

SUSPENSION OF PAYMENT POST-PANDEMIC IN INDONESIA: IS IT SAVING THE UNDERTAKINGS?

KUKUH LEKSONO SUMINARING ADITYA¹, WIDHAYANI DIAN PAWESTRI², M. HADI SHUBHAN³,
TRISADINI PRASASTINAH USANTI⁴

Faculty of Law, Universitas Airlangga, Indonesia¹

Faculty of Law, Universitas Airlangga, Indonesia²

Faculty of Law, Universitas Airlangga, Indonesia³

Faculty of Law, Universitas Airlangga, Indonesia⁴

Abstract *The Covid-19 pandemic that hit the whole world had a serious impact on the business climate in Indonesia. Many companies experience cash flow disruptions so that they cannot settle their obligations to their creditors. In Indonesia, suspension of payment basically is an instrument for reconciling debtors upon their obligations to creditors. It was recorded that in March 2020, when Indonesia declared a pandemic emergency status, there was a 42% increase in the application for Suspension of payment at the Central Jakarta Commercial Court. Business actors naturally avoid the bankruptcy process because the impact on their companies will be much more detrimental. This paper attempts to analyze whether the suspension of payment can save the business actors from bankruptcy. Using a normative and conceptual juridical approach, this paper explains that suspension of payment can also be a double-edge sword if the debtor cannot propose a good reconciliation to his creditors.*

Keywords: *Bankruptcy, Suspension of Payment, Commercial, Reconciliation;*

INTRODUCTION

Covid-19 caused a serious impact in people's health life and business globally. In Indonesia, the businesses related to the production and service have been severely affected by the pandemic.¹ Thus, lots of businesses were unable to pay their debts during the pandemic period and, then, the debt-claiming procedures that are regulated by Law Number 37 Years 2004 Concerning Bankruptcy and Suspension of Payment (hereinafter; Indonesian Bankruptcy Law) was commonly used. These debt-claiming procedures, however, are often considered too repressive in their application. For example, in the situation where a debtor has at least two creditors where one of these debts is due, and when this debt is claimable and has not been paid in full, the bankruptcy potential risk will certainly be very high.

The requirements for filling a bankruptcy or suspension of payment petition are repressive in nature because of the *prima facie* evidence of the debt existence that is provided by Article 8 (4) Indonesian Bankruptcy Law. In other words, this means that a debtor does not necessarily need to be in an insolvent state to be declared bankrupt.

Before the enactment of the 2004 Bankruptcy Law, bankruptcy or suspension of payment in Indonesia were quite difficult to be declared. Based on Article 1 of Law Number 4 Years 1998, "if it seems... that the debtor's condition is as he has stopped making payments. So that the judges previously found that if the debtor has paid even a small fraction of the agreed payment could not be declared bankrupt."²

The repressive character of the bankruptcy procedure in Indonesia is counter-balanced by the existence of a suspension of the payment. However, most law enforcers are skeptical about the effect of this counterbalance, mostly because when the suspension of payment fails, the debtor will

¹ Sri Wahyuni and Novita Ikasari, 'Unveiling The Impact of Covid-19 And The Policy Implications On Unveiling The Impact of Covid-19 And The Policy Implications On Indonesian Small Businesses: Where Do They Hurt The Most? Indonesian Small Businesses: Where Do They Hurt The Most?' (2022) 29 1, 51 <<https://scholarhub.ui.ac.id/jbb/vol29/iss1/5>> accessed 29 September 2023.

² Subianta Mandala, 'INDONESIAN BANKRUPTCY LAW: AN UPDATE' [2006] Legal & Institutional Reforms of Asian Insolvency Systems <<https://www.oecd.org/indonesia/38184160.pdf>> accessed 27 July 2021.



immediately be declared bankrupt and is then automatically in a state of insolvency. In the the business sector, it must be noted that bankruptcy is usually avoided at all costs, mostly because this would simply mean the end of their business.

Interestingly, in many bankruptcy cases, the debtor's assets are far greater than his or her liabilities. For example, Telkomsel, one of Indonesia's largest telecommunications companies, declared bankruptcy in the context where its debt was for the amount of \$557,601 even though its assets was more than \$6.5 Billion.³ Telkomsel is still doing business, contrary to many businesses that must stop their activities because of a bankruptcy.

Pursuant to Article 222(2) of the current Indonesian Bankruptcy Law, debtors who foresee that they will not be able to pay for their financial obligations use the suspension of payment to save their business. However, the Indonesian Bankruptcy Law implicitly states that it could not be guaranteed that the debtor will not be declared bankrupt even though the starting petition or procedure is a suspension of payment, since the failure of the suspension of payment result is bankruptcy declaration.

One of the important issues that concerns the application of the Indonesian Bankruptcy Law is to the question of whether a suspension of payment could, in fact, really help debtors being saved from bankruptcy, especially in the context of the time that followed the last pandemic period.

This paper analyzes the application of some of the legal standards that apply to bankruptcy law in Indonesia. More specifically, the authors examine the suspension of the payment process, including most of its legal and factual consequences.

DOCTRINAL RELEVANT FINDINGS

Hatchondo studied an equilibrium sovereign default model, in which the government issues COCOs (contingent convertible bonds) and stipulates that when the government loses market access, debt repayment is suspended.⁴ Their research found that when payment suspensions are triggered by local shocks and are accompanied by conditions, and when COCOs and fiscal rules complement each other, COCOs are more likely to mitigate sovereign risks and generate welfare benefits. Their paper also found that a reanalysis of using a haircut⁵ to supplement debt payments may be the best option.

