The Asia-Pacific Restructuring Review 2019

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The Asia-Pacific Restructuring Review 2019

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The Asia-Pacific Restructuring Review 2019

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Global Restructuring Review is a leading source of news and insight on cross-border restructuring and insolvency law and practice, read by international lawyers, insolvency practitioners and accountants, judges, corporate counsel, investors and academics.

We deliver on-point daily news, surveys, and features which gives our subscribers the most readable explanation of all the cross-border developments that matter allowing them they to stay on top of their game (even more so than they already are).

In the past couple of years, we have published exclusive interviews with bankruptcy judges around the world, unearthed nuggets from court hearings other services missed, released several original surveys, including on what it's like for female professionals working in restructuring, and features including a look at the retail sector and a retrospective on the 10-year anniversary of Lehman Brothers. Our newly-introduced *Worked Out* series, profiling key jurisdictions around the world, has so far published popular and well-read profiles of Singapore, Ukraine and Delaware, with profiles on the Cayman Islands, Hong Kong and China still to come. Our book-length *Art of the Ad Hoc* gathers the wisdom and perspectives of some of the leading practitioners in this area.

Complementing our news coverage, *The Asia – Pacific Restructuring Review* provides exclusive insight, direct from pre-eminent practitioners. *The Review* gathers the expertise of 24 different leading figures from 11 different firms in 10 different jurisdictions. Contributors are vetted for international standing and knowledge of complex issues before being approached.

In this volume our experts in Singapore take a look at the key developments and unresolved issues following the significant amendments to the Companies Act across two chapters, firstly one providing a brief overview of the changes to Singapore's restructuring regime with discussion of the key restructurings that took place since the new regime came into force, in particular, those that took advantage of the enhancements such as "pre-pack" schemes, super priority rescue financing, and court-ordered moratoriums. Our second chapter focusing on Singapore provides an overview of its cross-border insolvency laws.

One note to our readers is that the Singapore section was written before the new omnibus insolvency bill was tabled before Singapore's parliament on 10 September. The bill consolidates Singapore's insolvency regimes into a single statue, mandates qualifications and disciplinary rules for insolvency practitioners and restricts the use of ipso facto clauses in restructurings. The bill is expected to pass into law in time for the next edition.

Global Restructuring Review named India the most improved jurisdiction at our annual awards this year and it has been described in this edition as a jurisdiction 'in the process of laying the foundations of a mature market economy'. Our expert considers the amendments made to the Insolvency and Bankruptcy Code since its enactment and implementation.

In China, our experts consider the notice of the Supreme People's Court on issuing the minutes of the national court work conference on bankruptcy trails, which is considered the most important update to the legal practice of bankruptcy law in recent years. Particular consideration is given to the major aspects of the meeting minutes, selection of bankruptcy administrators, detailed rules on reorganisation, substantive consolidation and cross-border bankruptcy.

This edition also provides an overview of the Insolvency Reform Act in Australia, with case analysis on landmark cases including Bis Industries which was the largest restructuring of 2017 in the Australian market. Additionally, our expert panel consider the criticisms of the Indonesian restructuring legislation and provide jurisdictional updates in Japan, Malaysia, Korea and the Cayman Islands.

The Review is annual and will expand each edition. If you have a suggestion for a topic to cover or would just like to find out how to contribute please contact Mahnaz.Arta@globalrestructuringreview.com.

GRR would like to thank all our contributors for their time and effort.

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Indonesia

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After its enactment in 2004, Indonesian's Bankruptcy Code[1] quickly became a promising means for foreign lenders to enforce their security rights by levelling the playing field with Indonesian debtors. However, it is no secret that what is written in the law does not always translate well into practice. Consequently, the bankruptcy and debt moratorium process has been questioned, predominantly by these same lenders.

Common criticism of the application of the Bankruptcy Code concerns three issues:

- transparency of the process;
- inconsistent application; and
- lack of detail in the Code itself, leading to a variety of interpretations.

For a common law lawyer, the latter two issues can be both problematic and challenging, as Indonesian law does not recognise binding precedents, meaning that each court is able to decide independently.

Key features of Bankruptcy Code

The Bankruptcy Code introduced a choice of two processes for a court-driven restructuring – bankruptcy and suspension of debt repayment (known by its Indonesian initials as PKPU[2]). Each process has its own key features, set out in the accompanying table to this article.

On the face of it, the Bankruptcy Code seems to offer a straightforward set of requirements for filing a bankruptcy or PKPU petition. A creditor (or debtor) may file a petition simply by evidencing:

- the existence of at least two creditors; and
- either one due and payable debt (for a bankruptcy petition) or if the creditor or debtor can predict that the debtor cannot pay the debt (for a PKPU petition).

If these two conditions are met, technically that is sufficient for the court to grant a bankruptcy or PKPU decision. Comparing the amount of time involved in a bankruptcy and PKPU process with the challenging landscape of Indonesian commercial litigation and enforcement, it is easy to understand why, at face value, bankruptcy and PKPU are favoured by most industry practitioners.

