ACTIO

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The Shifting Meaning of Suspension of Payment *(PKPU)*

OJK (Financial Services Authority) and Insurance Company Filing for Bankruptcy

Is It Possible? To Bankrupt A Deceased Person

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There is no security on this earth. Only opportunity.

– Douglas MacArthur –

Dear Readers,
At the end of September, ACTIO presents the edition for the readers with the main topic of "Suspension of Payments (PKPU) and Bankruptcy". In this 21st century, globalization and modernization people to struggle and compete, especially in improving their economic prosperity. Primarily, entrepreneurs are required to compete in improving and developing their business.

Based on these reasons and the limitations of its own capital, employers seek opportunities to get loans from various sources, whether from banks, investment, bond issuance, or other permissible means.

This fact certainly raises the high risk of failure of loan repayment for the creditors as the financiers. Thus, the problem of debt settlement in the community occurs more often.

As the solution to the problem, PKPU (Suspension of Payment) and bankruptcy institution were established. A bankruptcy statement changes the legal status of a person becomes incompetent to perform legal deeds, control, and manage the property as the statement verdict of bankruptcy is declared.

With the verdict of the bankruptcy, it is expected that the debtor's bankruptcy property can be used to repay all debtor debts fairly and equally.

The discussion of ACTIO covers various aspects of PKPU and bankruptcy. The ACTIO team hopes that the sections in this edition can provide useful information to readers, especially to those seeking solutions and guarantees for the return of receivables.

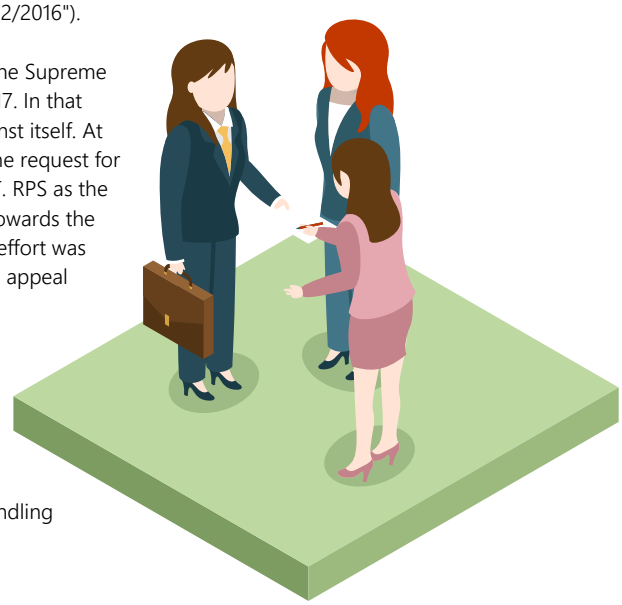
Happy reading!
Regards,

ANGGRAENI AND PARTNERS

Setyawati Fitri A, S.H., LL.M., FCIArb
Managing Partner

CURATOR APPOINTMENT MUST BE APPROVED BY CREDITOR

The appointment of curators and administrators by debtors must now be approved by creditors. The obligation is stipulated in Supreme Court Circular Number 2 Year 2016 on Increasing Efficiency and Transparency of Bankruptcy Case Handling and Delay of Debt Payment Obligation ("SEMA 2/2016").

