THE RESTRUCTURING REVIEW

Fifteenth Edition

Editor
Peter K Newman

THE LAWREVIEWS

THE RESTRUCTURING REVIEW

Fifteenth Edition

Reproduced with permission from Law Business Research Ltd
This article was first published in July 2022
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Peter K Newman

THE LAWREVIEWS

PUBLISHER
Clare Bolton

HEAD OF BUSINESS DEVELOPMENT
Nick Barette

TEAM LEADER
Katie Hodgetts

SENIOR BUSINESS DEVELOPMENT MANAGER
Rebecca Mogridge

BUSINESS DEVELOPMENT MANAGERS
Joey Kwok and Juan Hincapie

BUSINESS DEVELOPMENT ASSOCIATE
Archie McEwan

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Georgia Goldberg

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Jane Vardy

SUBEDITOR
Helen Sou

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-80449-096-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ABNR COUNSELLORS AT LAW

AFRIDI & ANGELL

ALLEN & GLEDHILL LLP

ARENDT & MEDERNACH

BAKER MCKENZIE

BEAUCHAMPS

CREEL, GARCIA-CUELLAR, AIZA Y ENRIQUEZ, SC

CUATRECASAS

DE PARDIEU BROCAS MAFFEI AARPI

DELOITTE LEGAL

GILBERT + TOBIN

HENGELER MUELLER

LINKLATERS LLP

MORI HAMADA & MATSUMOTO

PRAGER DREIFUSS AG

SARANTITIS LAW FIRM

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

SOLIMAN, HASHISH & PARTNERS

STEPHENSON HARWOOD

TATARA & PARTNERS

TRILEGAL

CONTENTS

PREFACE

I am very pleased to present this 15th edition of *The Restructuring Review*. Our intention is to help general counsel, government agencies and private practice lawyers, as well as other professionals, investors and market participants, to understand the prevailing conditions in the global restructuring market in 2021 and the first half of 2022. This edition seeks to highlight some of the most significant legal and commercial developments and trends during this period.

Two common themes pervade the contributions to this edition by leading practitioners from jurisdictions around the globe. First, the historic economic downturn experienced around the world in 2020 due to the covid-19 pandemic was met with significant state intervention, which cushioned some of the immediate impact of the pandemic. Indeed, many jurisdictions witnessed a bounceback during 2021 as the world eased out of the covid-19 pandemic. Widespread access to covid-19 vaccines allowed many countries to ease or lift entirely the lockdowns and travel restrictions that had been imposed in 2020. The opening of economies and continuation of government support measures allowed for rapid growth during this time. But the upward trajectory seems to have been short-lived, as a number of geopolitical and other factors have already started to slow growth and bring uncertainty to the next phase of post-pandemic life. The second theme is the continued development of restructuring tools to ameliorate and resolve insolvency and financial distress, with numerous jurisdictions introducing additional legislative reforms to facilitate restructurings or even beginning to 'road-test' tools introduced in recent years.

Following the initial onset of the pandemic in 2020, many jurisdictions witnessed only limited restructuring and insolvency activity throughout 2021. Temporary support measures implemented by governments to provide financial support and breathing space for companies to recover from the pandemic were successful in this regard. These measures seem to have offset (at least temporarily) much of the damage wrought by the pandemic for businesses, although most government support programmes have ended or are in the process of being phased out, and economies around the globe now face other challenges to economic recovery. These challenges include massive disruptions in global supply chains and historic levels of inflation in many jurisdictions. In addition, the war in Ukraine, which commenced with the Russian invasion in February 2022 and continues at the time of writing, has ushered in soaring energy costs, has exacerbated supply chain issues, and has been met with punishing economic sanctions from the EU, UK and US. An increased focus on environmental, social and governance concerns and metrics is also leading to changes in the corporate and investment landscape – changes to which businesses must adapt. Although 2021 was a record-breaking year for mergers and acquisitions deals activity, this began to slow in the first half of 2022. Companies are facing uncertain times on many fronts.

Although levels of insolvency and restructuring activity have remained suppressed, many jurisdictions have in recent years put in place new or updated laws, rules and practices relating to business restructuring and insolvency, both in reaction to the covid-19 pandemic but also as part of a broader trend of reform. As you will see in the coming chapters, many of these new laws have already been tested over the past year and have helped businesses to restructure in an exceptionally challenging period. This continued development means that corporate debtors and their advisers will have increasingly robust toolkits to deal with financial distress and insolvency arising in the turbulent post-pandemic environment.

I hope that this edition of *The Restructuring Review* will continueedia to serve as a useful guide at a crucial moment in the evolution of restructuring and insolvency law and practice internationally. I would like to extend my gratitude to all the contributors for the support and cooperation they have provided in the preparation of this work, and to our publishers, without whom it would not have been possible.

Peter K Newman
Skadden, Arps, Slate, Meagher & Flom (UK) LLP
London
July 2022

Chapter 11

INDONESIA

Emir Nurmansyah and Kevin Omar Sidharta[1]

I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

In court-supervised restructuring, the terms negotiated between debtors and (key) creditors and each of their financial and legal advisers mainly comprise haircuts, instalments, extensions of maturity (grace periods), debt-to-equity conversions, sales of part of a debtor's assets, potential investment plans from investors or any combination of these. It is also customary to apply different restructuring terms to different groups of creditors. In certain court-supervised restructuring cases involving a group of companies as a debtor with significant assets, a financial auditor or consultant, acting as an expert, may be appointed by the supervisory judge at the debtor's expense to carry out financial due diligence over the debtor's accounts to provide creditors with a more accurate picture of the debtor's financial state of health.