Hart proposes the idea that law is the combination of primary rules and secondary rules.⁶ In detail, Summers stated that Hart's concepts primary rule which is the rule of obligation, and secondary rule that rules specifying criteria for identification of valid rules of the legal system, rules empowering legislators and courts to legislate and adjudicate, and rules specifying sanctions.⁷ It means that the enactment of the Indonesian Bankruptcy Law is based on the standard of living in the society (primary rule) that debt has to be paid and no one shall bear any loss from another conduct. It is linear with the essence of Indonesian Civil Code.

The findings above will be a basis to analyze the economic situation in Indonesia. Are there any possibilities to achieve welfare benefits through the suspension of payment upon pandemic period? Compared to the Netherland, Declercq stated that suspension of payment "can be a viable tool for a cross-border restructuring of distressed debt." The attitude of courts and practitioners in the Netherlands is one of accommodating, as much as possible, cross-border restructurings in the Netherlands using existing Netherlands insolvency law and applying it with flexibility and creativity.⁸

³ Enricko Lukman, 'Telkomsel Declared Bankrupt!' (14 September 2012) <<https://www.techinasia.com/telkomsel-bankrupt>> accessed 27 July 2021.

⁴ J Hatchondo and others, 'Sovereign Cocos and the Reprofileing of Debt Payments' [2017] Society for Economic Dynamics (1435) 1.

⁵ The terms haircut refers to the reduction of outstanding interest payments or a portion of a bond payable that will not be repaid by the debtor.

⁶ Herbert Lionel Adolphus Hart, Herbert Lionel Adolphus Hart and Leslie Green, *The Concept of Law* (oxford university press 2012).

⁷ Robert S Summers, 'Professor HLA Hart's Concept of Law' [1963] Duke LJ 629, 635.

⁸ Peter JM Declercq, 'Restructuring European Distressed Debt: Netherlands Suspension of Payment Proceeding ... the Netherlands Chapter 11' (2003) 77 American Bankruptcy Law Journal 377, 407 <<https://heinonline.org/HOL/P?h=hein.journals/ambank77&i=425>>.



Newby's research presenting a credible commitment to return to commodity standards, the suspension of cash payments maintains the value and circulation of the currency.⁹ This research is very important to support the idea that in Indonesia, as an "economic growing" country, one of the most important law instruments to the businesses to stay alive when being hit by a pandemic is the suspension of payment.

METHODOLOGY

This paper mainly relies on doctrinal research method because it is comprised of "[t]he essential features of doctrinal scholarship involve a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation."¹⁰

1. Overview of the Indonesian Suspension of Payment

Bankruptcy is a legal process that aims to resolve the debts of companies, individuals, and governments when they experience serious financial distress.¹¹ When a company fails to pay off its debts, it may usually go bankrupt.¹² Based on Indonesian bankruptcy law, bankruptcy involves the seizure of all the assets of a debtor. It is somewhat 'easy' to make a debtor who has at least two creditors where one of his or her debt is due, when it is claimable and when it has not been paid in full¹³, to go bankrupt. In contrast, the suspension of payment is regulated by the Indonesian Bankruptcy Law to counterbalance the negative effects of the bankruptcy procedures. It is fair to infer from the understanding of the Indonesian Bankruptcy Law 2004 that it is meant to procedurally reconcile the suspension of payment petition and the bankruptcy petition when they are both filled at the same time in Court since the suspension of payment petition has to must be adjudicated prior to the bankruptcy petition.

The Indonesian Bankruptcy Law itself, however, does not explicitly describe the suspension of payment. From the formulation in the regulation, it can be described as an instrument used by either debtor or creditors to achieve a reconciliation agreement. In other words, the suspension of payment main objective is restructuring the debt, rather than the settlement or liquidation which is the final result of the bankruptcy procedures. The suspension of payment is intended to give the debtor more time to fulfil its obligations or reach an agreement with its creditors to restructure the debt.

Different with the bankruptcy petition requirements as mentioned in the first paragraph, when the debtor is unable to repay their obligation or they could foresee the inability to do so, the debtor or even the creditors have the option to file a suspension of payment petition to the commercial court. During the trial process, the debtor is required to present a reconciliation plan that outlines the proposed payment of either the entire or a portion of its debt to both secured and unsecured creditors.

The submission of a suspension of payment petition occurs before the head of court who has jurisdiction over the legal residence of the debtor. This petition must be duly signed by the petitioner and their legal representatives. As mentioned before, the legal standing for filling a suspension of payment is not only debtor itself (voluntarily), but also the creditors.

In the event that the debtor voluntarily files the petition, it is required that the petition be accompanied by a comprehensive enumeration of the debtor's debts and receivables, including a description of their nature, as well as any other supporting documentation that serves as evidence. According to Article 225 (2) Indonesian Bankruptcy Law,¹⁴ the Court is required to promptly declare

⁹ Elisa Newby, 'The Suspension of Cash Payments as a Monetary Regime' (CENTRE FOR DYNAMIC MACROECONOMIC ANALYSIS WORKING PAPER SERIES 2007).

¹⁰ Terry Hutchinson, *Researching and Writing in Law* (Emma Hutchinson ed, 1th edn, Lawbook Co 2002) 131.

¹¹ Michelle J White, 'Corporate and Personal Bankruptcy Law' (2011) 7 Annual Review of Law and Social Science 139, 2.

¹² Indonesian Bankruptcy Law adopt the terms as Dutch Bankruptcy Law that prior the bankruptcy declaration, the (commercial) court will appoint the curator (also referred to as the receiver, liquidator, trustee or administrator) 'What Does the Curator Do in a Bankruptcy?' | Business.Gov.Nl' <<https://business.gov.nl/ending-your-business/financial-problems-and-bankruptcy/what-does-the-curator-do-in-a-bankruptcy/>> accessed 29 September 2023.

