IN-DEPTH

Restructuring

INDONESIA

LEXOLOGY

Restructuring

EDITION 17

Contributing Editor

Peter K Newman

Skadden Arps Slate Meagher & Flom LLP

In-Depth: Restructuring (formerly The Restructuring Review) is an insightful guide to help general counsel, government agencies and private practice lawyers understand the prevailing conditions in the global restructuring market. It examines the most significant recent legal and commercial developments and provides an overview of the restructuring and insolvency legal framework in each jurisdiction.

Generated: July 26, 2024

Indonesia

Emir Nurmansyah, Bilal Anwari and Ulyarta Naibaho

ABNR

Summary

Introduction

Indonesia's modern bankruptcy legislation is relatively new, as it was developed in response to the 1998 Asian financial crisis. That year, the Indonesian House of Representatives made the first amendment to the Bankruptcy Ordinance since its original enactment by the colonial Netherlands–Indies government in 1906.

More comprehensive legislation was enacted as Law No. 37/2004 on 18 October 2004 (on Bankruptcy and Suspension of Payments) (the Indonesian Bankruptcy Law (IBL)). This was aimed at clarifying terms and addressing ambiguities and issues that arose from the 1998 legislation.

The IBL contains two formal procedures for businesses facing financial difficulty: bankruptcy, which is aimed primarily at liquidation (but could result in restructuring); and suspension of payments (PKPU), for restructuring (and possible liquidation).

These, in combination with the Indonesian companies and civil procedure legislation (including the Supreme Court Practice Guide for Bankruptcy and PKPU Cases), constitute the totality of the Indonesian bankruptcy framework, which attempts to provide a legal mechanism for court-supervised settlement of debt in an effective way.

Unlike in some other jurisdictions, insolvency is not a prerequisite for initiating bankruptcy or PKPU under Indonesian law. Indeed, the term 'state of insolvency' refers more narrowly to just one stage in bankruptcy proceedings.

A bankruptcy petition can be initiated by or against a debtor if that debtor has at least two creditors and is in default to one of them. This must be summarily proven (so a dispute over the amount of a debt being claimed does not, in itself, render the debt's existence incapable of being summarily proven). For banks, financial institutions and state-owned enterprises, a bankruptcy petition can be initiated only by a regulatory agency.

Once a bankruptcy petition has been accepted by the court, a receiver and supervisory judge are appointed, and a 90-day stay period is imposed on the debtor's assets. Creditors may submit claims for verification, and the debtor can propose a composition plan to avoid liquidation. The plan must be approved by a majority of creditors and ratified in court.

PKPU is the sole court-supervised restructuring method in Indonesia. When granted, an administrator is appointed, and a provisional stay will halt debt collection attempts, including action by secured creditors to enforce their security, unless they receive court approval. This allows the debtor to formulate a composition plan to put to creditors for acceptance.

The court must call a creditors' meeting within 45 days of granting the provisional stay, and the process may be extended for up to a total of 270 days (including the initial 45) as part of a 'permanent' moratorium. If ratified, the debtor resumes payments in accordance with the plan; if not, the company is liquidated.

The success of bankruptcy and PKPU cases depends on several factors. These include the debtor's level of cooperation, the fairness and feasibility of the proposed composition plan, the commercial and legal fairness of the administrator's or receiver's approach, the effectiveness of the supervisory judge in fulfilling their role, and strict and reasonable

implementation and interpretation of the law in favour of creditors. The debtor's willingness to treat creditors fairly is also significant.

Although the majority of creditors can influence the process, their influence is sometimes insufficient to ensure a satisfactory outcome for them. (The law allows a debtor more control over the process than might be expected in similar proceedings in developed jurisdictions.)

The nation's approach to insolvency and restructuring is methodical and aims to provide clear procedures for resolving financial distress in businesses. The intention is to ensure that companies have the opportunity to reorganise and continue as going concerns and, to the extent possible, to avoid bankruptcy and liquidation while satisfying creditors' claims in an orderly manner.