Based on the court case tracking system (SIPP) for five commercial courts (Central Jakarta, Medan, Semarang, Surabaya and Makassar), in 2021, 117 bankruptcy petitions and 625 suspension of debt payment obligations (PKPU) petition filings were recorded. In 2020, there were 114 bankruptcy petitions and 635 PKPU cases in total. It is evident that the number of bankruptcy petitions filed increased slightly from 114 in 2020 to 117 in 2021. PKPU petition filings dropped slightly from 635 in 2020 to 625 in 2021.

If the number of cases in 2019, 2020, 2021 and 2022 is examined over the same period (January to the end of April), bankruptcy petition filings were 52, 35, 47 and 34, respectively, and PKPU petition filings were 133, 144, 282 and 155 in those years.[2] This shows that PKPU legal recourse is still more popular than bankruptcy as a means of debt restructuring in Indonesia.

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

Court-supervised insolvency and restructuring procedures available to companies in Indonesia are governed by Law No. 37 of 2004 on Bankruptcy and PKPU (Indonesian Bankruptcy Law (IBL)). The IBL provides two main formal proceedings: bankruptcy (aimed at liquidation) and PKPU (reorganisation).

---

1 Emir Nurmansyah and Kevin Omar Sidharta are partners at ABNR Counsellors at Law. The authors would like to thank Bilal Anwari, senior associate of the firm, for his valuable inputs and contributions in finalising this chapter.

2 As the May 2022 data were not yet complete at the time of writing, the number of cases for the January–May 2022 period might increase.

Both are intertwined as, on the one hand, restructuring can emerge from bankruptcy proceedings, which are primarily designed to facilitate liquidation, whereas, on the other, liquidation can be the result of PKPU proceedings, which are designed mainly for reorganisation and the continuation of a business.

The IBL provides that bankruptcy or PKPU proceedings can be initiated by:

a one or more creditors;

b the debtor;

c the public prosecutor, if it is in the public interest;

d particular institutions for certain debtors: banks, securities companies, stock exchange, clearing and guarantee institutions, depository and settlement institutions, insurance and reinsurance companies, and pension funds by the Financial Services Authority (OJK); and

e state-owned companies operating in the public interest by the Ministry of Finance.

In respect of banks, although technically possible, there have been no precedents for banks being either liquidated under bankruptcy or restructured under PKPU proceedings. Instead, all bank liquidations that have occurred in Indonesia in practice used non-court-supervised insolvency proceedings under the dissolution and liquidation process based on Law No. 40 of 2007 on Limited Liability Companies (Company Law) and a set of specific regulations governing bank pre-dissolution supervision and dissolution or liquidation.

In Indonesia, restructuring is often carried out informally outside the court-supervised process and is subject to general contract law under the Indonesian Civil Code (ICC). These restructuring arrangements can vary from contractual restructuring involving refinancing, maturity rescheduling, a partial haircut or instalments to security enforcement or sale of assets, or a combination of these. The disadvantage of informal restructuring is that the debtor is unable to take advantage of the features provided by court-supervised restructuring, including a stay period that prevents the enforcement of creditors' rights against the debtor during the restructuring process, and a cramdown on dissenting and non-participating creditors. An informal restructuring example in 2019 and 2020 was PT Krakatau Steel (Persero) Tbk, a state-owned public company, which was able to restructure its US$2.2 billion debt to its various bank creditors.[3]

i Taking and enforcement of security

Under Indonesian law, the repayment of a debt can be secured by *in rem* security rights over the assets of either a debtor or its affiliate(s). *In rem* security interests in Indonesia are limited to those prescribed by Indonesian law. Those available under Indonesian law are the mortgage, fiduciary security, pledge and the hypothec.

3 See https://money.kompas.com/read/2020/01/28/184414926/krakatau-steel-restrukturisasi-utang-rp-31-triliun-terbesar-sepanjang-sejarah.

Taking security

A mortgage under Law No. 4 of 1996 on Mortgages is used to secure land with certain land titles (right of ownership, right of exploitation, right to build, and to use, buildings, fixtures and other immovable appurtenances to the land, including machinery affixed thereto). The creation of a mortgage involves:

a the signing of the mortgage deed by the mortgagor and the mortgagee before a land officer or conveyancer with jurisdiction over the land to be mortgaged;

b the registration of the mortgage deed at the relevant land registration office; and

c the issuance of a mortgage certificate evidencing registration of the mortgage deed with the land registration book maintained by the land registration office.

Other immovable assets, which arguably include land with land titles not qualified to be mortgaged and untitled land, and movable, tangible and intangible assets (including but not limited to receivables, insurance proceeds and intellectual property rights) can be secured by a fiduciary transfer (sometimes referred to as a fiduciary assignment) under Law No. 42 of 1999 on Fiducia Security (Fiducia Law). The creation of a fiducia security would involve the signing of:

a a fiducia deed (setting out the fiduciary transfer agreement) by and between the fiducia transferor or assignor and the fiducia transferee or assignee before an Indonesian notary in the Indonesian language;

b registration of the fiducia deed at the relevant fiducia registration office; and

c the issuance of a fiducia security certificate, electronically signed by a fiducia registration office official, evidencing the registration of the fiducia deed with the fiducia registration book kept by the fiducia registration office.

