised if: (i) the claim and the debt already existed prior to the suspension of payment proceedings; or (ii) the claim and the debt exist as a result of transactions/actions carried out by the company before the suspension of payment proceedings.

A person who has taken over the debt or receivables from a third party prior to the pronouncement of suspension of payment cannot exercise a set-off if: (i) the taking over of the debt and receivables was not based on good faith; and/or (ii) the taking over of the debt or receivables was done after the initiation of the suspension of payment process.

3.7 How is each restructuring process funded?

The costs incurred in a suspension of payment procedure, including but not limited to the administrator's fees, must be paid by the company. As stipulated under Article 240 paragraph (4) of Law No. 37/2004, with prior approval from the administrator, the company in suspension of payment process may obtain loan or credit from any third party for the sole purpose of increasing the value of the company's estate. However, if the company intends to obtain a secured loan, it should be previously approved by the supervisory judge. Also, security rights can only be encumbered over the company's asset which has not been encumbered with any security rights. The creditor providing the above-described loan shall be treated the same as the other creditors involved in the suspension of payment process.

4 Insolvency Procedures

4.1 What is/are the key insolvency procedure(s) available to wind up a company?

The insolvency procedure available to wind up a company facing financial difficulties is the bankruptcy procedure.

The bankruptcy shall be pronounced by the Commercial Court if it fulfils the following requirements: (i) the company has at least two creditors (plurality of creditors); and (ii) at least one of the two debts could not be paid by the company when it becomes due and payable.

If, following its bankruptcy declaration, (i) no composition plan is submitted by the company to the creditors, (ii) a composition plan is submitted but subsequently rejected by the creditors, or (iii) a composition plan is submitted and subsequently approved by the creditors but is not ratified by the Commercial Court, then the company shall be declared insolvent. Where the company becomes insolvent, the bankruptcy procedure shall be concluded with the liquidation and dissolution of the company.

4.2 On what grounds can a company be placed into each winding up procedure?

A company can be placed in bankruptcy or suspension of payments if it passes all tests or conditions as described in question 4.1 above.

4.3 Who manages each winding up process? Is there any court involvement?

The receiver manages the bankruptcy process after declaration of bankruptcy by the Commercial Court. The administrator, together with the directors of the company, manage the suspension of payment process after the granting of suspension of payments by the Commercial Court.

4.4 How are the creditors and/or shareholders able to influence each winding up process? Are there any restrictions on the action that they can take (including the enforcement of security)?

Creditors' Influence

In a bankruptcy procedure, the creditors are entitled to submit a petition for bankruptcy against the company with the Commercial Court.

If, after the declaration of bankruptcy, the company proposes a composition plan, then the unsecured creditors are entitled to approve or reject the composition plan. Secured creditors are not entitled to take the vote regarding the composition plan and are not affected by the result of the vote. If the majority of the unsecured creditors reject the composition plan, then the company becomes insolvent and the bankruptcy procedure shall be concluded with the liquidation and dissolution of the company.

Shareholders' Influence

The Bankruptcy Law does not specifically discuss the powers of the shareholders during the bankruptcy procedure, but the shareholders are still entitled to pass resolutions with respect to the company's matters, except for those which pertain to assets and management. The shareholders' approval is required for the voluntary filing of a petition for bankruptcy by the company and for a debt-for-equity swap.

4.5 What impact does each winding up procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?

The bankruptcy of a company, in principle, does not change the validity or the terms of a contract which has been validly entered into by the company. The rights and obligations of the parties to such contracts remain unchanged. However, the receiver does not have the obligation to perform the contract. If the receiver confirms performance, he must guarantee performance; if he confirms cancellation, the other party will have to submit a damages claim as an unsecured creditor.

The Bankruptcy Law stipulates that in a bankruptcy procedure, the creditors can set off sums owed by them to the company against amounts owed by the company to them. However, the said set-off right can only be exercised if: (i) the claim and the debt already existed prior to the declaration of bankruptcy; or (ii) the claim and the debt exist as a result of transactions carried out before the declaration of bankruptcy.

These rules make a creditor's set-off right in an event of bankruptcy more favourable than its set-off right outside of a bankruptcy

procedure, since there is no requirement for the debts to be currently due and payable. However, there is uncertainty as to whether the receiver must approve an intended set-off.

4.6 What is the ranking of claims in each procedure, including the costs of the procedure?

In bankruptcy and suspension of payment procedures, the ranking of creditors' claims is as follows:

- **Preferred creditors (*kreditur preferen*)**. Preferred creditors are entitled to receive payment in full from the bankruptcy estate. Preferred claims are tax claims and post-bankruptcy/suspension of payments claims, such as:
  - fees of the receiver/administrator;
  - fees of experts appointed by the supervisory judge;
  - costs of liquidation of the bankruptcy estate or costs incurred during the suspension of payments process;
  - post-bankruptcy/suspension of payments financing;
  - lease of the bankrupt's house or offices; and
  - employees' wages.
- **Secured creditors (*kreditur separatis*)**. These are the creditors holding security rights over some or all of the assets of the company.
- **Unsecured creditors (*kreditur konkuren*)**. Unsecured creditors rank as follows:
  - specific statutorily preferred creditors whose preference relates only to specific assets;
  - general statutory priority creditors; and
  - non-preferred unsecured creditors.
- **Shareholders**. Generally, the shareholders of the company rank behind all other creditors in the distribution of the proceeds of the bankruptcy estate. Any distribution they receive is proportional to the shares that they hold in the company, if there are remaining assets after distribution to other creditors.