The covid-19 pandemic significantly increased awareness of bankruptcy and PKPU procedures for businesses in Indonesia. Many opportunistically relied on these options to collect bad debts or restructure their own, leading to a record number of petitions in 2021.

It has been suggested that the IBL is in need of reform, as it fails to provide insufficient protections for stakeholders. It has also been criticised for lacking a solvency test. Further, the enforcement process is laden with obstacles and notoriously complex. However, the revision of the existing legislation is low down on the national legislative agenda and is unlikely to happen any time soon.

Year in review

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 them. 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.

According to the court case tracking system (SIPP) for five commercial courts (Central Jakarta, Medan, Semarang, Surabaya and Makassar), in 2023, 94 bankruptcy petitions and 652 PKPU petition filings were recorded. In 2022, there were 105 bankruptcy petitions and 572 PKPU cases in total. The number of bankruptcy petitions filed dropped slightly from 105 in 2022 to 94 in 2023. PKPU petition filings increased from 572 in 2022 to 652 in 2023.

If the number of cases in the five-year trend from 2020 to 2024 is looked at over the same period (January to the end of April), bankruptcy petition filings were 35, 47, 34, 21 and 30, respectively, and PKPU petition filings were 144, 282, 155, 185 and 164 in those years.[1]

This shows that PKPU legal recourse is still more popular than bankruptcy as a means of debt restructuring in Indonesia.

Recent legal developments

In April 2020, the Supreme Court issued Decree No. 109/KMA/SK/IV/2020 on The 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 matter, 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 regarding how the IBL should be implemented for issues that in the past were implemented differently in different cases.

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

The Later Guide provides further guidance and clarity on technical issues and implementation:

1. 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;
2. data on creditors obtained from the 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;
3. several features recognised by the Indonesian civil procedural law (i.e., demurrers (unless on court jurisdiction), replies, rejoinders, interventions and counterclaims) are not recognised in a bankruptcy or PKPU case examination;
4. 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;
5. 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;
6. 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; no separate supervisory judge's order is required;

7. 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;
8. if the sale at public auction does not materialise, a private sale with the supervisory judge's approval may be conducted by the receiver after two attempts to hold a public auction, as evidenced by the minutes of auction; and
9. the end of bankruptcy proceedings does not automatically dissolve a company; the receiver will act as the liquidator in the process of revoking its legal entity status, certificate of registration and tax identification.

In 2021, two developments occurred. The first was the issuance 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 rupiah per hour for a receiver in bankruptcy, with maximum fees capped according to the following tiered rules:

Bankruptcy concluding with composition

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

Bankruptcy concluding with liquidation

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

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.

In the 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)[2] and 293(1)[3] 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 petition for an appeal (cassation) to the Supreme Court is permissible against a PKPU decision filed by a creditor and the rejection of the composition plan offered by a debtor.'

According to Article 285(4) of the IBL, a creditor's filing an appeal (cassation) to the Supreme Court is possible only when the composition plan is approved by the creditors and confirmed by the commercial court (the Court). Should the composition plan be rejected by the creditors, an appeal (cassation) to the Supreme Court is not possible. Under Article 290 of the IBL, if the Court has declared a debtor bankrupt, all bankruptcy provisions, as stated in Chapter II (Bankruptcy), except for the appeal (cassation) to the Supreme Court provision, apply. Further, Article 293(1) of the IBL provides that in respect of a Court decision under Chapter III (PKPU), no legal remedy is available, except as is otherwise regulated by the IBL. Given the foregoing, the provision of Article 285(4) of the IBL is effectively an exception to Article 293(1) of the IBL.

It is believed that MK Decision 23/2021 has indirectly caused the provisions of Articles 285(4) and 290 of the IBL to be amended such that a petition for an appeal (cassation) to the Supreme Court may be filed against a Court decision that declares a debtor in PKPU bankrupt following the 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.