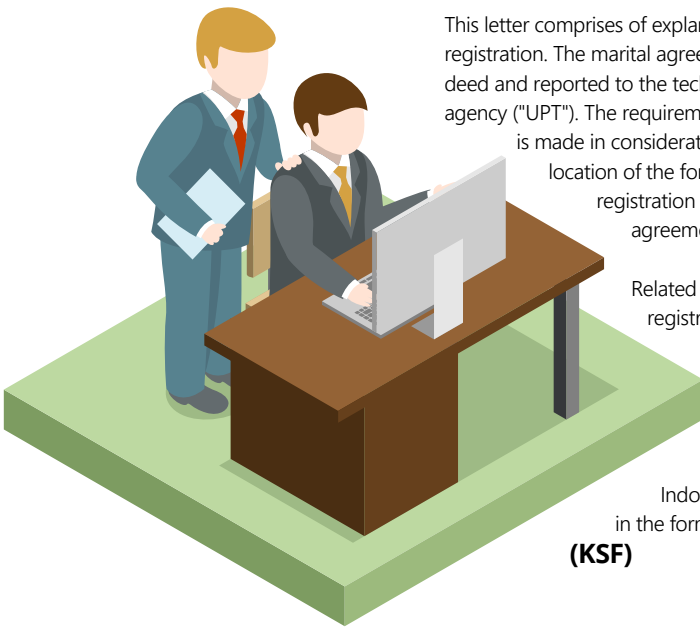


At the practical level, SEMA 2/2016 has been implemented in the Supreme Court decision on appeal with Number. 196K/Pdt.Sus-Pailit/2017. In that case, PT. RPS submits a request for bankruptcy statement against itself. At the first level, the Jakarta Commercial Court Judges declined the request for bankruptcy statements filed by PT. RPS on the grounds that PT. RPS as the debtor does not attach a letter of approval from the creditor towards the proposal of the curator. Although PT. RPS filed an appeal, the effort was foundered after the Supreme Court rejected the request at the appeal level.

The reason for the rejection of the Supreme Court of Justice is because the applicant does not attach a letter of approval from the creditor to the proposed curator. Therefore, the request for bankruptcy does not comply with the provisions in the Supreme Court Circular Number 2 Year 2016 on Enhancing Efficiency and Transparency of Bankruptcy Case Handling and Suspension of Payment ("SEMA").

MARITAL AGREEMENT REGISTRATION

The Director General of Population and Civil Registration issues a decree to all heads of district/city population and civil registration throughout Indonesia No. 472-2/5876/DUKCAPIL dated May 19, 2017. This letter as a follow-up to the Verdict of the Constitutional Court of the Republic of Indonesia Number. 69/PUU-13/2015 dated October 27, 2016 which allows marital agreements to be made after during the marriage.

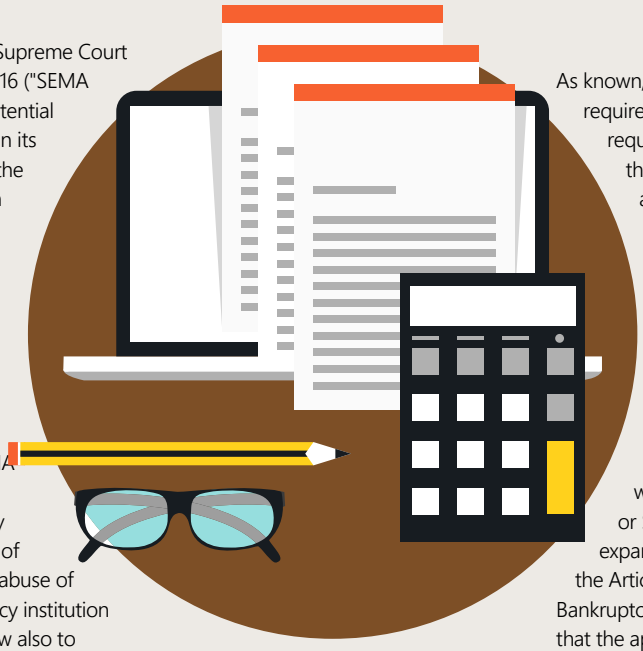


This letter comprises of explanation of the administration of marital agreement registration. The marital agreement, according to the decree, is made by notarial deed and reported to the technical implementing unit of the implementing agency ("UPT"). The requirements and procedures of marital agreement reporting is made in consideration of the time of the formulation of agreement, the location of the formulation of agreement, and the location of marital registration and the amendment or revocation of the marital agreement.

