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Restructuring across borders

Indonesia

Bankruptcy and Suspension of Payment Proceedings | January 2022

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1. Introduction

This note provides a general overview to the two types of court-supervised reorganization or debt restructuring schemes available under Law No. 37 of 2004 dated 18 October 2004 on Bankruptcy and Suspension of Payment (the **Bankruptcy Law**). This note discusses these two schemes, namely: the bankruptcy proceedings (the **Bankruptcy**) and the suspension of payment (penundaan kewajiban pembayaran utang, or the **PKPU**) proceedings, and general implication towards the creditors under each of the Bankruptcy and PKPU.

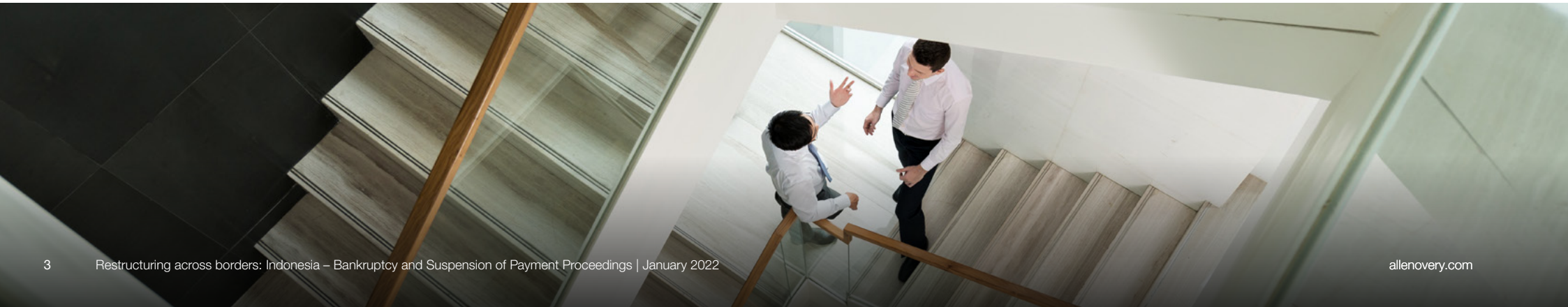
1.1 The Bankruptcy Law

The Bankruptcy Law was enacted to replace the previous bankruptcy legislations under Law No. 4 of 1998 (previously the Government Regulation in lieu of Law No. 1 of 1998). The Bankruptcy Law covers the Bankruptcy proceedings set forth in Chapter II (Articles 2 to 215) of the Bankruptcy Law, and the PKPU proceedings set forth in the Chapter III (Articles 222 to 294) of the Bankruptcy Law.

1.2 The Commercial Court

The Commercial Court (the **Court**) is the authorized court with jurisdiction over Bankruptcy, the PKPU proceedings, and any dispute in relation to these proceedings, including disputes over any bankruptcy estate and any claim against the board of directors of the debtor.

The Court is a specialized court in the commercial field established within the framework of the court of general jurisdiction. Initially only the District Court of Central Jakarta had a separate chamber designated as the Court; but now the District Courts of Makassar, Medan, Surabaya, and Semarang also have such Courts.



2. Bankruptcy Proceedings

This part provides a general understanding of the Bankruptcy proceedings, the parties to the Bankruptcy proceedings and the impact of Bankruptcy declaration on the Bankrupt Debtor and its creditors.

2.1 The Bankruptcy Petition

A petitioning party, either a creditor or a debtor, may submit a Bankruptcy petition to the Court having jurisdiction over the debtor's legal domicile. In order for the Court to grant the Bankruptcy petition, the petitioner must summarily establish that:

(a) the debtor has more than one creditor; and

(b) the debtor has failed to pay in full one of its debts which is already due and payable.

It is often the case that the Court rejects a Bankruptcy petition on the basis that the existence of debts that are already due and payable cannot be summarily proven.