Assets that may be secured by a fiduciary transfer (other than immovable ones) can also be secured by a pledge under the ICC (Articles 1150 to 1160). Due to the general pledge creation requirement that pledged property be delivered to or possessed by the creditor, most assets are secured by a fiduciary transfer, as it does not include this requirement. An exception to this is shares of an Indonesian company and bank accounts, which, in practice, most of the time are secured by a pledge, given that the pledge creation requirement for this type of asset (Article 1153 of the ICC) is notification of the party against whom the pledged right will be exercised (for a pledge of shares, the company that issued the shares being pledged; for a pledge of bank account, the bank with which the account is opened).

There is no formal legal requirement to conclude a pledge agreement in writing. However, it is standard practice in Indonesia that pledges are embodied in a deed of pledge (in notarial deed form or private deed form) by and between the pledgor and the pledgee (and, in some instances, the company whose shares are pledged) setting forth the particulars of the pledge. In respect of a pledge of shares and a bank account, the requirement of notification is generally considered to be complied with by:

a registration of the pledge in the shareholders' register of the company for a private company;

b recordation in the shareholders' register held by the Stock Administration Bureau and the issuance of a confirmation letter by the Indonesian Central Securities Depository for shares that are listed on the Indonesian stock exchange; or

c written acknowledgment from the bank where the account is opened.

A hypothec is used to secure a registered vessel or ship in Indonesia (Articles 1162 to 1232 of the ICC). A ship that can be registered in Indonesia must be owned by an Indonesian party (if a company, the majority shareholder must be Indonesian) and have gross tonnage of more than 20 cubic metres or the equivalent of seven gross tonnes (Articles 314 to 319 of the Indonesian Commercial Code and Law No. 17 of 2008 on Shipping). The creation of a hypothec over a registered ship involves (1) the signing of the hypothec deed by and between the hypothecator and the hypothecatee made by the vessel registration and ownership recordation officer with jurisdiction over the place where the vessel is registered and recorded with the Vessel Main Registry and (2) the issuance of the hypothec deed certificate evidencing the recordation of the hypothec deed with the Vessel Main Registry.

Enforcement of security

Indonesian law in general recognises the right conferred by operation of law in which an *in rem* security right holder (secured creditors) is entitled to sell the security object directly on its own authority via a public auction without consent of the collateral provider, or the right of instant or direct execution. Unfortunately, such a right can be enforced in practice only if the collateral provider is cooperative.

According to the Mortgage Law, Fiducia Law and Shipping Law, the mortgage certificate, fiducia certificate and hypothec deed certificate possess executorial title, which has the same status as a final and binding decision or judgment of an Indonesian court and confers on the holder the right to sell the security through a public auction after obtaining a writ of execution from the relevant district court. In respect of a pledge, enforcement is carried out by way of obtaining a court judgment that either (1) determines the manner in which the pledged shares should be sold to repay the debt, plus interest and costs, or (2) permits the pledgee to acquire the pledged shares at such a value to be determined by a court judgment.

Another option is to enforce the security through a private sale. The sale of the collateral in a private sale may be effected based on (1) the court judgment for security enforcement and (2) the mutual consent of the collateral provider and the secured creditors after the debtor's default for mortgage and fiducia enforcement – provided that the highest proceeds giving great benefit to both parties can be obtained.

Stay period during court-supervised proceedings

If the secured creditors attempt to enforce their security after restructuring and insolvency proceedings have commenced, they might not be able to do so, as their right to enforce their security is subject to a stay (1) for a maximum period of 90 days from the time a bankruptcy declaration is rendered in bankruptcy proceedings or (2) during the entire period of PKPU, which can be a maximum of 270 days from the provisional decision of PKPU being granted.

Upon the expiry of the stay period in bankruptcy, secured creditors may start enforcing their security right over the collateral. However, they need to complete the enforcement process within two months of the bankruptcy estate being in a state of insolvency. Otherwise, the appointed receiver is required to request the relevant secured creditors to hand over their collateral to be sold by the receiver. If the receiver has enforced the collateral, the proceeds to be distributed to the secured creditors need first to have the bankruptcy costs (including the receiver's fee) deducted from them.

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.[4]

ii Duties of directors

Indonesian law does not impose a requirement for a director of a company in financial difficulty to commence court-supervised restructuring or insolvency proceedings. In fact, voluntary bankruptcy or a PKPU petition can be filed by a director only if a general meeting of shareholders has approved it in advance.

Under the Company Law, the management of a company must be performed by each of the directors in good faith and with full responsibility. Each director is obliged to exercise due care when managing the company and is expected to serve in the best interests of the company. The directors owe a debt of loyalty to the company above their own personal interests and those of the shareholders who appointed them, especially if the interests of the company conflict with those other interests. The directors are not the agent of any shareholder.

The Company Law requires every member of the board of directors to accept full personal liability for losses of the company if the director concerned is at fault or negligent in the performance of their duties in managing the company in good faith and with full responsibility. In the event that the board of directors contains two members or more, personal liability and responsibility will apply to every member of the board of directors jointly and severally.