Bankruptcy

Following a bankruptcy decision, the company's assets – technically also including any assets located overseas – are placed under general attachment for the benefit of all creditors. The company also comes under the management of the bankruptcy receiver, who will work closely with the company management in its day-to-day business.

During bankruptcy, a debtor is still permitted to propose a restructuring plan to its creditors since the debtor's assets are not yet declared insolvent. If the restructuring plan is approved by a majority of unsecured creditors, the bankruptcy status will be revoked and the company's management will return to business as usual.

The bankruptcy estate will be declared insolvent if any of the following occurs:

- the debtor company does not propose a restructuring plan;
- the debtor company proposes a restructuring plan but this is not approved by a majority of unsecured creditors; or
- the restructuring plan is approved by a majority of unsecured creditors but is not ratified by the court.

A moratorium is applied from the date of the bankruptcy decision, with creditors required to submit their claims through the bankruptcy verification process managed by the receiver. For 90 days after the bankruptcy decision, secured creditors are prohibited from undertaking any enforcement action against the assets. Specific leave can, however, be granted by the receiver to allow a secured creditor to initiate early enforcement. If specific leave is granted, then the secured creditor must initiate enforcement no later than two months after the stay period ends, failing which the receiver may undertake enforcement on behalf of the secured creditor.

PKPU

A PKPU decision protects the debtor from any enforcement action by secured creditors for the entire PKPU period, which can last up to 270 days. During the PKPU process, the business will operate as usual, except for a prohibition on acquiring new debts or granting security over the debtor's assets.

Similar to the bankruptcy receiver, a PKPU administrator has authority to accept or reject claims made by creditors. In principle, a claim not submitted to the PKPU administrator during the prescribed PKPU process still exists, although it should be noted that unsecured creditors whose claims are not submitted during the bankruptcy and PKPU process are bound by the terms of the restructuring plan.

Challenges

As mentioned earlier, two of the most frequent criticisms of the bankruptcy and PKPU process are lack of transparency and inconsistency in the application of the Bankruptcy Code.

Concerns have been raised over the potential for spurious claims to be made by bogus creditors in an effort to reduce the voting leverage of unsecured creditors. Responsibility for ensuring the credibility and legality of claims rests with the appointed receiver or administrator, and concerns tend to grow if there is doubt over their impartiality.

Creditors (especially foreign creditors) often feel they have no option but to follow the restructuring plan being proposed. And it is no different for secured creditors. Under the Bankruptcy Code, a secured creditor that opposes a restructuring plan is entitled to compensation. The amount of compensation will be the lower of:

- the value of the security; or
- the value of the loan secured.

However, the Bankruptcy Code contains no guidance on how or when this compensation should be paid to dissenting secured creditors. The likelihood of a dissenting secured creditor succeeding in obtaining

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compensation from a debtor is not known, as it is usually settled or litigated privately and not generally made public.

It is common for creditors to believe they are unable to abandon the PKPU process once they have registered their claims. Most foreign secured lenders believe that they must use their voting rights to vote either for or against the restructuring plan. However, a possible third option is to not attend the voting meeting and instead seek to enforce the security once the PKPU process has concluded. This third option is almost never considered, primarily through fear of the unknown.

Inconsistent application of the Bankruptcy Code can also be problematic. For instance, a common understanding among practitioners is that based on the Bankruptcy Code, a voluntary PKPU filing would take precedence over an involuntary PKPU filing. This view is based on comparing how long it takes for a court to issue a PKPU decision when a debtor files (three days) compared with when a creditor files (20 days). In the past, that was also how the provision was implemented. Yet in a recent ruling, the court rejected a debtor's filing because another filing had already been made by the creditors.

Such inconsistent behaviour by the court arises from a lack of binding precedents under Indonesian law. In practice, a lower court may make a ruling that differs from a higher court's ruling, and it may even differ to the same court's rulings in past cases.

Such lack of clarity and inconsistency apply not only to court findings but also to how the bankruptcy and PKPU process is carried out in practice. While there is no express restriction preventing a company from entering a second PKPU, the Bankruptcy Code expressly states that if a debtor breaches the approved restructuring agreement, the creditor may then petition the court to annul the restructuring agreement and declare the debtor bankrupt. In one case, the court granted a second PKPU petition, immediately following the first PKPU of the debtor, rather than ordering annulment of the restructuring agreement and declaring the company bankrupt. While the legal arguments in that court decision were unclear, it is not uncommon for a decision to have only minimal legal considerations.

Proposed changes

Over the past few years there have been several discussions on amending the Bankruptcy Code. The idea of amending the present Bankruptcy Code was initiated by parties that consider the Bankruptcy Code to be overly friendly to creditors – potentially subjecting solvent debtors to an unnecessary bankruptcy or PKPU process. However, parties that have been subject to Indonesian court-driven restructurings may well hold the opposite view.