On 12 January 2023, Law No. 4 of 2023 on Financial Sector Development and Reinforcement, dubbed the Omnibus Law for the Financial Sector (the Omnibus Financial Law), was enacted. The Omnibus Financial Law amended the OJK Law and the IBL and provides the authority to file bankruptcy and PKPU petition to:

1. the OJK against a debtor that is in the following forms:
    - banks;
    - securities companies;
    - stock exchanges;
    - alternative market organisers;
    - clearing and guarantee institutions;
    - depository and settlement institutions;
    - fund organisers protection of investors;
    - securities funding institutions;
    - securities pricing agencies;
    - insurance companies;
    - *sharia insurance companies;*
    - reinsurance companies or sharia reinsurance companies;
    - pension funds;
    - guarantee institutions;
    - financing institutions;

- microfinance institutions;
- organisers of electronic systems that facilitate the collection of public funds through offerings securities;
- information technology-based co-funding service organisers;
- special purpose vehicle (financial instrument management institution) or trustee; or
- other financial services institutions that are registered and supervised by the OJK insofar that their dissolution or bankruptcy is not regulated separately in other laws; and

2. BI against a debtor that is in the following forms:
    - a provider of payment service and an organiser of payment system infrastructure;
    - an organiser of rupiah currency processing services;
    - money market brokers;
    - providers of trading facilities;
    - clearing facility for over-the-counter interest rate;
    - exchange rate derivative transactions; or
    - other institutions that are granted licence or stipulation by BI, as long as the dissolution or bankruptcy is not regulated otherwise by provisions of other laws and regulations.

Further, the Omnibus Financial Law also provides confirmation that the close-out netting mechanism in financial transactions (termination) can be performed prior to or after bankruptcy (event). This provision would provide legal certainty that the close-out netting mechanism would be recognised during the bankruptcy process.

Legal framework

Court-supervised insolvency and restructuring procedures available to companies in Indonesia are governed by the IBL. The IBL provides two main formal proceedings: bankruptcy (aimed at liquidation) and PKPU (reorganisation).

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 hand, 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:

1. one or more creditors;
2. the debtor;

3. the public prosecutor, if it is in the public interest;
4. 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 OJK; and
5. 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 under Law No. 40 of 2007 on Limited Liability Companies (the Company Law) and a set of specific regulations governing bank pre-dissolution supervision and dissolution or liquidation.

In Indonesia, restructuring is often conducted 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.[4]

The 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 affiliates. 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 hypothec.

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:

1. 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;
2. the registration of the mortgage deed at the relevant land registration office; and
3. 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 (the Fiducia Law). The creation of a fiducia security involves the signing of:

1. a fiducia deed (setting out the fiduciary transfer agreement) by and between the fiduciatransferor or assignor and the fiducia transferee or assignee before an Indonesian notary in the Indonesian language;
2. registration of the fiducia deed at the relevant fiducia registration office; and
3. 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 the pledge of a 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 notification requirement is generally considered to be complied with by:

1. registration of the pledge in the shareholders' register of the company for a private company;
2. 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
3. a written acknowledgement 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 the 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 conducted by 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 the greatest benefit to both parties can be obtained.

The 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 the PKPU, which can be a maximum of 270 days from the granting of the provisional PKPU.

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 ask 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 regarding the term 'secured creditors' in the IBL and (2) conflicting practice in different PKPU case precedents.[5]

The 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 the 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 consists of two or more members, personal liability and responsibility 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:

1. the losses do not result from their fault or negligence;
2. the director has exercised management in good faith and prudence in the interests of the company and within its objectives and purposes;
3. the director has no conflict of interest, either directly or indirectly, in the acts of management that have resulted in losses; and
4. the director has taken preventive measures against arising or continued losses, which include 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 damage caused by the bankruptcy, each member of the board of directors is jointly and severally liable for the damage, unless the directors can prove that:

1. the bankruptcy is not as a result of their fault or negligence;
2. they have conducted the company's management in good faith, with prudence and full responsibility, in the interests of the company, and within the objectives and purposes of the company;
3. the 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
4. the directors have taken measures to prevent the occurrence of bankruptcy.

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 the act was considered detrimental to the creditors. For the request to be granted, the receiver must prove that:

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

If the act was performed 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:

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

If the act was 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 was 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).