2.2 The Qualifying Petitioner

While, in general, the Bankruptcy Law allows any creditor (whether domestic or foreign) or debtor (in a voluntary bankruptcy) to submit a Bankruptcy petition against its debtor to the extent the requirements above are met, the Bankruptcy Law also provides for exceptions to this general principle. The Bankruptcy Law identifies the following parties as having exclusive authority to file a Bankruptcy petition:

(a) the Indonesian Central Bank (the Bank Indonesia), if the debtor is a commercial bank (as defined under the Banking law);

(b) the Capital Market and Financial Institution Supervisory Agency (*Badan Pengawas Pasar Modal*) or the BAPEPAM LK, if the debtor is a securities company, a stock exchange, a clearing and guarantee agency, and a depositary and settlement agency;

2. Bankruptcy Proceedings (cont.)

(c) the public prosecutor, if the bankruptcy petition involves the public interest; or

(d) the Minister of Finance, if the bankruptcy petition is against an insurance company, a reinsurance company, a pension fund, and a state-owned company in the form of a *persero*.

The Bankruptcy Law requires the Bankruptcy petition to be filed by a lawyer admitted to practice before the Court having jurisdiction over the debtor's legal domicile. If the debtor is a legal entity in the form of a limited liability company (*Perseroan Terbatas*, or PT), in case of voluntary bankruptcy, the Bankruptcy petition must satisfy the prerequisites set out in the debtor's Articles of Association and, be submitted to the Court with jurisdiction over the debtor's legal domicile stated in its Articles of Association. If the debtor is not domiciled in the territory of the Republic of Indonesia, theoretically, the petition must be filed with the Court having jurisdiction over the legal domicile of the debtor's office where it carries out its business in Indonesia.

2.3 Commencement of Bankruptcy Proceedings

At the latest three days after the Bankruptcy petition is registered, the Court will study the Bankruptcy petition and schedule the first hearing.

The first hearing must be held not later than 20 days after the registration date. Upon request of the debtor, the Court may postpone the first hearing until at the latest 25 days after the registration date.

In practice, the Court, after registering the Bankruptcy petition, immediately summons the debtor and its creditors, including the petitioning creditor(s) and other creditor(s) mentioned in the Bankruptcy petition to attend the court hearing. The summons are physically delivered to the parties by the Court's bailiff unless the party is domiciled in another country or the domicile/ dwelling place of the party is unknown. The summons will only be deemed properly served to the debtor if it reaches the debtor at least seven days before the court hearing.

2. Bankruptcy Proceedings (cont.)

2.4 Attachment over the debtor's assets and appointment of a temporary curator

Pending the Court's judgment on the Bankruptcy petition, any creditor may petition the Court: (i) for a general attachment over a part of, or all of, the debtor's assets; and (ii) to appoint a temporary curator (which is akin to a receiver or judicial manager).

From a strictly theoretical perspective, the Court may likely grant an attachment order if there are reasonable grounds for believing that the debtor will dispose of its assets to avoid subjecting them to the bankruptcy procedure (if the petition is successful). The assets subject to the attachment order cannot be transferred, encumbered or leased by the debtor. In granting the attachment order, the Court may require the petitioning creditor to provide a security deposit to the Court.

2.5 Court's Judgment: Appointment of a Supervisory Judge and a Curator

The Bankruptcy Law requires the Court to render its judgment on the Bankruptcy petition within 60 days after the date on which the petition is registered. If the Court is of the view that the Bankruptcy petition has met the prequisites under the Bankruptcy Law, the Court judgment will declare the debtor to be a bankrupt (the Bankrupt Debtor) and appoint a curator and a Supervisory Judge to supervise the Bankruptcy proceedings.

2.6 Appeal Process

The Bankrupt Debtor, any petitioning creditor(s), or any other non-petitioning creditor(s) by filing a request for cassation (*kasasi*) may submit an appeal against the Court's judgment to the Supreme Court by submitting a memorandum of cassation containing the reasons for filing such request, with the Registrar with the Court within eight days after the Bankruptcy judgment is rendered.

Within two days after the request for cassation is filed, the Registrar with the Court must deliver a copy of the request for cassation and the memorandum of cassation to the other party/ parties to give them a chance to file a response to the request for cassation (known as the counter memorandum of cassation) within seven days after the date they receive the copy of the request for cassation and the memorandum of cassation.

Subsequently, the Registrar with the Court must deliver all documents relating to the request for cassation to the Supreme Court within 14 days after the date the request for cassation is registered. The Supreme Court must commence adjudicating the request for cassation within 20 days as of the filing of the request for cassation, and render its decision within 60 days of the date the request for cassation is filed.