¹³ Requirements to fill bankruptcy petition as stipulated in Article 2 (1) Indonesian Bankruptcy Law

¹⁴ "In the event that the application is submitted by the Debtor, the Court shall, within a maximum period of 3 (three) days from the date of registration of the application as referred to in Article 224 paragraph (1), grant the temporary suspension of the payment obligation and shall appoint a Supervisory Judge from the court judges as well as appoint 1 (one) or more administrators who manage the Debtor's property together with the Debtor."



a temporary suspension of payment and designate a supervisory judge, along with one or more administrators¹⁵, to oversee the debtor's assets within a period of three days from the time the petition is filed.

On the other hand, when the creditors instigate the petition, the debtor is required to compile a corresponding inventory of debts, receivables, and reconciliation plan before the hearing, subsequent to receiving a summons from the Court (with a minimum of 7 days' notice prior to the hearing date). According to Article 225 (3) Indonesian Bankruptcy Law,¹⁶ the commercial court is obligated to declare the temporary suspension of payment within a period of 20 days from the date of petition registration.

Upon the declaration of a temporary suspension of payment, the administrator is required to officially declare the judgement in the State Gazette as well as in a minimum of two daily newspapers. The announcement should include an invitation to participate in the creditors meeting, the name of the supervising judge, and the address of the administrator, as stated in Article 226 (1) Indonesian Bankruptcy Law.¹⁷ The administrator is required to provide written notification, either through registered mail or courier, to all debtors within his or debtor knowledge. According to Article 226 (2) Indonesian Bankruptcy Law,¹⁸ in the event that the reconciliation plan has been filed prior to the temporary suspension of payment declaration, it is required that this plan be explicitly referenced in the announcement made at least 21 days before to the scheduled creditor meeting (with voting agenda).

The temporary suspension of payment will remain in effect for a duration of 45 days, or until an earlier date if determined by a subsequent hearing conducted by the Court. If the debtor is absent during the hearing, the Court will render a declaration of bankruptcy against the debtor in accordance with Article 225 (4) and (5) Indonesian Bankruptcy Law.¹⁹

Prior to temporary suspension of payment judgement, the supervisory judge shall determine the deadline for the creditors to submit their claims to the administrator. In practice, there exists a minimum duration of 14 days between the prescribed deadline for the submission of claims by creditors.

The claims submitted by the creditors shall be subject to review by the administrator, who will compile a comprehensive list of claims. This list shall include pertinent details such as the names of the creditors, the respective amounts of the claims, a concise explanation of each claim, and an indication of whether the administrators deem them to be disputable. The list will be made accessible for public examination at the registrar of the commercial court, commencing 7 days prior to the convening of the creditors' assembly, as stipulated in Article 276 Indonesian Bankruptcy Law.²⁰

At the meeting of the creditor, attendees may either be present in person or be represented by a proxy who has been duly authorised through a written power of attorney. The purpose of this meeting

¹⁵ Indonesian Bankruptcy Law stated that in the bankruptcy, the curator will mainly carry on the procedures. However, in the suspension of payment procedures, the administrator is the one who has the most important roles in the procedures.

¹⁶ "In the event that the application is submitted by Creditors, the Court shall, within a maximum period of 20 (twenty) days from the date of the registration of the application letter, grant the application for the temporary suspension of debt payment obligation and shall appoint a Supervisory Judge from the court judge as well as appoint 1 (one) or more administrators who manage the Debtor's property together with the Debtor"

¹⁷ "Administrator must immediately announce the decision on the temporary suspension of the debt payment obligation in the Official Gazette of the Republic of Indonesia and in at least 2 (two) daily newspapers appointed by the Supervisory Judge and said announcement must also contain invitations to attend the hearing which is a deliberation of judges including the date, place and time of the relevant hearing, the Supervisory Judge name and the name and address of the administrator"

¹⁸ "If at the time the temporary suspension of the debt payment obligation is rendered, a reconciliation plan has been proposed by the Debtor, this matter must be mentioned in the announcement, and the announcement must be made within a maximum period of 21 (twenty-one) days prior to the date of the planned hearing"

¹⁹ "(4) Immediately after the decision on the temporary suspension of debt payment obligation is rendered, the Court through the administrator must summon Debtors and known Creditors by registered mail or by courier, to appear before a hearing held no later than the 45th (forty-fifth) day since a decision on the temporary suspension of debt payment obligation is rendered." (5) In the event that the Debtor does not attend the hearing as referred to in paragraph (4), the temporary suspension of debt payment obligation expires and the Court is obliged to declare the Debtor as Bankrupt"

²⁰ "(1) Administrator must provide a copy of the list as referred to in Article 272 at the Court Registrar's Office, so that within 7 (seven) days prior to the holding of the meeting as referred to in Article 26, it can be seen by any person free of charge.

(2) The provision of copies as referred to in paragraph (1) shall be conducted free of charge."



is to engage in deliberation and decision-making regarding the reconciliation plan put forth by the debtor.