Significant transactions, key developments and most active industries

In 2022, the Commercial Court of Makassar declared Yayasan Rumah Sakit Sandi Karsa in bankruptcy due to failure to reach homologation. [6] Further, Supreme Court Decision No. 1262 K/Pdt.Sus-Pailit/2022 (Decision No. 1262) overturned a bankruptcy decision that concerned failure to reach homologation (ratification of composition plan) in a PKPU. It introduced a new legal concept for judges adjudicating PKPU petitions. Essentially, when

examining a case, the panel of judges (PoJ) must consider the following before granting a PKPU petition:

1. whether the debtor could still repay its debt: in the above case, the PoJ held that the debtor could still repay its debt (i.e., was solvent);
2. the creditors' real intention in filing the PKPU petition: the PoJ determined that the intention was to declare bankruptcy rather than reach a settlement;
3. the debtor's line of business: the debtor operated a hospital in accordance with Articles 2 and 29 of Law No. 44/2009 on Hospitals and declared its commitment to providing healthcare services based on humanitarian principles and social functions. (The running of a hospital was perceived as not solely profit oriented but focused more on humanitarian aspects. Therefore, it was important to provide the debtor with an opportunity to continue to operate in order to fulfil its obligations to its creditors.)

The Supreme Court accepted the cassation petition and declared that the debtor was not in bankruptcy. Consequently, a dissatisfied creditor filed for case review with the Supreme Court. However, the Court rejected the application, citing its Decision No. 9 PK/Pdt.Sus-Pailit/2023, dated 26 May 2023, and affirmed the previous decision. Despite the controversy surrounding the handling of this case (which included allegations of corruption that implicated court officials associated with the case), it appears that it did not ultimately impact enforcement of the decision against the parties involved.

Accordingly, in light of the above case, and at its own initiative, the PoJ cited additional criteria for a debtor to be placed in PKPU status, beyond those stipulated in the IBL (i.e., 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).

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 group. Both proceeded in 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 on the Singapore stock exchange. The Duniatex Group's total debt was 22.36 trillion rupiah (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 were 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 a petition for the recognition of foreign proceedings under Chapter 15 of the US Bankruptcy Code,[9] from the US Bankruptcy Court, Southern District of New York (the US Bankruptcy Court),[10] and also filed an application in 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, were 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 in the Jakarta Commercial Court (the Jakarta Court).[13] Responding to the petition, Pan Brothers filed a moratorium application in the Singapore High Court (SHC) in early June 2021. The SHC issued 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 ground that the SHC moratorium order bound Pan Brothers and there would be an 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 ground that the case could not be summarily proven because of the Singapore moratorium process.[14] Later, Pan Brothers succeeded in having its pre-packaged scheme approved by the SHC in January 2022[15] and obtained the recognition of its Singaporean scheme by 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 in the 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), submitted an application to the SHC for a moratorium. Golden Mountain is an intercompany creditor of Sritex Group,[18] under Senior Notes due 2024 (the 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 from 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 issued a moratorium order that 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 the recognition of foreign proceedings (both Indonesian and Singaporean proceedings) in the US Bankruptcy Court. On 6 July 2021, the court-appointed administrator of Sritex Group issued 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.

In the aviation sector, the most notable restructuring case involved the 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 debts 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 to handling the case of handing down its ruling on 21 October 2021, more than three months after the registration of the PKPU petition. This approach violated an IBL provision that requires a court ruling on an involuntary PKPU to be issued within 20 calendar days (the PKPU petition process timeline). The Jakarta Court dismissed the case as the PKPU requirements could not be summarily proven.[20]

Interestingly, one day after the PKPU petition ruling was handed down, 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 a dual Indonesia–UK restructuring.[22] However, it appears that, later, Garuda decided to take an inbound restructuring route in Indonesia. In June 2022, Garuda successfully reached agreement with its creditors, and its composition plan was homologated by the commercial court.[23] At the end of 2022, Garuda completed its massive debt restructuring process, which was marked by the issuance of new equity and new Notes as a part of its settlement with the creditors.[24]

At the end of October 2022, another Indonesian airline, PT Sriwijaya Air (Sriwijaya), was declared in PKPU. Sriwijaya, founded in 2003, is a private airline in Indonesia and saw a peak in its operations between 2017 and 2018 as it transported over 950,000 passengers each month to 53 domestic and international destinations.[25] However, the airline faced a downturn due to extensive route closures and a substantial reduction in its fleet size. After a nine-month trial, on 18 July 2023, Sriwijaya successfully reached an agreement with the approval of the majority of its creditors, and its composition plan was ratified by the commercial court.[26]

International

Unfortunately, the IBL has not adopted the United Nations Commission on International Trade Law (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.