2. Bankruptcy Proceedings (cont.)

2.7 Civil Review Process

The Bankruptcy Law also includes the process for civil review in Chapter IV (Articles 295 to 298). A request for civil review (*peninjauan kembali*) against a final and binding decision by the Supreme Court can be made only if:

(a) there is a new documentary evidence (*novum*), which is very crucial and that could reverse the previous decisions (ie the Supreme Court) if such evidence had been discovered and presented during that court proceedings; or

(b) the Court has made a gross mistake in applying the law when rendering its decision.

Similar to the request for cassation, the party filing a request for civil review must also submit a memorandum of civil review explaining the reasons for filing such request.

The request for civil review should be filed with the Registrar with the Court no later than: (i) 30 days after the decision to be reviewed is rendered in the event the request is made due to a gross mistake of the Court, or (ii) 180 days after the date the judgment is rendered in the event the request is made due to discovery of new evidence. Within two days after the filing date of the request for civil review, the Registrar with the Court must deliver a copy of the request for civil review and the memorandum of civil review to the other party/parties to give them a chance to file a response to the request for civil review within 10 days after the date the request was registered.

Subsequently, within 12 days as of the date the request is registered, the Registrar with the Court must deliver all documents relating to the request for civil review to the Supreme Court to be adjudicated. The Supreme Court must give its decision on the request for civil review within 30 days of the date the request is registered.

2.8 The Impact of Bankruptcy Declaration on the Bankrupt Debtor

After the Court declares the debtor bankrupt, the Bankrupt Debtor loses its capacity to manage and dispose of the bankruptcy estate, and all court enforcement procedures relating to security or otherwise are postponed and any attachment order is lifted. The power to undertake any legal action in respect of the bankruptcy estate passes to the curator.

The bankruptcy estate consists of all of the Bankrupt Debtor's assets at the time the declaration of bankruptcy of that Bankrupt Debtor is rendered (including all assets obtained during the bankruptcy but excluding assets stipulated in Article 22 of the Bankruptcy Law). In the event the Bankrupt Debtor is not a natural person but a limited liability company, bankruptcy of the company, as a general rule, does not extend to its members (shareholders) because they are protected under the limited liability concept. The maximum they can be required to contribute is the remaining unpaid amount of their capital contribution.

2. Bankruptcy Proceedings (cont.)

2.9 The Impact of Bankruptcy Declaration on the Creditors

The Bankruptcy Law identifies different classes of creditors. This classification differentiates the priority rights of the creditors in the Bankruptcy proceedings, including their voting rights and distribution of sale proceeds of the Bankruptcy estate.

(a) Secured Creditors

The secured creditors that hold asset security granted by the Bankrupt Debtor have a priority claim on the proceeds of the sale of any assets that have been pledged as security in their favour, whether a pledge (*gadai*), fiducia security (*jaminan fidusia*), or mortgage (*hipotek/ hak tanggungan*).

The secured creditors may enforce the security granted in their favour subject to a 90-day stay period. The stay period commences when the Court declares the debtor as a Bankrupt Debtor and it could terminate within 90 days, when an insolvency event as discussed in Section 2.19 below occurs. The secured creditor(s) must commence the enforcement within 2 months after an insolvency event occurs.

The Bankruptcy Law also entitles the secured creditors to request the Court that they be considered as unsecured creditors for the recovery of a portion of their secured claims if the secured creditors can establish that the value of their security will not be sufficient to recover the entire amount of their secured claims when they enforce the security. Secured creditors also have the option of releasing their security and rights as a secured creditor in order to claim as an unsecured creditor for the entirety of their claim.

(b) Unsecured Creditors

Unsecured (or "concurrent") creditors, on the other hand, share in the division of the remaining assets and obtain satisfaction of their debts in proportionate percentage (*pari passu*). Unsecured or concurrent creditors will share the money proportionately, rather than having a situation where the first creditor to apply will be the first to receive payment. As from the date of the Bankruptcy, the unsecured or concurrent creditors can obtain satisfaction of their claims only in the Bankruptcy procedure and not through individual enforcement proceedings.

