Newsflash

Foreign investors pledge support amidst economic crisis

Despite the global economic downturn, around 40 leaders of foreign chambers of commerce and industry have pledged to continue investing in Indonesia, or even expand their businesses in Indonesia. The chairman of the International Business Chamber said that investors had promised to expand business operations and work together to weather the global economic crisis since, in terms of business potential, many feel Indonesia has great unlocked value. A similar statement also came from the vice president of the Jakarta Japan Club and chief executive officer of Marubeni Indonesia, Komuro Seiji. He stated that Japanese investors would maintain and also expand their business activities in Indonesia.

Nevertheless, investors have requested that the government improve the business and investment climate, especially in terms of the consistency and transparency of regulations. They generally criticize the fact that many regulations made by the central government clash with those made by regional administrations, and there seem to be inconsistencies in regulations made by different government institutions. In this regard, the Indonesian Trade Minister, Mari Elka Pangestu, countered that the government is committed to responding to this issue. She said that the government is currently seeking to solve ambiguities in a presidential regulation that governs the businesses that are open and closed to foreign investment. The list is provided under the 2007 Law on Investment and details a total of 338 business sectors, including 69 sectors that would be more open than before and 11 sectors which involve national interests becoming more restrictive. MF

CSR remains mandatory for firms, court rules

After a thorough judicial review, it has been decided that Corporate Social Responsibility (CSR), as stipulated in Article 74 of the 2007 Law on Limited Liabilities Companies, is not un-constitutional and remains in the statute. The Constitutional Court upheld a provision which sets out such programs which, some believe, are contrary to the interests of the business community.

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The Judges said it was important to make CSR mandatory as a way of obliging companies to take part in rolling back environmental damage.

However, it has been argued that CSR programs should be voluntary, depending on the size of the firms and in which sectors they operate, instead of mandatory. By making it compulsory, businesses fear it will not only serve as a further burden on firms, but will also create legal uncertainty caused by overlapping regulations, as there are other laws already regulating CSR; all this goes without mentioning the increased potential for corruption.

The plaintiffs, consisting of the Indonesian Chambers of Commerce and Industry (Kadin), the Indonesian Women's Business Association (Iwapi) and the Indonesian Young Entrepreneurs Association (Hipmi), expressed their disappointment with the court's decision. "The law is in contradiction with the spirit of inviting foreign and domestic investment, and disrupts small companies' performance and expansion programs," said Hipmi chairman Erwin Aksa. "The sanctions imposed on companies that fail to comply with the law will discourage people from doing business here."

Kadin Vice Chairman Hariyadi B. Sukamdani said mandatory CSR contradicted the very spirit of the CSR principle itself. "Other countries define CSR as a company's voluntary commitment. Indonesia is the only country that obliges CSR," he said. While the court's decision is final and binding, he said he would continue to fight on. "The law needs a government regulation before it is effective. We will try to propose a more reasonable government regulation," he said. We should add, however, that the Company Law leaves the enforcement provisions to other laws. In addition, the Company Law clause only applies to companies in natural resource extraction or utilization.

APK

MKK Announcement

MKK is proud to welcome (left to right) Amanda Prinka, Eddy Prabowo and Mohammad Farhan to help deal with its expanding portfolio of clients.



Indonesian insolvency and court-supervised restructuring Part 2

by Karl S. Park and Sandi Adila

II. FORMAL RESTRUCTURING PROCEEDINGS

There are two formal restructuring options, namely (1) SoP and (2) Composition in Bankruptcy ("**CIB**"). "). The purpose

underlying restructuring is the same for SoP and CIB, that is to give the debtor who is, or expects to be, unable to pay its due and payable debts, a chance to present a composition plan that includes an offer to pay all or part of its debts to unsecured creditors. A composition plan, if approved by the creditors (both secured and unsecured creditors under SoP, but only unsecured creditors under CIB), permits the debtor to reorganize and carry on its business pursuant to terms and conditions agreed to by its creditors.

