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The Legal 500 Country Comparative Guides

Indonesia

RESTRUCTURING & INSOLVENCY

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This country-specific Q&A provides an overview of restructuring & insolvency laws and regulations applicable in Indonesia.

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INDONESIA
RESTRUCTURING & INSOLVENCY

1. What forms of security can be granted over immovable and movable property? What formalities are required and what is the impact if such formalities are not complied with?

Security rights over immovable and movable property are covv by virtue of an agreement including *hak tanggungan*, pledge, and fiduciary security.av

Hak tanggungan

A *hak tanggungan*, a real security right over land and land-related objects and the nearest equivalent to a 'mortgage' as understood in other jurisdictions. The 'objects' or 'goods' referred to include buildings, plants, and produce now existing or which may exist in the future and which form an inseparable part of the land, whether or not such buildings, plants, or produce are owned by the titleholder of the land. A *hak tanggungan* must be in notarial deed form, must be registered at the Land Office, and will be effective upon registration in the Security Right Book maintained by the Land Office in the jurisdiction where the land is located.

Pledge

A pledge, like a *hak tanggungan*, is a security right in rem. However, unlike a *hak tanggungan*, it can only have as its object movable properties, whether tangible (such as machines, vehicles, inventories, etc.) or intangible. The establishment of a pledge is dependent on the nature of the goods and can thus be classified as follows:

1. A pledge of tangible movable goods and bearer instruments – by delivery of the goods or the instruments into the physical possession of the pledgee or a third party agreed upon by the parties;
2. A pledge of intangible movable goods (except the above-mentioned bearer and order instruments) – by notification of the pledge concerned to the party against whom the rights pledged will have to be enforced.

The law does not require a pledge agreement to be in writing. Nevertheless, in practice, pledge agreements are always incorporated in a written document.

Fiduciary security

Fiduciary security is a non-possessory of security right object movable properties, whether tangible (such as machines, vehicles, inventories, etc.) or intangible (such as accounts receivable, shares). The security is established in a notarial deed will be effective upon registration with the Fiduciary Registration Office to obtain a Fiduciary Registration Certificate.

2. What practical issues do secured creditors face in enforcing their security (e.g. timing issues, requirement for court involvement)?

Although the rights of secured creditors are acknowledged by the law as not being affected by bankruptcy, the law, as a general rule waives the rights of secured creditors (and any party whose assets are under the control of the bankrupt) to foreclose their security for a period of 90 days from the date of the bankruptcy declaration. After 90 days have lapsed or the debtor has been declared insolvent, the secured creditor may enforce their security within 2 months.

As for a Delay of Payment (restructuring proceeding), the stay period is as long as the Delay of Payment period, which can last up to 270 days. If the debtor is declared bankrupt before or after the 270 days have lapsed, there will be no stay period, the secured creditor may enforce their security within two months after the debtor is declared bankrupt.

If within two months, the secured creditor has not started or succeeded in enforcing the security, the object of the security must be handed over to the appointed receiver(s). The receiver will have the right to sell the

object of security.

Many secured creditors face the challenge to meet the two months, from scheduling an auction date with the State Auction Office, securing the object, and securing a potential buyer.

3. What is the test for insolvency? Is there any obligation on directors or officers of the debtor to open insolvency procedures upon the debtor becoming distressed or insolvent? Are there any consequences for failure to do so?

The law is silent for a test for insolvency. In the elucidation of the law, insolvency is defined as a condition of being unable to pay. Under the law, insolvency can occur because:

a. in the verification meeting the debtor does not propose an amicable settlement plan;
b. the amicable settlement plan is rejected;
c. ratification of the amicable settlement plan is denied by a final and binding decision.

Directors or officers of the debtor are not required or mandatory to open insolvency procedures upon the debtor becoming distressed or insolvent. As a general rule, directors of a solvent company owe fiduciary duties only to its shareholders, and not to its creditors.

A declaration of bankruptcy (insolvency proceeding) may be applied for by the debtor if the debtor has two or more creditors and not have paid at least one debt already past due.

4. What insolvency procedures are available in the jurisdiction? Does management continue to operate the business and/or is the debtor subject to supervision? What roles do the court and other stakeholders play? How long does the process usually take to complete?

A declaration of bankruptcy may be applied for by the debtor, creditor, or by a third party. Bankruptcy is defined as the 'General confiscation of all assets of a bankrupt debtor that will be managed and liquidated by a receiver under the supervision of a supervisory judge'.

The purpose of bankruptcy is for a receiver (*kurator*) to divide up the debtor's wealth among all the creditors concerning each creditor's rights. General confiscation also covers a debtor's wealth outside of Indonesian sovereign territory.

A filing has a very restrictive time limit; it must be approved or denied by the court within 60 days from the date of the filing. The date of the bankruptcy declaration commences at 00.00 local times (zero-hour rule).