Related with the registration of marital agreements, the civil registry officials at the implementing agency or UPT make foot notes on the register of deeds and citation of marital certificates. Meanwhile, particularly for marital certificate or by other name issued by another country, yet the marital agreement or its amendment and its revocation is made in Indonesia, the registration of marital agreement is made in the form of certificate with special format.

(KSF)

POLEMIC DUE TO THE ISSUANCE OF (SEMA) NUMBER 2 YEAR 2016



The issuance of the Supreme Court Circular No. 2 of 2016 ("SEMA 2/2016") has the potential to create a new polemic in its implementation. One of the points in SEMA issued on April 25, 2016 is that it requires the debtor to include written approval from the creditor against the curator submitted by the debtor ("creditor approval").

It is understood that SEMA 2/2016 is published with good intention, especially to carry out the principle of parity, i.e. to prevent the abuse of institutions and bankruptcy institution by dishonest debtors, how also to prevent abuse of regulations and bankruptcy institutions by creditors who are not in a good faith.

However, as a matter of fact, the implementation is not as simple as what is written in SEMA 2/2016. One of them is the case of bankruptcy filed by by PT. Ramaldi Praja Sentosa ("PT RPS") in the commercial court at the Central Jakarta District Court No. 49/Pdt.Sus-Pailit/2016/PN.Niaga.Jkt.Pst on October 17, 2016.

In that bankruptcy case submission, PT. RPS submitted the file of bankruptcy with the basis of having one due and collectible debt as well as having more than one creditor. During the trial, PT. RPS invites its creditors, namely PT. Bank BNI (Persero) Tbk, TNI AU (MBAU), and S'Net.

Along with the filing of the bankruptcy, PT. RPS proposed a curator for the purpose of settling its bankruptcy estate. Although, according to PT. RPS, it has submitted the approval form for the curators proposed to the creditors, the fact until the date the verdict was read by the judge, there were no creditors returned the form of approval to the debtor.

On this basis, the judges of the commercial court declined the bankruptcy act filed by PT Ramaldi Praja Santosa with legal considerations that PT Ramaldi Praja Santosa did not meet the formal requirements stipulated by SEMA 2/2016. Although PT. RPS then filed an appeal, the effort failed after the Supreme Court rejected the appeal.

This verdict raises some interesting new legal issues to discuss. There are at least two elements that interest the author related to the terms of creditor approval of the curator set by SEMA 2/2016. First, is the independence of a curator measurable by the presence or absence of the creditor's consent? Secondly, has SEMA exceeded the requirements of bankruptcy submission approval as stipulated by Law Number 37 Year 2004 about Bankruptcy and Suspension of Payment ("Bankruptcy Law")?

As known, the Bankruptcy Law only requires that the bankruptcy filing request shall be accepted if (i) there are at least two creditors; and (ii) the existence of a debt that has due and collectible.[1] The extra requirement is the verification of the debt, which must be simple. [2]

In this case, it is interesting to question whether the other terms of the creditor's agreement are contradicting with the Bankruptcy Law, or SEMA 2/2016 is only the expansion of meaning from the Article 15 paragraph (3) of the Bankruptcy Law which stipulates that the appointed curator must be independent.

If so, will the independence of a curator be measured by the presence or absence of creditor approval of the curator's proposal by the debtor? Furthermore, how will it be executed if there is a conflict between creditors to the curator proposed by the debtor? This issue becomes a homework for the legislative institution which is currently discussing the new Bankruptcy Bill.

It is well understood that SEMA 2/2016 is the Supreme Court's response to the creditor's concerns about the existence of debtors who take advantage of bankruptcy agency and PKPU institutions to the benefit of themselves or some creditors. On the other hand, the issuance of SEMA 2/2016 has triggered a new polemic potential, both in interpretation and implementation. It is expected that the new bankruptcy law can address this issue.