For SoP, the debtor may submit a composition plan any time before the declaration of bankruptcy, regardless of whether there is any pending bankruptcy petition. For CIB, the debtor may submit a composition plan only after a declaration of bankruptcy has been issued but before it becomes a final and binding judgment. However, CIB is not available to the debtor where bankruptcy has been declared because of a prior failed SoP. The underlying policy is to deny the debtor more than one chance to enter into a settlement with its creditors.

A. SoP: Composition before Declaration of Bankruptcy

SoP provides the debtor with relief from creditors by means of a moratorium during which a debtor and its creditors attempt to agree upon a composition plan to restructure the debtor's outstanding debts. The debtor or any of its creditors (provided it has more than one creditor) may apply for SoP at any time before the declaration of bankruptcy (except if the debtor is a bank, insurance company or one of other specified financial services institutions, in which case only the relevant regulatory authority may so apply). Often, in practice, a debtor will file a SoP application to prevent declaration of bankruptcy under a previously filed bankruptcy petition and to provide additional time to consider and/or attempt restructuring.

The debtor may attach a composition plan to the SoP application at the time of filing or propose one after filing. The filing of a SoP application automatically defers consideration of any pre-existing bankruptcy petition

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relating to the same debtor if the SoP application has been submitted by the First Bankruptcy Hearing date. In case the SoP application has been filed in the absence of any bankruptcy petition, any subsequent bankruptcy petition filing will be barred until the SoP process has been completed.

After a SoP application is filed, the Court will (1) grant a TSoP, (2) appoint a supervisory judge and an administrator, (3) set a date for a creditors meeting regarding the SoP ("**First SoP Creditors Meeting**", which must occur within 45 days of the filing), and (4) through the administrator, summon the debtor and publicly announce the Court's granting of the TSoP and invite its known creditors to appear for the First SoP Creditors Meeting. The administrator and the debtor are jointly responsible for managing, and disposing of, the debtor's assets; during SoP proceedings, the debtor cannot take any action in this regard without the administrator's approval.

The Court must also appoint a creditor's committee if (a) the case involves debts of a complex nature or numerous creditors, or (b) the Court is so requested by unsecured creditors representing at least half of all acknowledged claims. In the course of performing its tasks, the administrator is required to ask for, and consider, the advice of the creditors' committee. The TSoP continues until the date of the First SoP Creditors Meeting. If the debtor fails to appear at the First SoP Creditors Meeting, the debtor is declared bankrupt. At the First SoP Creditors Meeting, if a composition plan has already been proposed, the creditors may vote on whether to approve it. If a composition plan has not yet been proposed, the creditors may vote on whether to grant the debtor a Definitive SoP ("**DSoP**") for up to 270 days from the date of the granting of the TSoP, with the intent that at a later hearing the creditors will vote on whether to approve a composition plan. If neither a composition plan nor a DSoP is approved by a SoP Required Majority (defined below), the debtor will be declared bankrupt. Such declaration of bankruptcy decision arising from an unsuccessful SoP is a final and binding decision and shall not be subject to review by cassation or civil review.

The SoP Required Majority for approving a composition plan or instituting a DSoP is as follows:

(1) *For unsecured creditors*: approval of more than half of those unsecured creditors whose claims are acknowledged or provisionally acknowledged present or represented at the hearing representing not less than 2/3 of all acknowledged or provisionally acknowledged claims of unsecured creditors present or represented at the hearing; and

(2) *For secured creditors*: approval of more than half of those secured creditors present or represented at the hearing representing not less than 2/3 of all secured claims of secured creditors present or represented at the hearing.

Separate approval from both unsecured and secured creditors is required. One major difference between the current BRL and the former law, Law No. 4 of 1998 regarding Bankruptcy, is that the BRL entitles both secured and unsecured creditors to vote on whether to approve the composition plan, and otherwise

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participate, in SoP proceedings, whereas under the 1998 law, only unsecured creditors were entitled to so vote and participate.