During the meeting, the commercial court will listen to the debtor, supervising judge, administrator, and the creditors who are present at the hearing or represented by proxy with an authorised power of attorney. In the event that the debtor has presented a proposed reconciliation plan concurrently with the submission of a suspension of payment petition, the process of voting may be initiated as stipulated in Article 228 (3) Indonesian Bankruptcy Law.²¹

In the event that the reconciliation plan has not been duly presented or if the creditors are unable to exercise their voting rights, it is within the debtor's prerogative to obtain a determination from the creditors as to whether a permanent suspension of payment should be granted or denied, as stipulated in Article 228 (4) Indonesian Bankruptcy Law.²² In the event that the creditors provide their consent to convert the temporary into permanent suspension of payments, it is imperative that the time limit of 270 days from the first granting of the temporary suspension of payment is not exceeded. Failure to adhere to this time limit will result in the debtor being declared bankrupt, as stipulated in Article 228 (6)²³ and 230 (1)²⁴ Indonesian Bankruptcy Law. Alternatively, in the event that the creditors decline the request for an extension to the permanent suspension of payment, the debtor will also be declared bankrupt.

2. How The Suspension Of Payment Rebalancing The Repressiveness of Bankruptcy Process
Based on the provisions of Article 2 paragraph (1) of the Indonesian Bankruptcy Law, the conditions for a debtor to be declared bankrupt are as follows:

1. The Debtor has two or more creditors
2. Not paying off at least 1 (one) debt that has due and claimable. The debtor's assumption of a stop-paying condition is carried out either because the debtor is unable or unwilling to pay his debt.

Unfortunately, the provisions of the Indonesian Bankruptcy Law do not regulate the condition that the debtor must be in a state of insolvent. A debtor who is already in a state of insolvent can only be declared bankrupt by the commercial court after the bankruptcy petition granted.²⁵ Therefore, an insolvent state is not quite important in Indonesia.

Compared to the other neighbor countries such as Malaysia and Singapore, their bankruptcy law determines that a debtor can be declared bankrupt only if the debtor is in a state of insolvent. For comparison, the conditions for bankruptcy in Singapore and Malaysia state regulation concerning minimum debt value or threshold. The amount of debt is considered important to avoid bankruptcy applications against debtors who have debts that are smaller than their assets.²⁶

In Singapore, based on Bankruptcy Act Chapter 20 Section 61(1), a petitioning creditor or debtor can begin bankruptcy application if the debtor owes a sum of money exceeding SGD15,000 with the debt is a liquidated sum payable to the creditor immediately and unable to repay the debt.²⁷ Moreover,

²¹ "If the reconciliation plan is attached to the application for the temporary suspension of the debt payment obligation as referred to in Article 224 paragraph (2) or has been submitted by the Debtor prior to the hearing, then a voting on the reconciliation plan may be conducted, if the provisions as referred to in Article 267 have been fulfilled."

²² "In the event that the provision as referred to in paragraph (3) is not fulfilled, or if Creditors have not been able to cast their votes on the reconciliation plan, at the request of the Debtor, the Creditor shall determine the granting or rejection of permanent suspension of the debt payment obligation with a view to enabling Debtors, administrators and Creditors to consider and approve the reconciliation plan at the next meeting or hearing."

²³ "If the permanent suspension of the debt payment obligation as referred to in paragraph (4) is approved, such suspension and its extension shall not exceed 270 (two hundred and seventy) days after the decision on the temporary suspension of the debt payment obligation is rendered."

²⁴ "If the period of temporary suspension of the debt payment obligation expires, due to Creditors not agreeing to the granting of a permanent suspension of the debt payment obligation or an extension has been granted, but up to the deadline as referred to in Article 228 paragraph (6), no agreement has been reached on the reconciliation plan, the administrator on the expiry day of said period must notify it through the Supervisory Judge to the Court which must declare the Debtor Bankrupt by no later than the following day."

²⁵ Sutan Remy Sjahdeini, *Sejarah, Asas, Dan Teori Hukum Kepailitan (Memahami Undang-Undang No. 37 Tahun 2004 Tentang Kepailitan Dan Penundaan Kewajiban Pembayaran)* (1st edn, Kencana 2016) 60.

²⁶ Diana Surjanto, 'Urgensi Pengaturan Syarat Insolvensi Dalam Undang-Undang Kepailitan Dan Penundaan Kewajiban Pembayaran Utang' (2018) 3 Denpasar: Acta Comitatus Jurnal Hukum Kenotariatan 3.

²⁷ Lim Jia Min and Rohaida Nordin, 'Debtor Protection Within Bankruptcy Proceeding in Malaysia and Singapore: A Comparative Analysis' *Rahmah Ismail* 162, 162.



since 2021, Singapore bankruptcy law took another leap that the cash flow test currently is required to assess that whether a company in a state of insolvency or not.²⁸

According to the Insolvency Act 1967, Malaysia has a provision regarding the Bankruptcy Threshold of RM 50,000. Therefore, unless the total amount owed is RM 50,000, the creditor cannot apply for bankruptcy against the debtor. This means that petitions with less than RM50,000 will be rejected.²⁹ Those countries bankruptcy law shows that before a bankruptcy decision is made, there are provisions for testing and ascertaining whether a company is experiencing economic failure,³⁰ whether it is indeed bankrupt, and whether cash flow is disrupted. In other words, before an undertaking or a person through the bankruptcy process, an insolvency test must be conducted. In contrast with Indonesia, unfortunately, it raises many problems in the practice area.