(SMF)

1. Article 2 paragraph (1) of the Bankruptcy Law.
2. Article 8 paragraph (4) of the Bankruptcy Law.

CONFLICT BETWEEN BANKRUPTCY GENERAL CONFISCATION AND CRIMINAL CONFISCATION

The conflict between the authorities to conduct seizure by curators and investigators has become the topic of conversation among practitioners and academics lately. The problem is; who is more authorized to conduct seizure and control items or assets in the case that the items or assets are a bankruptcy estate as well as evidence of crime investigation.

Opinions about these are split into two, the former argues that seizure for the purpose of preliminary investigation or criminal investigation should take precedence over seizure of the interests of bankruptcy and the clearance of debtor's property. The reason is that the interests of public law must take precedence over private law interests. In this case, the investigator has the authority of seizure of an item or asset even if it is known that the item or asset are in a state of a general seizure by the control of the curator.

The second opinion states that general seizure is higher than the criminal seizure. This is based on several matters: (i) general seizure is based on a court decision that has the effect to all judicial decisions (ii) that the product of a court decision can only be reversed by a court decision as well, not by court order. Meanwhile, the cornerstone of the authority of a criminal seizure is the court order.

Basically, general seizure is a foreclosure known in civil law, in particular in bankruptcy law that regulate the correlation between creditors and debtors. But during its progress, bankruptcy in Indonesia is not limited to private interests only.

Law Number 37 Year 2004 on Bankruptcy or Bankruptcy Law regulates aspects that intersect with the public interest, one of which is tax debt, which places the country as a preferred creditor. Another aspect of public interest in the bankruptcy process is the criminal seizure on the part of the asset bankruptcy of the debtor. This is where the wedge between the private and public domain intersects.

The purpose of the implementation of public seizure is to protect the interests of creditors. First, to avoid any act of debtors that can loss the bankrupt asset. Secondly, to stop the unilateral execution by creditors against the debtor's assets. Therefore, the general seizure of the debtor's possessions was established since the bankruptcy verdict was declared, and from then on, the debtor by law lost his right to control and take care of his assets.

Meanwhile, the criminal seizure is a series of investigative actions to take over and or to keep, under his control, of movable or immovable, tangible or intangible objects, for the interest of proof in investigation, prosecution and judicial proceedings. [1] the seized assets are taken by the investigator from the owners' authority to be used as evidence for the purposes of examination, prosecution and judiciary. The seizure is intended to keep the object safe, unable

to be eliminated or destroyed by a suspect or defendant.