There is a stay on enforcement of security and the rights of third parties to claim assets under the possession or control of the debtor or curator throughout the duration of any TSoP and/or DSoP. However, if the outcome of SoP proceedings is declaration of bankruptcy, then the State of Insolvency immediately ensues and there will be no stay on enforcement of security under such circumstances. Secured creditors will be required to start to enforce their security within 2 months of the declaration of bankruptcy.

A duly approved composition plan is still subject to Court ratification. If the Court refuses to ratify the approved composition plan, then the debtor will be declared bankrupt. If the approved composition plan is duly ratified, it is binding on all creditors except those secured creditors that refused to approve it, and the SoP (whether TSoP or DSoP) is terminated. Such termination ends the stay on enforcement of security and enables secured creditors to freely enforce their security rights, provided that secured creditors who approved the composition plan are subject to any of its terms which may relate to enforcement of security. Disapproving secured creditors are entitled to compensation, the amount of which is the lower of their security's value and their secured claim amount.

The BRL also contains provisions for terminating the SoP process at the initiative of the Court, supervisory judge or one or more creditors under certain circumstances. Court termination of the SoP process results in the debtor being declared bankrupt with no further right to review by cassation or civil review.

B. CIB: Composition after Declaration of Bankruptcy

Under CIB proceedings, the debtor may submit a composition plan to unsecured creditors only after a declaration of bankruptcy has been issued. This option is not available to the debtor where bankruptcy has been declared because of a prior failed SoP in respect of the same debtor.

A debtor that intends to pursue a CIB must, no later than 8 days before the Verification Meeting, present a draft composition plan to its creditors (secured and unsecured) and to each member of the TCC, and make such draft composition plan available for public inspection. The curator and the TCC must give a written opinion regarding the draft composition plan at the Verification Meeting.

Secured creditors are not eligible to vote on approval of the composition plan submitted in CIB proceedings, unless they first surrender their security rights; in such case, they will be deemed as unsecured creditors regardless of whether or not the composition plan is ultimately approved.

A composition plan in bankruptcy requires approval of more than 1/2 of the unsecured creditors (whose claims have been acknowledged or provisionally acknowledged) present or represented at a creditors meeting ("**First Meeting**")

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representing at least 2/3 of the total claims acknowledged or provisionally acknowledged of unsecured creditors present or represented at such meeting ("**CIB 1 Required Majority**"). If the composition plan is not approved at the First Meeting, but is approved by more than half the unsecured creditors present or represented thereat representing at least half of the total claims of unsecured creditors present or represented thereat ("**CIB 2 Required Majority**"), then a second vote at a subsequent creditors' meeting ("**Second Meeting**", separate notice of which is not required) must be held within 8 days of the First Meeting.

If approved by the CIB 1 Required Majority at the First Meeting or the CIB 2 Required Majority at the Second Meeting, the composition plan is still subject to ratification by the Court. The Court must reject ratification if (a) debtor's assets considerably exceed the total settlement amount stipulated in the composition plan; (b) implementation of the composition plan is not guaranteed; or (c) the composition plan is based on fraud or conspiracy involving one or more creditors, the use of unfair means, whether or not with the complicity of the bankrupt debtor. If the Court refuses to ratify the composition plan, the debtor cannot propose any other composition plan.

If the Court refuses to ratify the composition plan, the debtor and the unsecured creditors who approved the composition plan are each entitled to file an application for cassation.

If the Court ratifies the composition plan, the following parties may request review by cassation:

(a) unsecured creditors that either rejected the composition plan or were absent from the meeting where voting to approve the composition plan occurred; and

(b) unsecured creditors that approved the composition plan later discovered to have been based on fraud or conspiracy.

In any case, filing for cassation must be done within 8 days of the Court's decision.

If the composition plan is approved and ratified, and the ratification has become final and binding, the composition plan becomes binding on all unsecured creditors (but is not binding on secured creditors) and bankruptcy proceedings are terminated, thereby ending the stay on enforcement of security and enabling secured creditors to freely enforce their security rights.