(c) Preferred Creditors

Preferred creditors are entitled to preferential rights or privilege (*hak istimewa*) granted under the law. Articles 1137 and 1138 of the Indonesian Civil Code state that the preferred creditors are those creditors granted with prefential rights by the law. It is important to note that only creditors having a claim against the Bankrupt Debtor at the time of the Bankruptcy declaration may claim payment from the proceeds of the Bankruptcy estate. It should be noted also that all payment obligations of the Bankrupt Debtor which occur after the Bankruptcy declaration cannot be paid up from the proceeds of the Bankruptcy estate, unless the fulfilment of the payment obligations brings benefits to the Bankruptcy estate.

2. Bankruptcy Proceedings (cont.)

2.10 Administration of the Bankruptcy Estate

One of the purposes of bankruptcy is the orderly liquidation of the Bankrupt Debtor's assets and satisfaction of the unsecured or concurrent creditors' claims on a proportional footing or percentage. The basic principle for the distribution of the proceeds of the Bankruptcy estate to the creditors is the equality of the creditors (*paritas creditorium*) meaning that all creditors within a certain class have an equal right to payment, and the proceeds of the Bankruptcy estate must be distributed in proportion to the sizes of their respective claims.

As discussed in Section 2.5 above, the Court will also appoint a Supervisory Judge and a Curator to manage and preserve the Bankruptcy estate in the event the Court declares the debtor as bankrupt.

(a) Supervisory Judge (*Hakim Pengawas*)

The Supervisory Judge is responsible for supervising the actions of the curator with respect to administration and liquidation of the Bankruptcy estate. Most of the Curator's major decisions are subject to the approval of the Supervisory Judge. The Supervisory Judge is also empowered to examine witnesses or order an investigation by experts in order to obtain any information on the bankruptcy proceeding. The Court is obliged to hear the advice of the Supervisory Judge before deciding any matters related to the administration and liquidation of the Bankruptcy estate.

(b) Curator (*Kurator*)

The Curator acts as the official receiver of the debtor and administrator and liquidator of the Bankruptcy estate in consultation with and under the supervision of the Supervisory Judge. One of the main duties of the curator is to transform the Bankruptcy estate into cash by selling the bankruptcy estate through a public auction or a private sale, to be then distributed to the creditors.

The curator may either be a certain person(s) or firm(s), having the required skills and experience, who is an active member of a curators' association and registered with the Minister of Law and Human Rights, or, in the absence of a specific request for such a firm or person, the *Balai Harta Peninggalan* (the probate court or **BHP**), which is a special agency under the Minister of Law and Human Rights. The curator is nominated by the petitioning party and may be named in the Bankruptcy petition. If there is no such nomination in the Bankruptcy petition, and the Bankruptcy petition is granted, BHP shall act as the curator or the Court may appoint a curator. To be appointed, the nominated curator must be independent (ie must not have any relationship with either the debtor or any creditor of the debtor) and must not have any conflict of interest.

The Court may also appoint an additional curator at any time upon request of the (existing) curator, the Supervisory Judge or the Bankrupt Debtor (in the two latter instances, after hearing the opinion of the (existing) curator). The fees payable to the curator depend on the outcome of the process and the amount is capped at a maximum of a certain percentage of the bankruptcy estate as per guidelines enacted by the Minister of Law and Human Rights through Regulation No. 18 of 2021 (as may be amended from time to time).

(c) Creditors Committee (*Panitia Kreditor*)

Besides appointing a curator and a supervisory judge, the Court may also appoint: (i) a temporary creditors committee (*panitia kreditor sementara*) consisting of three members selected from the creditors that have registered themselves for verification (verification is discussed in Section 2.14 below) in the bankruptcy declaration or by a later decision if it is deemed necessary or if it is desirable for the interests of the bankruptcy estate; and (ii) a permanent creditors committee (*panitia kreditor tetap*) after the verification. The main duty of the creditors committee is to provide advice to the curator.

The curator, however, is not bound by the committee's advice or recommendation. In practice, the creditors committee is rarely established except in cases where the Bankrupt Debtor's assets are substantial and the creditors are numerous.