From the point of view that is not interested in exploring in-depth, they simply stated that Indonesian Bankruptcy Law is unfair and lacks justice in the implementation. Those forgot that the bankruptcy procedure is merely an instrument to collect debts and settle them proportionally. Moreover, in the Indonesian Bankruptcy Law, the term “debt” is expanded to any obligation that can be calculated in a sum of money. That expansion worsens the sinister statement of the Bankruptcy Law’s cruelty in Indonesia. There is one crucial thing forgotten regarding Indonesian Bankruptcy Law: there is not necessarily a dispute in the process since the debtor can fill the insolvency petition to themselves. The actual philosophy of the enactment was that the “debt-culture” in Indonesia is permissive. This means that generally of the debtor does not fulfill their duty to pay not because of the inability to pay but the unwillingness to pay. As evidence, the Financial Service Authority (in Bahasa: Otoritas Jasa Keuangan or OJK) stated that the Payment Failure Rate in 2021 of online lending reached 10,95% from almost 41 million debtors.³¹ It means that many people who take credit from an online lending company without any mortgages feel they can run away from their obligation to pay.

Based on Article 242 paragraph (1) Indonesian Bankruptcy Law, the suspension of payment results in the suspension of all execution actions that have been initiated to obtain debt repayment. In the suspension of payment procedures, the debtor's assets will be managed to be used to pay off the debts. Thus, the suspension of payment in Indonesian Bankruptcy Law basically a derivation from value-based theory which explained that “[T]he bankruptcy system, then, is not merely a mechanism for reaching an optimal economic outcome for creditors as a group; it is a process for rendering richer, more informed decisions to govern the relationships of all persons affected by financial distress”.³²

In contrast with the bankruptcy procedure, the suspension of payment does not cause a debtor to lose its right to control and manage its assets. The advantages for the debtor on this suspension of payment procedures is that the law provided a period (within the 45 to maximum 270 days) to reconcile with the creditors. On the other hand, for creditors, there is a high probability that debtors can fully pay its debts. Meanwhile, in bankruptcy procedures, all debtor’s assets will be auctioned if declared bankrupt, and creditors will not necessarily get payment in full. Therefore, suspension of payment is more profitable for debtors and creditors whose intended to be involved in a sustainable debt.

Even though the Indonesian Bankruptcy Law has a solid nuance of repressiveness, it shall be noticed that as mentioned in Table.1 below, most of the undertakings fill the suspension of payment petition to themselves to avoid bankruptcy as from the period January to June, comparing from before pandemic in 2019 to 2021, the suspension of payment new cases in commercial court, Central Jakarta

²⁸ ‘Cash Flow Test Now Sole Determinant for Company Insolvency | Singapore Business Review’ <<https://sbr.com.sg/professional-services/legal/news/cash-flow-test-now-sole-determinant-company-insolvency>> accessed 29 September 2023.

²⁹ Min and Nordin (n 27) 162.

³⁰ Eugene F Brigham, Louis C Gapenski and Phillip R Daves, ‘Intermediate Financial Management’.

³¹ ‘Statistik Fintech Lending Periode Juni 2021’ (4 August 2021) <<https://www.ojk.go.id/id/kanal/iknb/data-dan-statistik/fintech/Pages/Statistik-Fintech-Lending-Periode-Juni-2021.aspx>> accessed 27 September 2021.

³² Donald R Korobkin, ‘Value and Rationality in Bankruptcy Decisionmaking’ (1991) 33 Wm. & Mary L. Rev. 333, 335.



has been increased almost 42%. Even though it is acknowledgeable that there are still some potentials to be bankrupt from the suspension of payment process as portrayed in Table 1 below.

Table 1 Table of Suspension of Payment petition in the last 5 years at Central Jakarta Commercial Court

	Petitions				
	2023	2022	2021	2020	2019
January	24	16	63	22	26
February	44	22	31	43	22
March	39	43	59	27	24
April	13	29	59	21	25
May	38	22	47	33	17
June	34	33	23	42	25
July	45	29	31	47	21
August	47	33	52	34	22
September	32	35	37	62	24
October		45	33	35	26
November		38	38	55	27
Desember		42	39	30	29
Total	316	387	512	451	288

The data above shows that even though Indonesia government already officially revoked the national emergency status of COVID-19 pandemic in June 2023,³³ the pandemic still has a slight effect to business failure since the suspension of petition numbers in 2022-2023 are higher than 2019.

Most of the business who experience an economic failure does not realized that, Indonesian Bankruptcy Law adheres to the principle of single reconciliation.³⁴ This principle of single reconciliation is reflected in Article 289, which states that parties can only submit a reconciliation plan once. If the reconciliation plan is rejected, a second reconciliation plan can no longer be submitted. Because, after the reconciliation plan is rejected, the debtor is immediately declared bankrupt by the commercial court.

The principle of single reconciliation is also reflected in the provisions in Article 292. The article determines that if the reconciliation has been rejected in the suspension of payment process and then the debtor is declared bankrupt, in the bankruptcy process, the debtor may no longer submit a reconciliation plan.

As a legal consequence of the creditors refusing the reconciliation plan based on the provisions mentioned above, there was a change in the legal procedure, which was previously pursued amicably based on the suspension of payment procedures, changed to procedures in the bankruptcy provisions.³⁵

Reconciliation is one of the chain values in the Indonesian Bankruptcy Law. Article 144 Indonesian Bankruptcy Law stipulates that even the bankrupt debtor reserves the right to file a reconciliation with all creditors. The purpose of reconciliation in bankruptcy proceedings is to avoid the liquidation of their assets, thus the business sustainability can be continued.³⁶ However, when the reconciliation proposal was accepted, but the commercial court refused to confirm the reconciliation, the bankruptcy process immediately fell into a situation of insolvency and the debtor will be declared bankrupt.³⁷

³³ 'Sekretariat Kabinet Republik Indonesia | Gov't Declares End of COVID-19 Pandemic' <<https://setkab.go.id/en/govt-declares-end-of-covid-19-pandemic/>> accessed 30 September 2023.