Once the Commercial Court has declared the debtor 'bankrupt', the debtor loses the right to manage, and control his assets, and the power to dispose of his property and this power passes to the appointed receiver under the supervision of a supervisory judge. The judge supervises the conduct of the receiver and, for certain of the receiver's actions, must approve.

The length of the liquidation may vary depending on how fast the receiver can liquidate all the debtor's assets.

5. How do creditors and other stakeholders rank on an insolvency of a debtor? Do any stakeholders enjoy particular priority (e.g. employees, pension liabilities)? Could the claims of any class of creditor be subordinated (e.g. equitable subordination)?

Security rights conferred by law are general in nature. They encompass all (unencumbered) assets of a debtor. Conferment by law can be found in Article 1131 of the Indonesian Civil Code (ICC) which states that all assets of a debtor, movable as well as immovable, existing presently as well as in the future, may constitute security for a debtor's debts. All the debtor's creditors have 'pari passu pro rata' rights to such assets. As mentioned in Article 1131 ICC 'The proceeds of the foreclosure of such assets shall be divided "pari passu pro rata parte" amongst his creditors' unless there is a valid reason to give preference to the certain creditor(s). Preference amongst the creditors may arise from preferential rights.

In general, creditors are divided into three main categories; preferred creditors, secured creditors, and unsecured creditors.

The following classes of debt have priority over all unsecured debts

a. the costs and expenses of liquidating the assets incurred by the receiver
b. the receiver's fee
c. creditors who have a preferred right, including those whose priority rights are denied. If the payment above is not sufficient to cover all claims of the preferred creditors, the creditors

will be considered as the unsecured creditors for the remaining debts owned by them.

d. creditors holding pledge, fiduciary security, *hak tanggungan*, hypothec, or other collateral right on assets, as long as they have not yet received payment from the proceeds of the sale of the security will be settled from the proceeds of the sale of properties in which they have a priority right or that were secured as collateral to them.

The tax has preferred right from all debtor's assets. Employees also enjoy a priority of their claims. Unpaid wages/salary will have preferred rights before all secured creditors. As for severance payment will be prioritised over unsecured creditors but not before secured creditors.

All unsecured creditors shall be granted a percentage that is determined by the supervisory judge.

Claims of any class of creditors cannot be subordinated.

6. Can a debtor's pre-insolvency transactions be challenged? If so, by whom, when and on what grounds? What is the effect of a successful challenge and how are the rights of third parties impacted?

Actio Pauliana is a principle that protects the creditor's rights which is an effort by creditors to cancel the debtor's legal acts which may cause losses to the creditor's interest, which were conducted before the declaration of bankruptcy.

A lawsuit for the annulment of the debtor's legal acts may be filed in the court and the annulment will only be implemented if it can be proved that at the time of the performance of the legal acts, the debtor and the party with whom the debtor performed the legal acts were aware or should have been aware that the legal act would adversely affect the creditors.

If the transaction was entered into within a year prior to the bankruptcy declaration and the bankrupt debtor was not required to enter the transaction, both the bankrupt and the counterparty are deemed to have known or should have known that the transaction in question would harm the interest of the creditors.

In a successful challenge, any transaction made must be returned to its original condition before the transaction.

7. What form of stay or moratorium applies in insolvency proceedings against the continuation of legal proceedings or the enforcement of creditors' claims? Does that stay or moratorium have extraterritorial effect? In what circumstances may creditors benefit from any exceptions to such stay or moratorium?

Any legal proceeding claiming for fulfillment from the bankruptcy estates shall be null and void upon declaration of bankruptcy. The declaration of bankruptcy will also affect the enforcement of court judgments against the bankruptcy estates which has proceeded before the declaration of bankruptcy. The enforcement of court judgment must cease immediately.

If enforcement of security has proceeded before the declaration of bankruptcy and the date of the enforcement has been determined, the receiver with permission from the supervisory judge may continue the enforcement of security.

Stay Period

The law as a general rule waives the rights of secured creditors (and any party whose assets are under the control of the bankrupt) to foreclose their security for a period of 90 days from the date of the bankruptcy declaration.

The creditors or any third party may request that the receiver waives or amend the requirements of the 90 days stay period. If the receiver rejects the request, the creditor or the third party may file a petition to the supervisory judge. The creditors or the third party can file an objection (*perlawanan*) to the court. The decision of the court in this regard is final and binding.

8. What restructuring and rescue procedures are available in the jurisdiction, what are the entry requirements and how is a restructuring plan approved and implemented? Does management continue to operate the business and/or is the debtor subject to supervision? What roles do the court and other stakeholders play?