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

a the losses do not result from their fault or negligence;
b the director has exercised management in good faith and prudence in the interests of the company and within its objectives and purposes;
c the director has no conflict of interest, whether directly or indirectly, in the acts of management that have resulted in losses; and
d the director has taken preventive measures against arising or continued losses, which includes steps to access information about the acts of management that have resulted in losses, inter alia, through a meeting of the board of directors.

In cases in which the bankruptcy of a company is a result of the fault or negligence of the board of directors and the assets of the company are not sufficient to cover the damages caused by such a bankruptcy, each member of the board of directors is jointly and severally liable for such damage, unless the directors can prove that:

a the bankruptcy is not due to their fault or negligence;
b they carried out management in good faith, prudence, and full responsibility in the interests of the company and within the objectives and purposes of the company;
c directors do not have a conflict of interest, either directly or indirectly, over the management actions that have been performed by the board of directors; and
d directors have taken measures to prevent the occurrence of bankruptcy.

4 For example the practice in Case No. 23/PKPU/2011/PN.Niaga.Jkt.Pst: *PT Bank Central Asia, Tbk v. PT Arpeni Pratama Ocean Line, Tbk* is different from the practice in Case No. 27/PKPU/2012/PN.Niaga.Jkt.Pst: *PT Bank Mandiri (Persero), Tbk v. PT Berlian Laju Tanker, Tbk*.

Clawback action

In bankruptcy proceedings, the receiver of the interest of the bankruptcy estate may request nullification of any legal action of the bankrupt debtor before the bankruptcy declaration if such an act was considered detrimental to the creditors. For the request to be granted, the receiver must prove the following:

a the act was performed by the debtor before it was declared bankrupt;
b the debtor was not obliged by contract (existing obligation) or by law to perform the act;
c the act prejudiced the creditors' interests; and
d the debtor and a third party had or should have had knowledge that the act would prejudice the creditors' interests.

If the act was conducted within one year of the company's bankruptcy (while the act was not mandatory for the debtor – unless it could be proven otherwise), both the debtor and the third party with whom the act was performed are deemed to know that the transaction was detrimental to the creditors, if the act falls into one of the following three categories:

a a transaction in which the consideration that the debtor received was substantially less than the estimated value of the consideration given;
b a payment or grant of security for debts that are not yet due; or
c a transaction entered into by the debtor with a certain relative or related parties. (e.g., member of the board of directors or commissioners or the majority shareholder).

If the act is in the form of a grant by the debtor, the receiver must be able to prove that when the grant was made, the debtor should have known that the act would prejudice the creditors' interests. If the grant is made within one year of the company's bankruptcy, the debtor is deemed to know that the grant would be detrimental to the creditors.

Payment of a due and payable debt can be nullified only if it can be proven that the recipient knew that the bankruptcy petition had been registered or if the payment resulting from a concerted action by the debtor and the creditor was aimed at facilitating preferential treatment of the latter (collusion).

III RECENT LEGAL DEVELOPMENTS

In April 2020, the Supreme Court issued Decree No. 109/MA/SK/IV/2020 on Use of a Guide Book for Resolving Bankruptcy and PKPU Cases, dated 29 April 2020 (the Later Guide), which revoked and replaced Supreme Court Decree No. 3/KMA/SK/I/2020 on the same, dated 14 January 2020 (the Guide), which contains controversial provisions that restrict a secured creditor's right to file a PKPU petition against its debtor – a feature clearly permitted in the IBL.

The Later Guide imposed various obligations on commercial court personnel to update information on ongoing bankruptcy and PKPU cases (announcements and court decisions) in the SIPP and administration systems. It also provided clarification on how the IBL should be implemented for issues that in the past were implemented differently in different cases:

It is confirmed that OJK is authorised to file for bankruptcy or a PKPU petition against a bank. The IBL provides that Bank Indonesia (BI), the Indonesian central bank, is the only party that can file such a petition against a bank. In 2013, the function, task, and

authority in regulation and supervision of financial services activities in the banking sector were transferred from BI to OJK based on Law No. 21 of 2011 on OJK. There has yet to be a precedent of a bankruptcy or PKPU petition being filed against a bank by either BI or OJK.

The Later Guide provides further guidance on technical issues and on the implementation of which the IBL was not clear:

a the requirement to submit the latest financial statement audited by a public auditor as evidence for a voluntary bankruptcy filing by a debtor that is a legal entity;

b data on creditors obtained from OJK through the Financial Information Services System website would not carry sufficient evidentiary weight to prove the existence of more than two creditors, unless supported by other proof establishing the existence of the debt;

c several features recognised by the Indonesian civil procedural law (i.e., demurrers (unless on court competence), replies, rejoinders, interventions and counterclaims) are not recognised in a bankruptcy or PKPU case examination;

d upon permission or an order of the judge, and at the expense of the bankruptcy petitioner, the court may facilitate a bankruptcy petitioner's request to have other creditors that have been cited in the petition summoned by the court to attend an evidentiary hearing;

e a formal objection to claim verification in the bankruptcy proceedings must be raised in the formal claim verification meeting for a subsequent adjudication process to be allowed to proceed;

f when a bankruptcy estate is in a state of insolvency, this will be reflected in the minutes of the creditors' meeting to be uploaded to the court tracking system, and no separate supervisory judge's order is required;

g if the secured creditors themselves are unable to sell the collateral within two months of the state of insolvency, the collateral must be handed over to the receiver to be sold at public auction;

h if the sale at public auction does not materialise, a private sale at the supervisory judge's approval may be carried out by the receiver after two attempts to hold a public auction, as evidenced by the minutes of auction; and

i the end of bankruptcy proceedings does not automatically dissolve a company; the receiver will act as liquidator in the process of revoking legal entity status, certificate of registration and tax identification.