³⁴ It means that a debtor cannot propose a reconciliation plan twice.

³⁵ Rindy Ayu Rahmadiyah, 'AKIBAT HUKUM PENOLAKAN RENCANA PERDAMAIAAN DEBITOR OLEH KREDITOR DALAM PROSES PENUNDAAN KEWAJIBAN PEMBAYARAN UTANG' 8 Notarius 252, 262.

³⁶ SH Munir Fuady, *Hukum Bisnis Dalam Teori Dan Praktek Buku Ketiga*, vol 3 (Citra Aditya Bakti 2018) 88.

³⁷ Siti Mahmudah, Siti Malikhatun Badriyah and Bagus Rahmanda, 'THE POSITION OF THE GUARANTOR IN RECONCILIATION ON THE BANKRUPTCY ACT ACCORDING TO THE LAW OF BANKRUPTCY IN INDONESIA' 3 Diponegoro Law Review 243, 250.



From the analysis above it can be shown that implicitly, the suspension of payment in Indonesia is “creditor friendly” rather than “protecting debtor”. It is because the suspension of payment which has ‘reconciliation’ nuance, could become a bankruptcy procedure when:

1. The debtor did not propose a reconciliation plan within 45 days, or if extended, 270 days, or
2. The creditors did not approve the extension from 45 to 270 days, or
3. The reconciliation plan was not approved by the unsecured creditors and secured creditors in the voting in the creditor meeting, or
4. The reconciliation plan even though approved by the secured creditors and unsecured creditors through voting, is not granted by the Commercial Court Judges, or

However, it shall be underlined that the bankruptcy from suspension of payment reflected the debtor experiencing an economic failure in its business. Economic failure is a condition where the business cannot cover the debt for their operation or maintain their company's sustainability, and it is always referred to as the unsuccessful outcomes of inefficient use of capital and labor.³⁸

3. Indonesian Government Attempt to Protect Economies In The Pandemic Situation

By September 2021, The Coordinating Ministry for Maritime Affairs and Investment and the Coordinating Minister for the Economic said that the government is currently preparing a moratorium on bankruptcy and Suspension of Payment.³⁹ This news certainly surprised many Indonesian people because it was felt that previously there had been no discussion related to this, both among practitioners and academics. The proposal invited many opinions from various parties, especially the Asosiasi Pengusaha Indonesia (Indonesian Enterprises Association), who felt that bankruptcy filing and suspension of payment were no longer in a condition to heal the company but instead led to bankruptcy, so they proposed to the government to issue a regulation with suspending temporarily or moratorium of Indonesian Bankruptcy Law implementation sparked the rejection of the proposed moratorium on the application for Postponement of Bankruptcy and Suspension of Payment until 2025. The association and practitioners and academics have their views regarding the proposed moratorium by the Government of Indonesia.

The inclusion of principles in the Indonesian Bankruptcy Law is a form of extension of the mandate in Article 33 Paragraph (4) of the Constitution of the Republic of Indonesia, as a basis given that the national economy is organized based on economic democracy with the principles of togetherness, efficiency, justice, sustainability, environmental insight, independence, as well as by maintaining the balance of progress and national economic unity.

Suspension of payment, theoretically, is a solution for settling debtors' debts because it contains elements of justice, benefit, and legal certainty. Creditors get certainty and benefit from the process and payment of their debts which are legalized based on court decisions, and debtors can arrange payment plans according to their abilities.

The suspension of payment moratorium, which will temporarily stop suspension of payment submissions, can eliminate effective and efficient solutions that the law has provided. If the moratorium is issued, creditors who fight for their rights through the courts will choose the path of litigation for civil lawsuits so that it will take a longer time, and the purpose of implementing the law on justice, expediency, and legal certainty will be less fulfilled so that the government cannot maintain a balance of progress and national economic unity. If this happens, the Government will not fulfill the purpose of the Trade Regulations contained in Law no. 7 of 2014, where the Indonesian Trade Law was made to increase national economic growth. The role of trade is very important in increasing the economic development of a country. Therefore, the government is obliged to maximize the role of trade in a country.

It is understandable for the pro-moratorium arguments that several regulations in the Indonesian Bankruptcy Law cannot overcome the pandemic Covid-19 situation. Thus, the proposal of the

³⁸ Hung-En Sung, ‘State Failure, Economic Failure, and Predatory Organized Crime: A Comparative Analysis’ (2004) 41 Journal of Research in Crime and Delinquency 111, 113.

³⁹ Caesar Akbar, ‘Usulan Moratorium PKPU Dan Kepailitan, Siapa Yang Diuntungkan? - Bisnis Tempo.Co’ (21 August 2018) <<https://bisnis.tempo.co/read/1499834/usulan-moratorium-pkpu-dan-kepailitan-siapa-yang-diuntungkan/full&view=ok>> accessed 27 September 2021.



moratorium in Indonesian Bankruptcy Law implementation was needed. Several cases regarding the suspension of payment in Indonesia are increasing, especially in the 2021. Almost 480 cases spread in Jakarta and Surabaya.⁴⁰ Increase case of the suspension of payment arises from the impact cause a “Moral Hazard” because of the easy requirement to submit a suspension of payment. Example: There is a misconception and no legal certainty in implementation of Article 2 (1) Indonesian Bankruptcy Law that make people easier to propose the suspension of payment to the court.

However, it has to be noticed that the “Moral Hazard” that happened because the arises of the case in the suspension of payment between 2020-2021 is certainly because of for some legal practitioners, unfortunately, become an instrument to create a more chaotic situation. They use the suspension of payment to ‘snare’ the debtors into bankruptcy. Solidly, the moratorium is not the answer to resolve this problem. The moratorium will arise many problems because the moratorium condition will not give legal certainty to the debtor, even the creditor.