Delay of Payment can be applied for by a debtor who has more than one creditor or by a creditor. The debtor can submit a Delay of Payment Application (DOP Application) of his own will or in response to a filing for bankruptcy

submitted by a creditor.

The debtor in the first hearing of bankruptcy application may submit a DOP Application. The court must then decide on the Delay of Payment prior to the bankruptcy application. Therefore, an application for a Delay of Payment overrides any pending bankruptcy or other court proceedings. The Delay of Payment application is followed by proposing an amicable settlement plan for approval by the unsecured and secured creditors.

If the temporary Delay of Payment has been granted, the court appoints a supervisory judge and one or more Administrators who, jointly with the debtor, will manage the debtor's assets

During a temporary or permanent Delay of Payment:

a. the management of the debtor's business is placed under the supervision of one or more administrators who in turn are supervised by a supervisory judge.
b. if any of the debtor's obligations are met without prior approval from the administrator after the Delay of Payment decision, they can only be charged to the debtor's assets if they benefit the debtor's assets.
c. during the period of the temporary/permanent Delay of Payment, the debtor is relieved from liability to pay his debts.
d. enforcement of creditors' claims secured by pledges, *hak tanggungan*, fiduciary agreements, and other priority rights may not be enforced nor may secured assets attached by the creditors.
e. the proceedings already commenced by the court do not end nor does it preclude the initiation of new proceedings.

As in bankruptcy, the law waives the rights of secured creditors (and any party whose assets are under the control of the bankrupt) to foreclose on their security. As for a Delay of Payment, the stay period is as long as the Delay of Payment period, which can last up to 270 days.

The creditors' meeting must decide whether to approve the amicable settlement plan. The votes needed to approve the amicable settlement plan are:

a. more than 1/2 of the unsecured creditors attending the meeting and holding at least 2/3 of the unsecured debt;
b. more than 1/2 of the creditors whose accounts receivable are encumbered by a pledge, fiduciary agreement, *hak tanggungan,* hypothec, or other collateral rights over property attending the meeting and holding at least 2/3 of the unsecured debt;

If the amicable settlement plan is not approved up to the minimum requirement, then the debtor is declared bankrupt.

9. Can a debtor in restructuring proceedings obtain new financing and are any special priorities afforded to such financing (if available)?

The debtor may obtain new financing with prior approval from the administrator(s) and if the financing requires security, the financing must also be approved by the supervisory judge. There are no priorities for the new financing.

10. Can a restructuring proceeding release claims against non-debtor parties (e.g. guarantees granted by parent entities, claims against directors of the debtor), and, if so, in what circumstances?

No, however, it has been seen in amicable settlement plants which require the release of guarantees.

11. Is it common for creditor committees to be formed in restructuring proceedings and what powers or responsibilities do they have? Are they permitted to retain advisers and, if so, how are they funded?

A creditor committee can be formed by the court if:

a. if the claims are complicated or involve many creditors; or
b. requested by creditors representing at least ½ of all claims accepted.

If the creditor committee is formed, the administrator(s) must ask and consider advice from the committee.

The law is silent on whether the committee is permitted to retain advisers. Even if so, the cost would be borne by the creditors.

12. How are existing contracts treated in restructuring and insolvency processes? Are the parties obliged to continue to perform their obligations? Will termination,

retention of title and set-off provisions in these contracts remain enforceable? Is there any ability for either party to disclaim the contract?

For existing contracts, the contracting parties may ask the receiver(s)/administrator(s) to give certainty whether the contract will continue or be terminated. If the receiver does not respond to the request or decides to terminate the contract, the contracting party may claim damages and will be treated as an unsecured creditor.

However, if the existing contract requires the debtor to deliver goods sold, the contract is automatically terminated since the debtor is declared bankrupt. The contracting party may also claim for damages and will be treated also as an unsecured creditor.

If the contract relates to rent or lease, the receiver or the contracting parties may terminate the rent or lease agreement with a minimum prior notice of 90 days. If rent or lease has been paid upfront, the contract cannot be terminated.

13. What conditions apply to the sale of assets / the entire business in a restructuring or insolvency process? Does the purchaser acquire the assets “free and clear” of claims and liabilities? Can security be released without creditor consent? Is credit bidding permitted? Are pre-packaged sales possible?

Insolvency

The sale of assets by the receivers in insolvency must be done thru a public auction. If the public auction does not succeed after reaching the liquidation value, the receiver may ask for approval from the supervisory judge to sell it thru a private sale. The purchase will acquire the assets free and clear of claims and liabilities. Under the law, the security will be released thru a release decree by the supervisory judges after the listing of distribution of proceeds is accepted. However, in practice, the creditor(s) will release the security after the list of the asset(s) has been sold.

Credit bidding is not acknowledged in Indonesia. However, creditors (limited to the bank(s) may participate in the auction and make a cash bid. Pre-packaged sales are not permitted as receivers must sell it thru public auction.