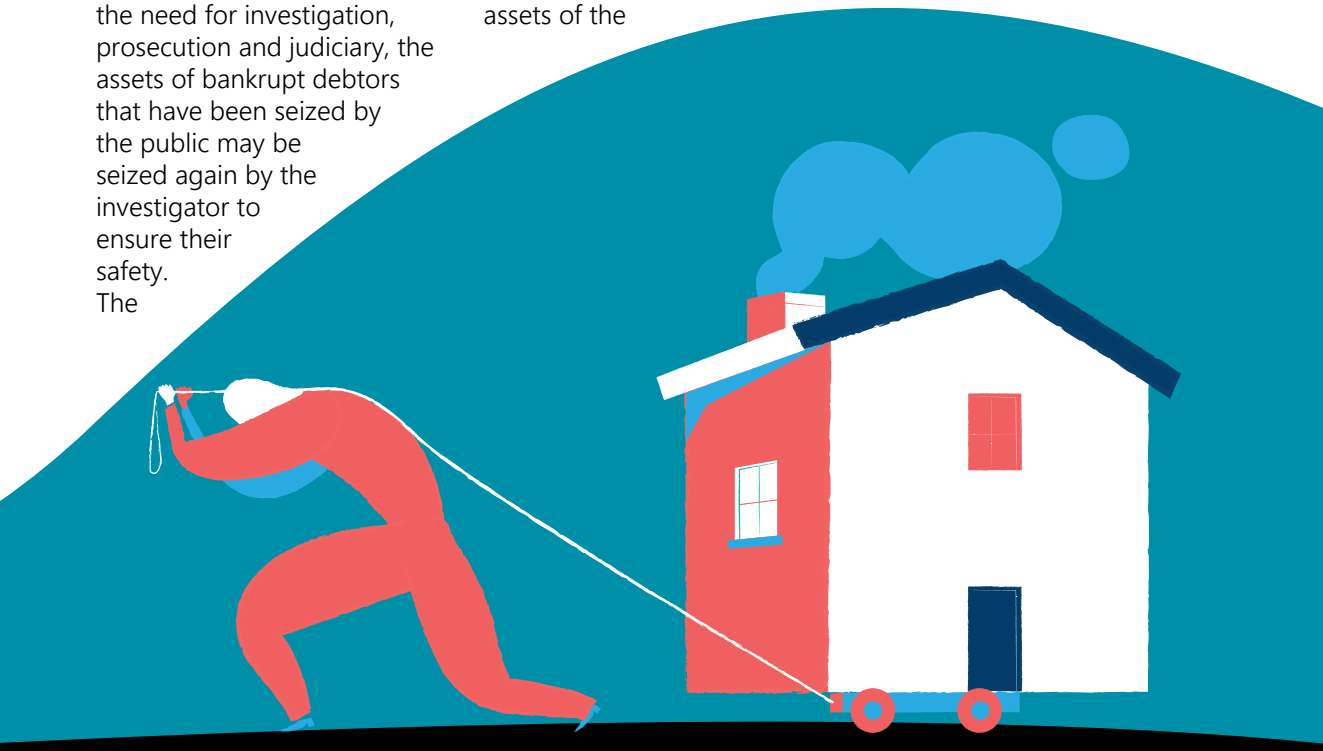
Article 31 Paragraph (2) concerning Bankruptcy Law essentially states that all seizure is terminated when the bankruptcy verdict has been pronounced, if necessary the supervisory judge shall order the write-off. Since the bankruptcy verdict was pronounced, all the seizure that existed on an object expired and were replaced by the general seizure of bankruptcy. This is intended to protect the bankrupt debtors' assets from possible fraud by creditors or debtors. [1]

Meanwhile, the Article 39 Paragraph (2) of Law of Criminal Procedure states that objects in bankruptcy cases may be seized by investigators for the needs of investigation, prosecution and trial of criminal cases. As matter of the need for investigation, prosecution and judiciary, the assets of bankrupt debtors that have been seized by the public may be seized again by the investigator to ensure their safety.
The asset will be used as evidence in the investigation, prosecution and judiciary so that its security must be guaranteed.

In implementation, the two articles are risky to be confronted to for an authority competition between the curator and the investigator in the execution of public seizure and criminal seizure. Any opinion of who should take precedence comes with a clear legal basis. At the level of practice, required a discernment in making decisions and taking actions of each party, both curator and investigator. They may choose to challenge these authorities through legal channels or work together to smooth the execution of their respective duties.

If the interest of the curator is to auction off the assets of the debtor and share the proceeds with the creditors, it is possible to "lend" the assets to the investigator. As known, the interest of the investigator to seize the items or assets is to make it become evidence and complete the process of preliminary investigation or full investigation, not to have it. Thus, the criminal case can be immediately resolved and ordered in the hope that the evidence will be returned to the curator.

At the normative level, a firmness setting is required-or perhaps more on technical issues-when the debtor's assets are insolvent and at the same time as evidence in the process of preliminary investigation, full investigation, or perhaps in the prosecution and trial of criminal cases. **(MSB)**



1. Article 1 paragraph (16) of Law of Criminal Procedures.

TO BANKRUPT A DECEASED PERSON

Q Can the petition of bankrupt be filed against the deceased debtor with the condition of still oblige to pay off the due debts? How is the process of bankrupt filing, and is there any period of time?

The petition of bankrupt may not only be directed against a bankrupt debtor, but also the property of a deceased person with the requirement that two or more creditors file a bankruptcy request by proving the matter contained in Article 207 of Law Number 37 Year 2004 concerning Bankruptcy and Suspension of Payment (Law No. 37/2004), namely that:

a. The debt of the deceased, unpaid in his lifetime; or
b. At the time of the death of such person, the asset is not enough to pay its debts.