The suspension of payment is important to make a reconciliation agreement between the debtor and the creditors. In the pandemic situation that affects the whole economy in Indonesia, absolutely the moratorium to suspend the Indonesian Bankruptcy Law is not relevant, based on the data that is collected by the National Workforce Survey,⁴¹ people who was being fired because of the pandemic is calculated to 757.574 that divided into all cities or even the villages. Even in cities alone, there are 529.069 people also. In the villages, 228.505 people were being fired because of the impact of pandemic Covid-19.

The law itself must be implemented by looking through the other social aspect. The sustainability of business in a pandemic is important, and sustainable development is used to protect the reduction of vulnerability and the mitigation of disaster impacts.⁴² Based on the article 222 (1) and (2) Indonesian Bankruptcy Law, the debtor has a right to restructure or suspend their debt to the creditor. Also, the debtor will be able to request restructure of their debt to the creditor for convenience to continue their business. This regulation is being used to negotiating with the creditor to give legal certainty regarding the debt, especially in the pandemic Covid-19 situation, which became more complicated because it impacted much business. Thus, the Suspension of the payment plays an important role in the sustainability of the business in pandemic Covid-19.

Bankruptcy and going concerned have a connection with each other as going concerned is being needed to determine whether the business that is going to be in bankruptcy condition can continue their business or not.⁴³ In the Indonesian Bankruptcy Law, Suspension of payment is one of the implementations of business going concerned. Based on the data from the Ministry of Health Indonesia, the Covid-19 case from Juli 2021 into September 2021 keeps decreasing. Moreover, reach its number in 3779 case per-day. It brings positivity to the sustainable economic growth in Indonesia. Many businesses will re-open their store, and many people will be able to get their job back. Therefore, by looking at this positive progress, it is clear that the moratorium is not relevant.

CONCLUSION

Suspension of payment in the bankruptcy law regime in Indonesia when it is carried out following its dignity, then business actors can certainly avoid bankruptcy. The adverse effects of suspension of payment can become a trap for debtor business actors because, unfortunately, there are several conditions when the suspension of payment fails, the debtor automatically declared bankrupt. However, when the whole process of Indonesian Bankruptcy Law is thoroughly examined, the failure

⁴⁰ Yohana Artha Uly, ‘Pemerintah Diminta Hati-Hati Kaji Wacana Moratorium PKPU Dan Kepailitan Halaman All - Kompas.Com’ (26 August 2021) <<https://money.kompas.com/read/2021/08/26/164443926/pemerintah-diminta-hati-hati-kaji-wacana-moratorium-pkpu-dan-kepailitan?page=all>> accessed 27 September 2021.

⁴¹ ‘Buku Ketenagakerjaan Dalam Data 2021’ (1 April 2021) 40 <<https://satudata.kemnaker.go.id/publikasi>> accessed 27 September 2021.

⁴² Bojan Obrenovic and others, ‘Sustaining Enterprise Operations and Productivity during the COVID-19 Pandemic: “Enterprise Effectiveness and Sustainability Model”’ (2020) 12 Sustainability 5981, 4.

⁴³ Nirosh Kuruppu, Fawzi Laswad and Peter Oyeler, ‘The Efficacy of Liquidation and Bankruptcy Prediction Models for Assessing Going Concern’ [2003] Managerial auditing journal 578.




of Suspension of Payment is a sign that the debtor is suffering an economic failure, a *contrario*, when the debtor is still solvent, normatively it is still capable of continuing the business. The reconciliation as an output from suspension of payment lead to many positive things as the business has been rising significantly since the pandemic gone in 2022. In other words, the moratorium of the implementation of the Indonesian Bankruptcy Law currently is not relevant in Indonesia.

ACKNOWLEDGEMENT

The successful completion and submission of this article would not have been possible without the generous support and contributions of various individuals and organizations. We express our sincere gratitude to Universitas Airlangga for the invaluable research grant that provided the financial foundation for this study. Their commitment to fostering academic research has been instrumental in bringing this project to fruition. Special appreciation goes to the participants of this study for their willingness to share their experiences, which added depth and authenticity to our research findings. This article stands as a testament to the collective effort of all those involved, and we are sincerely thankful for the collaborative spirit that made its completion possible. Hopefully this article could expand the knowledge not only the academicians, but also the practitioner to “wide-open” their eyes that reconciliation through the suspension of payment, shall implement the law normatively and upholding fairness so that the economy sustainability could be maintained properly.