In a restructuring process, the sale of assets must obtain prior approval from the administrator and if it is being encumbered must also be approved by the creditor holding the security.

14. What duties and liabilities should directors and officers be mindful of when managing a distressed debtor? What are the consequences of breach of duty? Is there any scope for other parties (e.g. director, partner, shareholder, lender) to incur liability for the debts of an insolvent debtor?

Each member of the board of directors will be held personally liable for any company losses if the relevant person is found at fault or negligent in carrying out his duties.

A member of the board of directors cannot be held liable for the loss if he/she can prove that:

a. the loss was not incurred because of his fault or negligence;
b. he/she has managed in good faith and with due care in the company’s best interest and in accordance with the company’s purposes and objectives;
c. he/she has no conflict of interest, either directly or indirectly, in the management action that caused the loss;
d. he/she took measures to prevent the loss from occurring or continuing.

Further, the Company Law regulates that if bankruptcy occurs due to a fault, or the negligence of the board of directors and the company’s bankruptcy assets are inadequate to settle all the company’s liabilities caused by the bankruptcy, then each member of the board of directors shall be held jointly and severally liable for all the outstanding liabilities of the bankruptcy assets

The above liability will also apply to members of the board of directors found to be at fault or negligent who were members of the board of directors for 5 years prior to bankruptcy is declared.

The board of commissioners can also be held liable if bankruptcy is caused by the fault or negligence of the board of commissioners in supervising the management performed by the board of directors.

15. Do restructuring or insolvency proceedings have the effect of releasing

directors and other stakeholders from liability for previous actions and decisions?

Neither restructuring nor insolvency proceedings will release directors and other stakeholders from liability for previous actions or decisions

16. Will a local court recognise foreign restructuring or insolvency proceedings over a local debtor? What is the process and test for achieving such recognition? Does recognition depend on the COMI of the debtor and/or the governing law of the debt to be compromised? Has the UNCITRAL Model Law on Cross Border Insolvency or the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments been adopted or is it under consideration in your country?

No, the Indonesian court will not recognise foreign restructuring or insolvency proceedings.

17. For EU countries only: Have there been any challenges to the recognition of English proceedings in your jurisdiction following the Brexit implementation date? If yes, please provide details.

N/A

18. Can debtors incorporated elsewhere enter into restructuring or insolvency proceedings in the jurisdiction? What are the eligibility requirements? Are there any restrictions?

Yes, if the debtors have business activities in Indonesia.

19. How are groups of companies treated on the restructuring or insolvency of one of more members of that group? Is there scope for cooperation between office holders?

The companies within a group are still treated as individual legal entities and must still file separate restructuring or insolvency applications.

20. Is your country considering adoption of the UNCITRAL Model Law on Enterprise Group Insolvency?

Not that we are aware of.

21. Did your country make any changes to its restructuring or insolvency laws in response to the Covid-19 pandemic? If so, what changes were made, what was/is their effect and were/are they temporary or permanent?

The Indonesian Finance Services Authority has enacted temporary regulations to assist debtors suffering financial fallout from the Covid-19 pandemic.

Commercial Courts are also more likely to reject a bankruptcy petition compared to restructuring proceedings and the court would prefer debtors to maximise the restructuring process.

22. Are there any proposed or upcoming changes to the restructuring / insolvency regime in your country?

The last changes to the restructuring/insolvency regime were in 2004. Since then, there had been discussion at the Ministry level proposing an amendment to the law. However, like in recent years, these discussions to amend the law faded away.

23. Is it a debtor or creditor friendly jurisdiction?

The law emphasises the rights of creditors over debtors and as such can be seen as a creditor-friendly jurisdiction. Whilst there are some limitations on the options that might otherwise be available to distressed companies and some inflexibility in certain of the tools available to insolvency practitioners, Indonesia's insolvency regime is, for the most part, primarily focused on protecting the rights and interests of creditors over the interests of debtors.

Creditors are active participants in all insolvency processes in Indonesia. They can enforce their rights in each process, whilst there are some timing limitations placed on their enforcement rights over secured assets.

Secured creditors and employees enjoy a statutory priority in the distribution of assets. Unlike secured creditors, unsecured creditors are given no legal right to

priority.

24. Do sociopolitical factors give additional influence to certain stakeholders in restructurings or insolvencies in the jurisdiction (e.g. pressure around employees or pensions)? What role does the state play in relation to a distressed business (e.g. availability of state support)?

There is very little state involvement or government intervention for distressed businesses.

25. What are the greatest barriers to efficient and effective restructurings and insolvencies in the jurisdiction? Are there any proposals for reform to counter any such barriers?

There are still many agencies that do not understand the bankruptcy process.

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