The verdict of bankrupt declaration will result in the law that the property of the deceased shall be separated from the heirs' property.

Therefore, the bailiff's mailing address against the heirs of the bankruptcy request must be filed with the debtor's last address, without having to name the heirs. The bankruptcy application is filed 90 days after the debtor has passed away.

Meanwhile, conciliation does not apply to the bankruptcy of heritage property, as set forth in Article 144 to Article 177 of the Bankruptcy Law, unless the inheritance has been received by the heirs purely outside the jurisdiction of NKRI.
(EDN)

Q Can the execution can be conducted on the assets of debtors who live overseas and known by the creditors only after the commercial court in Indonesia issued a bankruptcy declaration?

In the Elucidation of Chapter I General Section of Law Number 37 Year 2004 concerning Bankruptcy and Postponement of Debt Payment Obligation ("Law No. 37/2004") stated that this Act is based on several principles, one of the principle of integration.

"The principle of integration in this Law implies that the formal legal system and its material law combine a unified whole of the civil law system and the national law of civil procedure.

"Referring to the explanation above, Article 299 of Law no. 30/2004 stipulates that to the extent not specified otherwise by Law No.37 / 2004, then the applicable law procedure is a civil procedure law. Therefore, the verdict of bankruptcy declaration which has been decided by the commercial court in Indonesia is only valid and binding in the territory of the Unitary State of the Republic of Indonesia, and the execution power can only be applied to assets in NKRI territory according to Article 431 Reglement op de Rechtvordering ("Rv ").

Thus, it can be concluded that the curator cannot execute the assets of debtors that are outside the jurisdiction of NKRI.
(EDN)

Note: the questions were asked by employee at a financial services company in Jakarta.

INSURANCE COMPANY'S BANKRUPTCY FILING REGULATED BY OJK

The Financial Services Authority or OJK introduces the Regulations on Dissolution, Liquidation and Insolvency of Insurance Company, Sharia Insurance Company, Reinsurance Company, and Sharia Reinsurance Company pursuant to OJK Regulation Number 28/ POJK.05/2015 dated December 11, 2015 ("POJK 28/2015").

In this regard, creditors who consider an insurance company meet the bankruptcy requirements under the Bankruptcy Law may submit an application to OJK in order for the authority to file a request for a bankruptcy statement to the commercial court.

Filing of bankruptcy by creditors

Applications are made in writing by creditors to OJK by including at least the following:

a. the identity of the creditor, at least including the full name and address of the creditor;
b. the name of the company being requested to be declared bankrupt by the commercial court;
c. a description of the basis of the petition:
   1. the authority of the commercial court;
   2. creditor's legal position containing a clear description of the creditor's right to apply; and
   3. the reasons for the petition for declaration of bankruptcy are clearly and detailed;
d. the items being petitioned for; which is addressed to the Chairman of the Board of Commissioners of OJK with a copy directed to the Chief Executive of the Insurance Supervisor, Pension Fund, Financing Institution, and Other Financial Services Institution OJK.

Evidence of bankruptcy

The proof of application for bankruptcy statement from the creditor, other than in writing, shall be filed in a compact disk (CD) format, containing at least the following:

a. Proof of creditor's ID
b. Letter or written evidence relating to the reason for the request
c. List of witness and/or expert candidates with a brief summary of the reasons for the petition, and a statement willing to attend the hearing, in the event that the creditor intends to present witnesses and/or experts; and
d. List of other evidences, they can be information in or sent through electronic media, if required

Time frame of bankruptcy petition

OJK approves or refuses the application within 30 days from the date the file is received completely. If the documents are incomplete, the creditor is obligated to complete them within 10 days from the date of receipt of the notification, and shall be terminated upon such period.