REFERENCES

- [1] Akbar C, ‘Usulan Moratorium PKPU Dan Kepailitan, Siapa Yang Diuntungkan? - Bisnis Tempo.Co’ (21 August 2018) <<https://bisnis.tempo.co/read/1499834/usulan-moratorium-pkpu-dan-kepailitan-siapa-yang-diuntungkan/full&view=ok>> accessed 27 September 2021
- [2] Brigham EF, Gapenski LC and Daves PR, ‘Intermediate Financial Management’
- [3] ‘Buku Ketenagakerjaan Dalam Data 2021’ (1 April 2021) <<https://satudata.kemnaker.go.id/publikasi>> accessed 27 September 2021
- [4] ‘Cash Flow Test Now Sole Determinant for Company Insolvency | Singapore Business Review’ <<https://sbr.com.sg/professional-serviceslegal/news/cash-flow-test-now-sole-determinant-company-insolvency>> accessed 29 September 2023
- [5] Declercq PJM, ‘Restructuring European Distressed Debt: Netherlands Suspension of Payment Proceeding ... the Netherlands Chapter 11 ’ (2003) 77 *American Bankruptcy Law Journal* 377 <<https://heinonline.org/HOL/P?h=hein.journals/ambank77&i=425>>
- [6] Hart HLA, Hart HLA and Green L, *The Concept of Law* (Oxford University Press 2012)
- [7] Hatchondo J and others, ‘Sovereign Cocos and the Reprofitting of Debt Payments’ [2017] *Society for Economic Dynamics* (1435) 1
- [8] Hutchinson T, *Researching and Writing in Law* (Emma Hutchinson ed, 1st edn, Lawbook Co 2002)
- [9] Korobkin DR, ‘Value and Rationality in Bankruptcy Decisionmaking’ (1991) 33 *Wm. & Mary L. Rev.* 333
- [10] Kuruppu N, Laswad F and Oyelere P, ‘The Efficacy of Liquidation and Bankruptcy Prediction Models for Assessing Going Concern’ [2003] *Managerial Auditing Journal*
- [11] Lukman E, ‘Telkomsel Declared Bankrupt!’ (14 September 2012) <<https://www.techinasia.com/telkomsel-bankrupt/>> accessed 27 July 2021
- [12] Mahmudah S, Badriyah SM and Rahmanda B, ‘THE POSITION OF THE GUARANTOR IN RECONCILIATION ON THE BANKRUPTCY ACT ACCORDING TO THE LAW OF BANKRUPTCY IN INDONESIA’ 3 *Diponegoro Law Review* 243
- [13] Mandala S, ‘INDONESIAN BANKRUPTCY LAW: AN UPDATE’ [2006] *Legal & Institutional Reforms of Asian Insolvency Systems* <<https://www.oecd.org/indonesia/38184160.pdf>> accessed 27 July 2021
- [14] Min LJ and Nordin R, ‘Debtor Protection Within Bankruptcy Proceeding in Malaysia and Singapore: A Comparative Analysis’ *Rahmah Ismail* 162

- 
- [15] Munir Fuady SH, *Hukum Bisnis Dalam Teori Dan Praktek Buku Ketiga*, vol 3 (Citra Aditya Bakti 2018)
- [16] Newby E, 'The Suspension of Cash Payments as a Monetary Regime' (CENTRE FOR DYNAMIC MACROECONOMIC ANALYSIS WORKING PAPER SERIES 2007)
- [17] Obrenovic B and others, 'Sustaining Enterprise Operations and Productivity during the COVID-19 Pandemic: "Enterprise Effectiveness and Sustainability Model"' (2020) 12 *Sustainability* 5981
- [18] Rahmadiyahanti RA, 'AKIBAT HUKUM PENOLAKAN RENCANA PERDAMAIAN DEBITOR OLEH KREDITOR DALAM PROSES PENUNDAAN KEWAJIBAN PEMBAYARAN UTANG' 8 *Notarius* 252
- [19] 'Sekretariat Kabinet Republik Indonesia | Gov't Declares End of COVID-19 Pandemic' <<https://setkab.go.id/en/govt-declares-end-of-covid-19-pandemic/>> accessed 30 September 2023
- [20] Sjahdeini SR, *Sejarah, Asas, Dan Teori Hukum Kepailitan (Memahami Undang-Undang No. 37 Tahun 2004 Tentang Kepailitan Dan Penundaan Kewajiban Pembayaran)* (1st edn, Kencana 2016)
- [21] 'Statistik Fintech Lending Periode Juni 2021' (4 August 2021) <<https://www.ojk.go.id/id/kanal/iknb/data-dan-statistik/fintech/Pages/Statistik-Fintech-Lending-Periode-Juni-2021.aspx>> accessed 27 September 2021
- [22] Summers RS, 'Professor HLA Hart's Concept of Law' [1963] *Duke LJ* 629
- [23] Sung H-E, 'State Failure, Economic Failure, and Predatory Organized Crime: A Comparative Analysis' (2004) 41 *Journal of Research in Crime and Delinquency* 111
- [24] Surjanto D, 'Urgensi Pengaturan Syarat Insolvensi Dalam Undang-Undang Kepailitan Dan Penundaan Kewajiban Pembayaran Utang' (2018) 3 *Denpasar: Acta Comitatus Jurnal Hukum Kenotariatan*
- [25] Uly YA, 'Pemerintah Diminta Hati-Hati Kaji Wacana Moratorium PKPU Dan Kepailitan Halaman All - Kompas.Com' (26 August 2021) <<https://money.kompas.com/read/2021/08/26/164443926/pemerintah-diminta-hati-hati-kaji-wacana-moratorium-pkpu-dan-kepailitan?page=all>> accessed 27 September 2021
- [26] Wahyuni S and Ikasari N, 'Unveiling The Impact of Covid-19 And The Policy Implications On Unveiling The Impact of Covid-19 And The Policy Implications On Indonesian Small Businesses: Where Do They Hurt The Most? Indonesian Small Businesses: Where Do They Hurt The Most?' (2022) 29 1 <<https://scholarhub.ui.ac.id/jbb/vol29/iss1/5>> accessed 29 September 2023
- [27] 'What Does the Curator Do in a Bankruptcy? | Business.Gov.Nl' <<https://business.gov.nl/ending-your-business/financial-problems-and-bankruptcy/what-does-the-curator-do-in-a-bankruptcy/>> accessed 29 September 2023
- [28] White MJ, 'Corporate and Personal Bankruptcy Law' (2011) 7 *Annual Review of Law and Social Science* 139