In 2021, two developments occurred. First was enactment of Ministry of Law and Human Rights Regulation No. 18/2021 on Guidelines for Receiver/Administrator Fees, which introduced an hourly rate of 4 million rupiahs per hour for a receiver in bankruptcy, with maximum fees capped in accordance with the following tiered rules:

Bankruptcy concluding with composition

Value of debt to be paid	Fee
Up to 50 billion rupiahs	5%
Above 50 billion rupiahs to 250 billion rupiahs	3%
Above 250 billion rupiahs to 500 billion rupiahs	2%
Above 500 billion rupiahs to 1 trillion rupiahs	15 billion rupiahs
Above 1 trillion rupiahs	20 billion rupiahs

Bankruptcy concluding with liquidation

Liquidation value outside debt	Fee
Up to 50 billion rupiahs	7%
Above 50 billion rupiahs to 250 billion rupiahs	5%
Above 250 billion rupiahs to 500 billion rupiahs	3%
Above 500 billion rupiahs to 1 trillion rupiahs	25 billion rupiahs
Above 1 trillion rupiahs	30 trillion rupiahs

It also introduced a change to the maximum administrator's fee in PKPU to 7.5 per cent of the value of debt to be paid, if the PKPU concludes with composition, and 5.5 per cent if the PKPU concludes without composition.

Second, on 15 December 2021, the Constitutional Court rendered a decision in case No. 23/PUU-XIX/2021 (MK Decision 23/2021), which included a declaration that Articles 235(1)[5] and 293(1)[6] of the IBL were against 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) of the IBL, filing for cassation by a creditor is possible only when the composition plan is approved by the creditors and confirmed by the commercial court (Court). Should the composition plan be rejected by the creditors, no cassation filing is possible. Under Article 290 of the 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) of the IBL provides that in respect of a Court decision based on Chapter III (PKPU), no legal remedy is available, except as is otherwise regulated by the IBL. Based on the foregoing, the provision under Article 285(4) of the IBL is effectively an exception to Article 293(1) of the IBL.

It is viewed that MK Decision 23/2021 has indirectly caused the provision under Articles 285(4) and 290 of the 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 the proposed composition plan. How the Supreme Court would decide contrariwise, and how a final settlement would be reached for all creditors, given that the new norm set out in MK Decision 23/2021 has not yet been tested, might give rise to some uncertainty.

IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

In 2019 and 2020, the most notable restructuring cases were the PKPU of a Central Java-based group of textile companies, the Duniatex Group, comprising six companies,[7] followed by the PKPU of its owner, Sumitro,[8] acting as a personal guarantor securing various liabilities of the

5 'No legal remedy can be raised in respect of a PKPU decision.'

6 'In respect of a Court decision based on Chapter III (PKPU), no legal remedy is available, except as otherwise regulated by the IBL.'

7 Case No. 22/Pdt.Sus-PKPU/2019/PN.Niaga.Smg.: *Pt Shine Golden Bridge V. 1. Pt Delta Merlin Dunia Textile, 2. Pt Delta Dunia Tekstil, 3. Pt Delta Merlin Sandang Tekstil, 4. Pt Delta Dunia Sandang Tekstil, 5. Pt Dunia Setia Sandang Asli Tekstil, 6. Pt Perusahaan Dagang Dan Perindustrian Damai*.

8 Case No. 25/Pdt.Sus-PKPU/2019/PN Niaga Smg: *Sumitro*.

group. Both proceeded at the Semarang Court. The market was shocked by the Duniatex PKPU, which commenced in September 2019, given that as recently as March 2019 the group issued US$300 million-worth of senior notes due to mature in 2024 at the Singapore stock exchange. The Duniatex Group's total debt was 22.36 trillion rupiahs (approximately US$1.5 billion).

From a procedural perspective, these two PKPU cases, initially supervised by two different supervisory judges, one for each case, are unique. The two sets of administrator teams appointed for each separate PKPU case managed to coordinate and align the restructuring process of both PKPU cases, as they are commercially connected. This accommodated the creditors of each party to the PKPU, some of whom overlapped and some of whom were totally different. From an international perspective, the PKPU of the Duniatex Group filed petition for recognition of foreign proceedings under Chapter 15 of the US Bankruptcy Code,[9] from the US Bankruptcy Court, Southern District of New York (US Bankruptcy Court),[10] and also filed an application with the High Court of Singapore for an order that the PKPU proceedings be recognised in Singapore.[11] From a commercial perspective, the restructuring terms on offer were unprecedented, as the US$300 million senior noteholders, which were previously secured merely by a pledge of bank account, are being offered with additional collateral.[12]

A breakthrough in this area, and a novel informal approach, was an attempt to encourage all parties to use online meeting platforms for creditor meetings to discuss and negotiate the terms and conditions of the composition plan and the holding of online court hearings because of the covid-19 emergency. This was unprecedented and led to the establishment of a 'new normal' in restructuring and bankruptcy practice, now applied to subsequent cases.

In recent key developments, an Indonesian court in a PKPU petition case rendered a decision by referring to and basing it on a foreign court judgment in its considerations. Under Indonesian general legal principles, foreign court decisions are not enforceable in Indonesia (however, Indonesian judges have broad fact-finding powers, and the judgments of the Indonesian courts might not always be consistent).