If the bankrupt debtor fails to proffer a composition plan to the unsecured creditors by or before the Verification Meeting, the State of Insolvency is deemed to have commenced. Similarly, if the composition plan is so proffered but is either rejected or approved but not ratified by the Court, subject to the debtor's and/or approving unsecured creditors' rights to review by cassation against the Court's refusal to ratify the composition plan, the State of Insolvency is deemed to have commenced.

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The significance of the commencement of the State of Insolvency is that it ends the stay on enforcement of security, enabling the secured creditors to freely enforce their security rights, and triggers the creditors' entitlement to effect a forced liquidation of the bankruptcy estate's assets. The date of the State of Insolvency is also significant because the 2-month period within which the secured creditor is required to start enforcement of its security rights begins to run as of such date. In forced liquidation proceedings, the curator liquidates the bankruptcy estate's assets under the supervision of the supervisory judge. Proceeds from the liquidation are to be distributed among the creditors in accordance with the respective priorities of their claims.

The information and opinions contained in this article are not meant to be a comprehensive analysis of the indicated subject matter and should not be relied upon or treated as a substitute for specific advice concerning particular factual situations. This article is written on the basis of applicable Indonesian law and practice as of February 5, 2009.

Indonesia's Position Paper at the Second G20 Summit on Financial Markets and the World Economy

by Elaine Kohar

The second G20 Summit on Financial Markets and the World Economy was recently held. The summit, which took place in London, was attended by G20 members—that is, the Group of Twenty Finance Ministers and Central Bank Governors—as well as various regional international organizations. Indonesia, as a member of the Group of Twenty, presented its position paper, which comprises three sections: background to the crisis, short-term policies and finally long-term policies.

In the background section, it states that the economic crisis of 1997/1998 triggered awareness of the need to maintain national as well as global financial stability. During the crisis, financial instability was so severe that there was a marked loss of confidence on the part of the public; this ultimately led to a run on bank deposits and a significant drop in GDP. As the cost of letting such a crisis take place clearly exceeds the cost of preventing it, Indonesia expresses its commitment to use all economic and financial tools at its disposal to ensure the stability and proper functioning of the financial markets.

The next section on Indonesia's position paper is its short-term economic policies. Nationally, Indonesia intends to support its private sector during the time of crisis so as to prevent the collapse

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of international trade; this will be done by improving the effectiveness of guarantee facilities, providing direct or bridging financing, and coming up with incentives to promote foreign investment. Internationally, the country intends to support G20's macroeconomic coordination and efforts to ensure liquidity in the international markets. The latter includes extending the regional and bilateral swap lines between central banks so as to boost the markets' confidence. In addition, it also urges that there be an expansion in the membership of the Financial Stability Forum and other standard setting bodies, and that the International Financial Institutions (IFIs), including the IMF and Multilateral development Banks, to ensure that they have adequate capital in their reserves. The latter is important so that these IFIs may address the current economic crisis more effectively. Finally, Indonesia will also undertake to: (i) support the finances of other developing countries so that they may pursue counter-cyclical policies and mitigate the effect of the current economic downturn, and (ii) assist in the development of poor countries by strengthening the current knowledge-sharing process and, possibly, by increasing the amount of grants and other front-loaded disbursements that are provided to these countries.

The last section of Indonesia's position paper deals with the country's long-term economic policies. One of these is governance reform on multilateral institutions so that they may play a more responsive and proactive role in preventing or mitigating the effect of the global economic crises. This can be done by strengthening the institutions' management accountability. One of the ways to achieve this is by increasing the quality of their high-end executive managers, for example, by heightening the criteria for their selection and conducting the selection process in an open and transparent manner. Another one of its long-term economic policies is to improve the economic growth of Asia, for example, by drawing upon the abundant and productive workforce of these countries to supply the world with affordable goods. Finally, it urges Asian countries to closely coordinate their macroeconomic policies.