The consequences of bankruptcy petition

As long as the bankruptcy decision has not been pronounced, OJK may apply to the court to:

a. Puts securitization against some or all of it corporate wealth; or
b. Designate the curator (BHP or other curators) to monitor:
   1. The business management; and
   2. Payments to creditors, transfers, or the use of company's wealth as the collateral that in the case of bankruptcy is the authority of the curator.

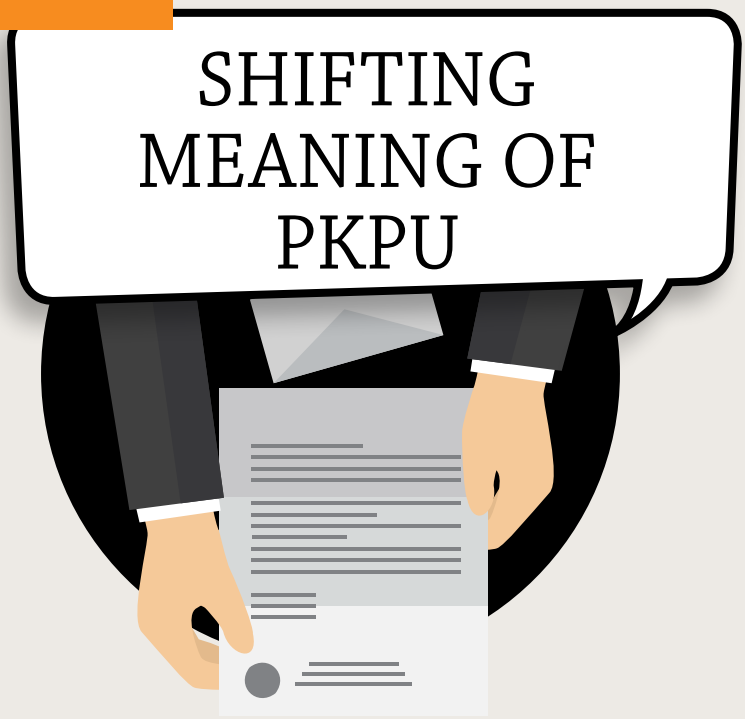
Follow-up at the end of bankruptcy

the rights of the policy holder, the insured, or the participant have the highest position on the distribution of funds from the bankrupt assets of the company so they should take precedence.

If funds are inadequate, payments are made proportionately. However, if there is an excess, funds may be used for those entitled to insurance benefits, other than the above three parties.

(TWK)

SHIFTING MEANING OF PKPU



Regulation of bankruptcy and postponement of debt obligations or abbreviated as PKPU was first enacted by Government Regulation In lieu of Law Number 1 Year 1998 on Amendment to Bankruptcy Law ("Perppu 1/1998"). Perppu 1/1998 was subsequently enacted into law through Law Number 4 Year 1998 on Stipulation of Government Regulation in Lieu of Law Number 1 Year 1998 on Amendment to Bankruptcy Law ("Law 4/1998"). Perppu 1/1998 is intended to solve the debt problem in a fair, prompt, open, and effective manner1. The law was in fact, stipulated as a result of the monetary crisis that hit Indonesia in 19972

As the law develops in the community, Perppu 1/1998 is no longer appropriate. Therefore, in 2004, the government issued Law No. 37 of 2004 on Bankruptcy and Suspension of Payment/PKPU ("Bankruptcy Law").

One of the fundamental changes of Perppu 1/1998 to the Bankruptcy Law is the process of applying for PKPU, which originally only be submitted by the debtor, but then also the creditor3. The philosophical foundation allows creditors to apply for PKPU, one of which is contained in the Explanation of Bankruptcy Act in paragraph 15, namely to avoid the potential of debtor's fraud.

For example, the debtor seeks to give an advantage to one or more particular creditors so that the other creditor is disadvantaged, or the debtor rushes all of his or her possessions to relinquish responsibility to the creditors. With the application of PKPU

by creditors, any management actions and ownership of the debtor's asset is under the supervision of the board so as to prevent the possibility of such matters.