In May 2021, PT Pan Brothers Tbk (Pan Brothers) was the subject of a PKPU petition filed by Maybank Indonesia with the Jakarta Commercial Court (Jakarta Court).[13] Responding to the petition, Pan Brothers filed a moratorium application with the Singapore High Court (SHC) in early June 2021. SHC rendered an order to grant a moratorium to Pan Brothers and its subsidiaries on debt settlement for syndicated creditors. In July 2021, the Jakarta Court rejected the PKPU petition on the basis that the SHC moratorium order bound Pan Brothers and there would be overlap in the debt settlement process if the PKPU petition were granted. Subsequently, Maybank filed a bankruptcy petition against Pan Brothers in August 2021. However, the Jakarta Court rejected the petition on the basis that the case

9 See https://links.sgx.com/FileOpen/DMDT%20Announcement%20-%20Recognition%20Filings.ashx?App=Announcement&FileID=581512.

10 See Debtwire article dated 11 November 2019 by Megawati Wijaya: 'Duniatex: 144 creditors hold USD 1.59bn-equivalent claims – verified list'.

11 See https://links.sgx.com/FileOpen/DMDT%20Announcement%20-%20Recognition%20Filings.ashx?App=Announcement&FileID=581512.

12 See Debtwire article dated 7 April 2020 by Megawati Wijaya: 'Duniatex's revised plan proposes 2nd lien security pledge for half of USD 300m notes vs 1st lien pledge for one-third of notes in Dec plan'.

13 Case No. 245/Pdt.Sus-PKPU/2021/PN.Jkt.Pst.: *Pt Bank Maybank Indonesia V. 1. Pt Pan Brothers, Tbk*.

could not be summarily proven because of the Singapore moratorium process.[14] Later, Pan Brothers succeeded in having its pre-packaged scheme sanctioned by SHC in January 2022[15] and obtained recognition of its Singaporean scheme before the US Bankruptcy Court.[16]

Another case that followed the content of the SHC decision was the PKPU of a Central Java-based group of textile companies, PT Sri Rejeki Isman, Tbk (Sritex Group).[17] On 19 April 2021, Sritex Group was the subject of a PKPU petition filed with Semarang Commercial Court by its trade creditor, CV Prima Karya, and, on 6 May 2021, the petition was granted by the court. On 21 April 2021, a Singapore subsidiary of Sritex Group, Golden Mountain Textile and Trading Pte Ltd (Golden Mountain), made an application to the SHC for a moratorium. Golden Mountain is an intercompany creditor of Sritex Group,[18] under Senior Notes due 2024 (Notes) issued by Golden Legacy Pte Ltd (Golden Legacy), another Singapore subsidiary of Sritex Group, unconditionally and irrevocably guaranteed by Sritex. Upon receiving the proceeds of the Notes, Golden Legacy used them as a capital injection in Golden Mountain, and Golden Mountain then lent those proceeds to Sritex Group.

In May 2021, the SHC rendered a moratorium order, which included a requirement that Golden Mountain lodge a claim in the PKPU proceedings and exercise its right to vote in the PKPU proceedings of Sritex Group. This was to be in a manner that reflected the voting instructions of each individual holder of the Notes that cast its votes in a manner that would be (1) expressed by the trustee in accordance with the Golden Legacy indenture or (2) obtained through other customary procedures as may be appropriate, including through the clearing systems.

In June 2021, Sritex Group filed a Chapter 15 petition for recognition of foreign proceedings (both Indonesian and Singaporean proceedings) with the US Bankruptcy Court. On 6 July 2021, the court-appointed administrator of Sritex Group rendered a list of claims against Sritex Group that rejected the claim submitted by the trustee of the Notes on the basis of the SHC moratorium order, and accepted Golden Mountain's claim submissions instead.

14 Pan Brothers' press release and disclosure on the update of the bankruptcy Case No. 245/Pdt. Sus-PKPU/2021/PN.Jkt.Pst.: *Pt Bank Maybank Indonesia V. 1. Pt Pan Brothers, Tbk*, available online at: https://www.panbrotherstbk.com/public/uploads/news-events/pdfen_1636961097-PBR X-Siaran-Pers-Kepailitan.pdf / https://www.idx.co.id/StaticData/NewsAndAnnouncement/ANNOUNCEMENTSTOCK/From_EREP/202111/0e7bad22dc_209a107ca7.pdf.

15 See GRR article dated 17 January 2022 by Kyriaki Karadelis: 'Indonesia's Pan Brothers obtains Singapore scheme sanction', available online at https://globalrestructuringreview.com/liens/indonesias-pan-brothers-obtains-singapore-scheme-sanction.

16 See GRR article dated 9 March 2022 by Teodor Teofilov: 'Pan Brothers wins Ch15 recognition, defers restructuring date', available online at https://globalrestructuringreview.com/financial-restructuring/pan-brothers-wins-ch15-recognition-defers-restructuring-date.