4.7 Is it possible for the company to be revived in the future?

Yes, it is possible. The bankrupt company can be revived if the composition plan proposed by the company is agreed by the creditors and ratified by the Commercial Court, or if the claims of the creditors have been fully satisfied by the bankruptcy estate.

5 Tax

5.1 Does a restructuring or insolvency procedure give rise to tax liabilities?

Tax liabilities are ordinarily incurred during each of the procedures if the business is continued during each procedure. The written-off amounts in haircuts and debt write-offs are subject to income tax on the part of the company.

6 Employees

6.1 What is the effect of each restructuring or insolvency procedure on employees?

Claims of employees fall into the classification of *estate creditors*, and as such they are entitled to payments in full of their claim on the basis of the employment contract.

If the employer is declared bankrupt, termination of employment may be conducted by the employer, which triggers payment of the severance package for the employees.

7 Cross-Border Issues

7.1 Can companies incorporated elsewhere restructure or enter into insolvency proceedings in your jurisdiction?

The Bankruptcy Law is only applicable for, and the Commercial Court is only authorised to, declare the bankruptcy and suspension of payment of an Indonesian entity. Therefore, any foreign company would not be able to restructure or enter into insolvency proceedings in Indonesia.

7.2 Is there scope for a restructuring or insolvency process commenced elsewhere to be recognised in your jurisdiction?

No, the Bankruptcy Law adopts the principle of territoriality and does not recognise cross-border bankruptcy or suspension of payment cases. Moreover, foreign court judgments cannot be enforced in Indonesia. Therefore, any court judgments, orders, or reliefs made during foreign bankruptcy or suspension of payment proceedings cannot be enforced in Indonesia and shall not affect the status of assets situated in Indonesia.

Foreign creditors may participate and register their claims in the bankruptcy or suspension of payment proceedings conducted in Indonesia and shall have the rights and be treated the same with the local creditors.

7.3 Do companies incorporated in your jurisdiction restructure or enter into insolvency proceedings in other jurisdictions? Is this common practice?

No, the Commercial Court does not recognise bankruptcy/insolvency and suspension of payments/rescue procedures in other jurisdictions; insolvency proceedings outside Indonesia cannot affect the status of assets located in Indonesia.

8 Groups

8.1 How are groups of companies treated on the insolvency of one or more members? Is there scope for co-operation between officeholders?

The Bankruptcy Law does not recognise the bankruptcy or suspension of payment proceedings of a corporate group. Petition for bankruptcy or suspension of payment may only be submitted against a company or legal person, but the bankruptcy of a company does not affect the status of other companies within the group. There is no scope for co-operation between officeholders.

9 Reform

9.1 Are there any proposals for reform of the corporate rescue and insolvency regime in your jurisdiction?

There are no proposals for the reform of the corporate rescue and insolvency regime in Indonesia.

Theodoor Bakker
Ali Budiardjo, Nugroho, Reksodiputro
Graha CIMB Niaga, 24th Floor
Jl. Jend. Sudirman Kav. 58
Jakarta 12190
Indonesia

Tel: +62 21 250 5125
Fax: +62 21 250 5001
Email: tbakker@abnrlaw.com
URL: www.abnrlaw.com

Mr. Theodoor Bakker graduated from Leiden University in the Netherlands, is admitted to the Amsterdam Bar and is a registered Foreign Lawyer under the Indonesian Advocates Law. He has worked in Southeast Asia since 1984, over time building up extensive experience in: direct foreign investment; project finance work, including private power and petrochemical projects; aircraft finance; infrastructure development; and general manufacturing investment. During the Asian financial crisis, he was involved in many aspects of restructuring and insolvency, and has advised on foreign law issues of bankruptcy reform in Indonesia. His practice now also encompasses capital market transactions, structured finance, and mergers and acquisitions. He has published various articles on insolvency and cross-border investment issues and teaches at the Faculty of Law of University of Indonesia and at the Ministry of Law and Human Rights.

Herry N. Kurniawan
Ali Budiardjo, Nugroho, Reksodiputro
Graha CIMB Niaga, 24th Floor
Jl. Jend. Sudirman Kav. 58
Jakarta 12190
Indonesia

Tel: +62 21 250 5125
Fax: +62 21 250 5136
Email: hkurniawan@abnrlaw.com
URL: www.abnrlaw.com

Mr. Herry N. Kurniawan joined ABNR as an associate in 1999 and became a partner on 1 January 2012. His specified areas of practice are mergers and acquisitions, foreign investment, project and corporate finance, restructuring and bankruptcy, in which fields he has both intensive and extensive regulatory knowledge. He was involved in the project for the monitoring of the implementation of the Indonesian Bankruptcy Law in 1999, which gave him further in-depth regulatory knowledge in bankruptcy and suspension of payments matters. He co-writes various articles and publications on bankruptcy, mergers and acquisitions, and speaks in seminars and workshops on bankruptcy and suspension of payments, as well as on investment, and mergers and acquisitions. He has also acted as counsel in numerous bankruptcy/suspension of payments and commercial litigation/arbitration.

ABNR
COUNSELLORS AT LAW

Ali Budiardjo, Nugroho, Reksodiputro, usually abbreviated to ABNR, was established in Jakarta in 1967 as a partnership of legal consultants in Indonesian business law. The firm is one of Indonesia's largest independent full-service law firms. The commitment we make to clients is to provide broad-based, personalised service from top-quality teams of lawyers with international experience that includes groundbreaking deals and projects. ABNR's reputation has been recognised around the world by independent industry surveys and law firm guides. ABNR was selected, based on its high level of integrity and professionalism, to be the sole Indonesian member of the world's largest law firm association Lex Mundi and of the prestigious Pacific Rim Advisory Council (PRAC).

Current titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com