But in its progress, the authority for creditors to apply for PKPU is deviated from the initial purpose of the formation of Bankruptcy Law. In practice, it is not uncommon for creditors to use bankruptcy and PKPU institutions to force debtors with sound financial condition to enter the PKPU process so that all of their business activities are under supervision and approval of the management. Not infrequently, the actual company is still prospective and able to pay its debts tipped bankrupt and all of its assets are in foreclosure by the curator.

It is understood that bankruptcy and PKPU in Indonesia do not require an insolvency test.4 Conversely, the Bankruptcy Law requires that debtors simply prove to have two creditors and one debt that has matured. Therefore, the debtor is declared bankrupt or PKPU is not merely a condition of a debtor that is unable to pay, but the unwillingness to pay the debtor's debt. Formally, it is irrelevant to use the reason that companies are still able to pay to avoid bankruptcy proceedings and PKPU. However, we need to go back to the philosophical foundation of the formation of the Bankruptcy Law, the principle of business continuity. Therefore, according to the author, it would be more appropriate if the main objective of PKPU is to help debtors who have difficulty in paying their debt in order to continue their business. In this case, the debtor is given the opportunity to submit a settlement proposal to its creditors. On the contrary, it would be inappropriate if PKPU's request by creditors is intended to force debtors to pay their debts, moreover to shut down the debtor's business. Thus, it is hoped that the new Bankruptcy Law Draft plan will be able to fulfill the sense of justice for both parties. **(ADP)**

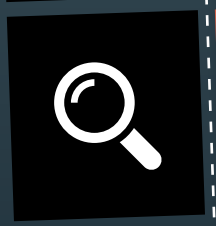
1. Third Paragraph General Elucidation of Law Number 4 Year 1998 on Stipulation of Government Regulation in Lieu of Law Number 1 Year 1998 on Amendment to Law concerning Bankruptcy to Become Law ("Law 4/1998").
2. Second Paragraph General Explanation of Law 4/1998.
3. Article 222 paragraph (1) jo. paragraph (3) of the Bankruptcy Law.
4, Process to determine the ability to pay a company.

6 STEPS OF LIMITED COMPANY DEBTOR TO APPLY FOR SUSPENSION OF PAYMENTS (PKPU)

GENERAL MEETING OF SHAREHOLDERS (RUPS)
Obtain GMS's approval (with a quorum attendance of 3/4 shares with voting rights present/represented and approved by at least 3/4 of the total shares) (article 89 UUK & PKPU);

CREDITOR APPROVAL
Obtain approval from creditors on behalf of prospective management to be proposed in PKPU (number II letter 2 SEMA No. 2 year 2016);

HAVE MORE THAN ONE CREDITOR AND ONE DUE AND COLLECTIBLE DEBT
Have more than one creditor (with debts that are due and can be collected and also not expected to be able to continue payments) (article. 222 UU UUK & PKPU);



PREPARE THE EVIDENCE
Prepare evidence documents related to the application of PKPU and to seal the documents to be used as evidence to the court;

PREPARATION OF PKPU APPLICATION
Prepare draft application for suspension of payments. In the event that the PKPU application is filed by a legal representative, the application for PKPU is signed by a lawyer and a debtor;

REGISTER THE SUSPENSION OF PAYMENT FILE TO COMMERCIAL COURT
The suspension of payment's files are copied 11 times to be submitted to the chairman of the commercial court at the legal domicile of the applicant (Article 3 verse 5 UUK & PKPU). The proposal of PKPU shall be attached with the submission of the initial evidences. **(TSH)**

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ACTING AS AN ATTORNEY for an Indonesian shipping company in its capacity as a respondent in a bankruptcy proceeding at the Commercial Court in the District Court of Central Jakarta;

2014

DRAFTING AND ANALYZING shipping contracts for a palm oil plantation company;

2013

REPRESENTING a Japanese private company as a foreign shareholder in a joint venture in the transfer of shares to a domestic shareholder, in a manpower outsourcing joint venture.