17 Case No. 12/Pdt.Sus-PKPU/2021/PN.Niaga.Smg.: *CV Prima Karya V. 1. Pt Sri Rejeki Isman, Tbk, 2. Pt Sinar Pantja Djaja, 3. Pt Bitratex Industries, 4. Pt Primayudha Mandirijaya*,

18 See Offering Memorandum of the US$150,000,000 6.875% Senior Notes due 2024 issued by Golden Legacy Pte Ltd unconditionally and irrevocably guaranteed by PT Sritex Rejeki Isman Tbk, available online at: https://links.sgx.com/FileOpen/Project%20Infinity%2017%20-%20Final%20Offering%20Memorandum.ashx?App=Prospectus&FileID=30968.

In the aviation sector, the most notable restructuring case involved Indonesian national flag carrier PT Garuda Indonesia (Persero), Tbk (Garuda). Similar to other airlines in the world during the covid-19 pandemic, Garuda suffered huge financial losses since 2020, and gross mismanagement and graft by previous directors compounded its problems.[19]

The government attempted to save Garuda in 2020 through government capital participation, which is estimated to amount to around US$570 million. In the same year, Garuda Indonesia secured approval of US$500 million from global sukuk holders to extend the maturity date of its obligations under its global sukuk. In June 2021, Garuda Indonesia further managed to obtain approval from various state-owned banks, airport operators, oil and gas companies, and enterprises, as well as local private banks for rescheduling its debts.

On 9 July 2021, Garuda was the subject of a PKPU petition filed by PT My Indo Airlines. Due to the covid infections peaking at this time, the Jakarta Court took the unprecedented approach in handling the case by rendering its decision on 21 October 2021, taking more than three months since registration of the PKPU petition. This approach violated an IBL provision that requires a court decision on involuntary PKPU to be rendered within 20 calendar days (PKPU petition process timeline). The Jakarta Court rejected the case as the PKPU requirements could not be summarily proven.[20]

Interestingly, one day after the PKPU petition decision was rendered, another was filed against Garuda by PT Mitra Buana Koorporindo.[21] This time, the Jakarta Court again violated the PKPU petition process timeline and granted Garuda PKPU on 9 December 2021, thereby marking maybe one of the largest debts subject to PKPU in Indonesia's commercial history. The Jakarta Court ultimately issued an unprecedented decision by appointing a six-member administrator team for Garuda (as proposed by the PKPU petitioner and Garuda).

Initially, Garuda planned for dual Indonesia–UK restructuring.[22] However, at the time of writing (almost six months since commencement of the PKPU process), Garuda has not yet commenced UK restructuring. In April 2022, the Indonesian Parliament agreed to allocate state capital to Garuda of 7.5 trillion rupiahs from the 2022 state budget to rescue the airline,[23] provided that the PKPU process resulted in successful debt restructuring approved by the creditors. Negotiations between Garuda and creditors are still ongoing and the PKPU is expected to be completed this year.

19 See 'Garuda's dwindling options', available online at: https://www.thejakartapost.com/academia/2021/09/16/garudas-dwindling-options.html.

20 Case No. 289/Pdt.Sus-PKPU/2021/PN Niaga Jkt.Pst: *PT My Indo Airlines v. PT Garuda Indonesia (Persero), Tbk*.

21 Case No. 425/Pdt.Sus-PKPU/2021/PN Niaga Jkt.Pst: *PT Mitra Buana Koorporindo (formerly PT Mitra Buana Komputindo) v. PT Garuda Indonesia (Persero), Tbk*.

22 See GRR article by Tom Brown dated 14 December 2021: 'Garuda plans dual Indonesia-UK restructuring after creditor triggers first airline PKPU', available online at https://globalrestructuringreview.com/corporate-lending/garuda-plans-dual-indonesia-uk-restructuring-after-creditor-triggers-first-airline-pkpu.

23 https://money.kompas.com/read/2022/04/24/051515326/rp-75-triliun-duit-rakyat-untuk-selamatkan-garuda?page=all / https://bisnis.tempo.co/read/1584877/panja-komisi-vi-dpr-setujui-pemberian-pmn-ke-garuda-indonesia-rp-75-triliun.

V INTERNATIONAL

Unfortunately, the IBL has not adopted the UNCITRAL Model Law, and no international treaty has been ratified to enable Indonesian courts to recognise restructuring or insolvency proceedings commenced, or decisions issued, in another jurisdiction.

VI FUTURE DEVELOPMENTS

Since the enactment of the IBL in 2004, the reforms that have taken place have been driven by the Indonesian Supreme Court through its circular letters and the Ministry of Law and Human Rights through its decisions. Most of the reforms related to the practical implementation of the IBL.

The Supreme Court and Ministry of Law and Human Rights are preparing an online bankruptcy information portal that will improve transparency of reporting on administration and liquidation processes. Due to the covid-19 emergency, this may be delayed.

In 2018, a report on the analysis and evaluation of legislation concerning bankruptcy[24] and an academic paper for the draft IBL amendment[25] were produced by working groups established by the National Law Development Agency. According to the Indonesian Parliament's website,[26] the bill on IBL is included in the national legislative programme for 2020–2024 as a government-initiated bill but, unfortunately, is not on the priority list – even in 2022.[27] At the time of writing, the draft bill on IBL was not yet available for public review. Given the covid-19 emergency and the fact that a number of World Bank recommendations were not accommodated in the academic paper,[28] it is expected that a lengthy discussion will take place on the draft IBL bill in Parliament, and it might not be completed in the near future. In late 2021, the Indonesian Entrepreneurs Association urged the government to incorporate an insolvency test as a PKPU requirement in the next revisions to the bankruptcy law to tackle the covid-19 situation.[29] This suggestion was met with widespread opposition from academia[30] and insolvency practitioners the Indonesian Receiver and Administrator Association[31] and was regarded as almost wholly unworkable in Indonesia.