2. Bankruptcy Proceedings (cont.)

2.11 Announcement of the Bankruptcy Declaration

Within five days after the Bankruptcy declaration by the Court, the curator will announce the Bankruptcy declaration of the Bankrupt Debtor, together with the name and address of the Bankrupt Debtor, the name of the appointed Supervisory Judge, the composition of the interim creditor's committee (if any), as well as the venue and time scheduled for the first creditors' meeting, in the State Gazette and at least two daily newspapers with nationwide distribution as determined by the Supervisory Judge.

2.12 Creditors' Meetings

Every creditors' meeting will be chaired by the Supervisory Judge, and must be attended by the curator, the Bankrupt Debtor, and the creditors. The Bankruptcy Law allows the creditors to be represented (or accompanied) by their proxies in the creditors' meetings. The first creditor's meeting will be held within 30 days calculated from the date of the bankruptcy declaration. If it is decided to hold a creditors' meeting for verification of creditors' claims, the curator must immediately notify all creditors they are aware of and put an advertisement in two newspapers with nationwide circulation about the schedule for the creditors' meeting and the deadline for submission of their debt claims.

2.13 Submission of Claims

The Bankruptcy Law requires that every creditor submit its claim in the form of a written statement setting out the nature and the amount of the claim, accompanied by documentary evidence or copies relating thereto and a statement as to whether the creditor concerned has a security right over particular assets *in rem* (secured creditors) or a statutory priority right (eg, a preference, or a priority claim, such as tax).

Pursuant to the Bankruptcy Law, a creditor's claim may be submitted to the curator directly by the creditor itself or by its proxy. If the claim is submitted by the creditor itself, a power of attorney is not needed. However, if the claim is submitted by a proxy, a specific power of attorney is required. The creditor submitting the claim has the right to obtain an acknowledgment of receipt from the curator. The claims submitted by the creditors will then be verified in the creditors' meeting.

2. Bankruptcy Proceedings (cont.)

2.14 Verification of Claims and A List of Claim

Verification in this context is the process of confirming/acknowledging or refuting/disproving a creditor's claim. In the verification meeting, all creditors' claims against the Bankrupt Debtor that have been submitted will be verified (and, if presented, the debtor's composition (accord) plan (discussed in Section 2.18 below) will be decided in that meeting). The curator must verify the claims by comparing their statements with the notes and/or record/statements of the Bankrupt Debtor, and discussing with the relevant creditor if it has any objections to the claim. In verifying a claim, the curator is entitled to require the relevant creditor to provide it with letters or documents that have not been submitted and to show original notes and evidence.

Rules for verification of creditors' claims are set forth in Chapter II, Part 5 (Articles 113 to 143) of the Bankruptcy Law, which among other things, stipulates that:

(a) a claim whose due date is not yet determined or which grants rights to periodic instalments, when being verified, is to be valued as at the date the Bankruptcy declaration is pronounced;

(b) pursuant to Article 124 of the Bankruptcy Law, interest (on receivables), which arises after a Bankruptcy declaration, cannot be verified unless and only to the extent that such interest is secured by a mortgage, pledge or other security right;

(c) a receivable which is due within one year from the date of the Bankruptcy declaration, is to be treated as if that receivable was due at the moment when the bankruptcy is declared. A receivable which is due more than one year after the Bankruptcy declaration, is to be verified for its value as at one year after the bankruptcy commences; and

(d) the value of a claim which cannot be determined or is not denominated in Indonesian currency (Rupiah or Rp) in the verification process shall be verified by calculating the estimated value in Rupiah as at the exchange rates on the date of the Bankruptcy declaration.

The curator must put all claims that it has acknowledged into a list of claims provisionally acknowledged and all claims that it has disputed into a list of disputed claims together with its reason(s) for disputing those claims.

In each of those lists, it must also state its opinion on the existence of (valid) security rights, preference rights or retention rights on any of those claims. The curator must make available copies of these lists at its office for public inspection free of charge during the seven days prior to the meeting for verification of claims. Claims accepted by the curator and recorded in the minutes of the verification meeting are final and legally binding. Any claims contested by the curator and which remain disputed will be brought to the Supervisory Judge. If the Supervisory Judge fails to amicably settle the dispute, the issue will be submitted to the Court, which will decide the case expeditiously.