The discussion on the key provisions of the proposed law concerns the removal of the right of secured creditors to file for bankruptcy or petition for PKPU. One current proposal would restrict the right to file a bankruptcy petition to unsecured creditors, while only the debtor could petition for PKPU. Another proposal would introduce an insolvency test prior to submitting the petition to court. While it is still not decided whether such an insolvency test would be based on the book value or cash flow of the company, there is growing concern about whether it is possible in practice to obtain the financial statements of a private company when debtor and creditor are in conflict.

With the changes that are currently being proposed, the only practical option for secured creditors would be to enforce the security. Enforcement in Indonesia has its own challenges and is difficult to resolve given many issues on the ground. The proposed amendment of the Bankruptcy Code to make it more debtor-friendly has understandably increased the concerns of foreign lenders. It would be unattractive for foreign lenders to have only one option in a foreign jurisdiction – ie, to enforce the security.

The potential impact on Indonesia's foreign investment climate is not yet known. Although Indonesia remains an attractive jurisdiction economically, such a change to the Bankruptcy Code is bound to be considered carefully by foreign investors and lenders.

Item	Bankruptcy	Suspension of Debt Repayment (PKPU)
Party initiating petition	Debtor (voluntary) or creditors (involuntary)	Debtor (voluntary) or creditors (involuntary)
Requirements	Debtor has two or more creditors; and debtor fails to pay at least one due and payable debt	Debtor has two or more creditors; and debtor is unable, or predicted to be unable, to continue servicing its due and payable debts
Insolvency test	Not required	Not required
Court process	60 days in the first court	Three days for voluntary PKPU filing, 20 days for involuntary PKPU filing
Effect of decision	Subject to appeal to Supreme Court, although that will not stay a bankruptcy process granted by the first court	Final and binding decision, subject to civil review by the Supreme Court as an extraordinary course of action
Duration	Indefinite	45 days for the first phase (Temporary PKPU), extendable by up to 225 days if approved by the majority of the shareholders (Permanent PKPU)
Clawback	Available	Not available
Management of process	Bankruptcy receiver	PKPU administrator
Enforcement of security	Stayed for a maximum of 90 days, but this period can be terminated earlier by the bankruptcy receiver, supervising judge, or court	Stayed throughout the PKPU period
Majority voting to pass a resolution or composition plan	More than half of unsecured creditors in number, representing at least two-thirds of unsecured creditors in value	More than half of unsecured creditors in number, representing at least two-thirds of unsecured creditors in value; and, more than half of secured creditors in number, representing at least two-thirds of secured creditors by value

Notes

1 Law No. 37 of 2004 regarding Bankruptcy and Suspension of Debt Payment Obligations.

2 *Penundaan Kewajiban Pembayaran Utang* or Suspension of Debt Payment Obligations, which is similar to Chapter 11 of the US Bankruptcy Code; while the bankruptcy process is similar to Chapter 7.

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Debby Sulaiman is a partner of Hiswara Bunjamin & Tandjung's dispute resolution and restructuring, turnaround and insolvency practices. Debby's practice focuses on complex high-value disputes, and she also has particular expertise in restructuring, work-outs and corporate insolvency, having acted for international clients in a number of high-profile bankruptcy and restructuring cases in Indonesia.

Debby trained with Hiswara Bunjamin & Tandjung in Jakarta and in the London office of associated firm Herbert Smith Freehills in her early years of practice. She has extensive first-hand experience of representing and handling transnational and complex commercial disputes before Indonesian courts, as well as in domestic and international arbitration.

Debby not only advises clients on contentious matters, she also provides strategic advice and dispute avoidance tactics, given her experience with distressed markets. Her experience also includes antitrust and anti-monopoly disputes, construction disputes, and regulatory and compliance issues.

Debby was a partner at two other Indonesian firms with international tie-ups before returning to Hiswara Bunjamin & Tandjung in August 2017.

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Hiswara Bunjamin & Tandjung is one of the leading commercial and corporate law firms in Indonesia, specialising in protection of foreign investor interests in both transactions and contentious situations. The firm is consistently ranked top tier in major legal directories in its core practice areas of infrastructure, energy and natural resources, corporate and M&A, project finance, and disputes.

We provide high-quality, innovative legal services of an international standard based on informed and commercially relevant local knowledge. Our client base includes some of the largest multinational corporations and financial institutions. In recent years we have acted on many of the largest transactions in Indonesia, including privatisations, mergers and acquisitions, corporate and debt restructurings.

Our Indonesian disputes practice has been ranked top tier by *Asia Pacific Legal 500* for the last seven years (2012–2018). We were named Indonesian Law Firm of the Year by *Chambers Asia-Pacific* in 2016, and Indonesian Arbitration Law Firm of the Year and Litigation Law Firm of the Year by *Asian Legal Business* in 2017.

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