24 See https://www.bphn.go.id/data/documents/pokja_kepailitan.pdf.

25 See https://www.bphn.go.id/data/documents/naskah_akademik_ruu_kepailitan_dan_pkpu_final_2018.pdf.

26 See http://www.dpr.go.id/uu/prolegnas-long-list.

27 https://www.dpr.go.id/dokakd/dokumen/BALEG-SK-PROLEGNAS-RUU-PRIORITAS-TAHUN-2022-1642658467.pdf.

28 See presentation of the World Bank Group titled Insolvency in Indonesia, Opportunities for Reform, 24 August 2018.

29 https://insight.kontan.co.id/news/apindo-usulkan-tes-insolvensi-jadi-syarat-pkpu/?utm_source=line&utm_medium=text.

30 https://www.hukumonline.com/berita/a/gagasan-insolvency-test-tidak-relevan-untuk-revisi-uu-kepailitan-lt59f1abb87e6fe.

31 https://www.hukumonline.com/berita/a/sembilan-alasan-insolvency-test-tak-cocok-di-indonesia-lt61961f44a2b8b/; https://nasional.kontan.co.id/news/akpi-uji-insolvensi-tidak-sesuai-dengan-sistem-hukum-indonesia.

Appendix 1

ABOUT THE AUTHORS

EMIR NURMANSYAH

ABNR Counsellors at Law

Emir Nurmansyah, a senior partner at ABNR and a member of the firm's management board, is one of the most respected and versatile lawyers in Indonesia today. After some 30 years in legal practice, he is a market-leading lawyer for restructuring and insolvency, projects, banking and finance, corporate and mergers and acquisitions, foreign direct investment, shipping, aviation, and technology, media and telecoms.

Most recently, he advised and represented the bondholders' trustee as well as a machinery leasing company on the US$1.5 billion debt restructuring of Sritex Group and an international bank on the US$1.7 billion debt restructuring of the Duniatex Group, both of which are Indonesia's biggest textile conglomerates. Previously, he acted for the China Development Bank (one of the largest creditors at US$600 million) in the US$4.5 billion Bumi Resources global debt restructuring, the largest such deal in Southeast Asia at the time and one of the most complex of its kind ever in the region.

He also advised the secured parties under PT Berlian Laju Tanker Tbk (BLT)'s approximately US$650 million Senior Secured MLA Credit Facility, including DNB Bank ASA, Singapore Branch, the facility agent and affiliates of KKR and York Capital, the largest lenders under the facility, in the second stage of BLT's debt restructuring process in 2014–2015, which constituted the first ever out-of-court amendment of a court-approved restructuring plan under Indonesia's PKPU regime. He is currently advising and representing numerous aircraft and engine lessors, manufacturers, and other aviation-related vendors and service providers in the ongoing US$13.8 billion debt restructuring of PT Garuda Indonesia (Persero) Tbk.

KEVIN OMAR SIDHARTA

ABNR Counsellors at Law

Kevin Omar Sidharta is listed as a 'name to know' in Indonesia for restructuring and insolvency by the *Global Restructuring Review* and as a 'next generation partner' for restructuring and insolvency by *The Legal 500: Asia Pacific*, making him one of only five Indonesian lawyers ranked for this practice area.

He recently represented the bondholders' trustee as well as a machinery leasing company on the US$1.5 billion debt restructuring of Sritex Group and an international bank on the US$1.7 billion debt restructuring of the Duniatex Group, both of which are Indonesia's biggest textile conglomerates. Previously, he also represented China State Construction

Engineering Co Ltd (CSCEC) on the US$500 million debt restructuring of PT Mahkota Sentosa Utama (Meikarta Project owner) and a number of oil and gas services providers in the recently concluded US$412 million debt restructuring of PT Apexindo Pratama Duta, one of Indonesia's largest oil and gas drilling companies.

In 2016, he acted for the China Development Bank in the US$4.5 billion Bumi Resources global debt restructuring, having previously in 2012–2013 acted for various vessel lessor creditors and shipowner entities in the US$2 billion Indonesian court-sanctioned restructuring of PT Berlian Laju Tanker Tbk (BLT). After the BLT restructuring was completed, he advised the secured parties under BLT's approximately US$650 million Senior Secured MLA Credit Facility in the second stage of BLT's debt restructuring process, a first-ever out-of-court amendment of a court-approved restructuring plan under Indonesia's PKPU regime.

He also headed the ABNR team representing a major Japanese integrated trading and investment conglomerate in the approximately US$2 billion debt restructuring of PT Asmin Koalindo Tuhup. He is currently advising and representing numerous aircraft and engine lessors, manufacturers and other aviation-related vendors and services providers in the ongoing US$13.8 billion debt restructuring of PT Garuda Indonesia (Persero) Tbk.

ABNR COUNSELLORS AT LAW

Graha CIMB Niaga, 24th Floor
Jl Jend Sudirman Kav 58
Jakarta 12190
Tel: +62 21 250 5125/5136
Fax: +62 21 250 5001/5121/5122/5392
enurmansyah@abnrlaw.com
ksidharta@abnrlaw.com
www.abnrlaw.com

ISBN 978-1-80449-096-9