Outlook and conclusions

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 relate to the practical implementation of the IBL.

The Supreme Court and the Ministry of Law and Human Rights are preparing an online bankruptcy information portal that will improve the transparency of reporting on administration and liquidation processes. This plan is still pending. It has not been realised or is likely to be in the near future, even though the covid-19 emergency is over.

In 2018, a report on the analysis and evaluation of legislation concerning bankruptcy-[27] and an academic paper for the draft IBL amendment[28] were produced by working groups established by the National Law Development Agency. According to the Indonesian Parliament's website,[29] the bill on IBL is included in the national legislative programme for 2020–2024 as a government-initiated bill. However, it is included in a comprehensive list of 260 draft bills (number 218)[30] and not in the priority list, which consists of 47 draft bills. Consequently, it is unlikely to be enacted in 2024 as it is not part of the 2024 priority national legislation programme, despite being proposed since December 2019.

At the time of writing, the draft bill on IBL for February 2022 version already 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,[31] 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 of the bankruptcy law to tackle the covid-19 situation.[32] This suggestion was met with widespread opposition from academia[33] and insolvency practitioners the Indonesian Receivers and Administrators Association[34] and was regarded as almost wholly unworkable in Indonesia.

Endnotes

1 As the May 2024 data were not yet complete at the time of writing, the number of cases for the January–May 2024 period might increase. Back to section

2 'No legal remedy can be raised in respect of a PKPU decision.' Back to section

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

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

5 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. Back to section

6 Case No. 1/Pdt.Sus-PKPU/2021/PN Niaga Mks., dated 24 Maret 2022: PT Mulya Husada Jaya v. Yayasan Rumah Sakit Sandi Karsa. Back to section

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. Back to section

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

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

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

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

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'. Back to section

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

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-PBRX-Siaran-Pers-Kepailitan.pdf, https://www.idx.co.id/StaticData/NewsAndAnnouncement/ANNOUNCEMENTSTOCK/From_EREP/202111/0e7bad22dc_209a107ca7.pdf. Back to section

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. Back to section

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. Back to section

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. Back to section

18 See Offering Memorandum of the US$150 million 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. Back to section

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

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

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. Back to section

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. Back to section

23 https://www.idnfinancials.com/news/43492/court-homologates-giaas-resolution-plan-creditors. Back to section

24 https://www.thejakartapost.com/opinion/2023/01/11/analysis-garuda-completes-restructuring-back-to-black-resumes-stock-trading.html; https://voi.id/en/news/240615. Back to section

25 https://www.sriwijayaair.co.id/aboutus. Back to section

26 https://reorg.com/articles/central-jakarta-court-ratifies-sriwijaya-air-composition-plan-idr-3-6t-claims-from-secur
Back to section

27 See https://www.bphn.go.id/data/documents/pokja_kepailitan.pdf. Back to section

28 See https://www.bphn.go.id/data/documents/naskah_akademik_ruu_kepailitan_dan_pkpu_final_2018.pdf. Back to section

29 See http://www.dpr.go.id/uu/prolegnas-long-list (access restricted). Back to section

30 https://www.dpr.go.id/uu/prolegnas-long-list. Back to section

31 See the presentation of the World Bank Group titled 'Insolvency in Indonesia, Opportunities for Reform', 24 August 2018. Back to section

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

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

34 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. Back to section

Emir Nurmansyah enurmansyah@abnrlaw.com
Bilal Anwari banwari@abnrlaw.com
Ulyarta Naibaho unaibaho@abnrlaw.com

ABNR