The verified distribution proceeds list will be placed for public viewing with the Clerk's office for a period determined by the Supervisory Judge. During that period, any creditor can file a challenge to the list with the Clerk's office and after the period has lapsed, the Supervisory Judge will determine the date of the court proceedings. The Court's decision on this issue can still be objected to by a creditor by submitting a petition for appeal, which will be decided in the manner set out in the paragraph above.

The curator will then conduct appropriate payment to the creditors, after which the bankruptcy ends.

The curator will distribute payment to all acknowledged creditors upon the order of the Supervisory Judge at any time the curator considers that there are sufficient funds available. Creditors that have not received full payment maintain the right to reassert their claim(s) (based on the verification minutes or the final and binding distribution of proceeds list) against the debtor. As a general rule, the debtor will only be liberated after full payment of such claims or waiver or release from the creditors. If the debtor is a (limited liability) company, the creditors may request a Court order to dissolve the company.

A creditors meeting will be convened to decide on the method of liquidation and also to verify the claims that are not yet verified. Each time considerable proceeds are accumulated, the Supervisory Judge will order the curator to distribute the proceeds to the creditors whose claims have been verified.

[1] Constitutional Court Decision No. 67/PUU-XI/2013 dated 11 September 2014 jo. Article 1139 Indonesian Civil Code (**ICC**) jo. Article 1149 ICC jo. Article 21 of Law No. 28 of 2007 on Third Amendment to Law No. 6 of 1983 on General Provisions of Tax.

2. Bankruptcy Proceedings (cont.)

The curator will prepare a distribution proceeds list to be approved by the Supervisory Judge, containing a list of income and expenses including costs of bankruptcy, and the list of creditors, their verified claims and their distribution of payment.

The curator is responsible for distributing the proceeds of the liquidated estate. The amount of the liquidated estate plus collected receivables deducted with bankruptcy fees and estate debts (*utang harta pailit*) should be paid in the following order:[1]

1. to the employees, for unpaid salary;
2. to the secured creditors (if they have not previously enforced their security and collected and applied the proceeds from such enforcement);
3. to the employees, for unpaid allowances;
4. to the preferred creditors; and
5. the balance being paid *pro rata* to the unsecured or concurrent creditors.

2.15 Set-off and Compensation Rights

During the Bankruptcy proceedings, a creditor is entitled to exercise its right to set-off its claim against a debt owed to the debtor, if certain conditions are fulfilled. Rights of set-off arising prior to the Bankruptcy declaration are not affected by the stay of execution. However, the exercise of any rights of set-off resulting from the transfer of debts or claims against the debtor prior to a Bankruptcy declaration will only be upheld if such transfer was done in good faith. For example, a party who intends to set off any debts owing by it to the debtor against any debts owing by the debtor to it under a negotiable debt instrument (issued by the debtor) will have to establish that at the relevant time the party was the owner in good faith of the negotiable instrument.

There are certain situations in which set-offs against the bankrupt estate may be deemed to be in bad faith. For example, a creditor who transfers its claims against the debtor to a third party who then takes enforcement action against the debtor's assets outside of Indonesia (and is thereby preferred ahead of other creditors) or a creditor who transfers its claims against the debtor to a third party with the intention of setting off the transferred claim against amounts owing by the debtor to the third party outside of Indonesia (which is prohibited). In both situations the creditor may be liable to compensate the Bankruptcy estate.

2.16 Completion of the Bankruptcy

After all acknowledged creditors have received the full amount of their claims or as soon as the final distribution plan (made by the curator) has become binding, the bankruptcy will end. The completion of the bankruptcy must be announced by the curator in the same manner as the announcement of the declaration of bankruptcy. Thirty days after the end of the Bankruptcy, the curator will account for its administration and liquidation of the Bankruptcy estate to the Supervisory Judge.

2.17 Validity and Binding Effect of the Curator's Actions

It should be noted that any cassation or civil review process does not affect any action taken by the curator, who is empowered by law to administer and liquidate the bankruptcy estate. If for any reason the declaration of bankruptcy is reversed in a cassation or civil review, actions that are taken prior to the curator being served notice of such cassation or civil review are legal and binding on
the debtor.

2.18 Composition Plan under the Bankruptcy Proceedings and Voting Rights

The Bankruptcy Law recognizes the possibility of settlement between the Bankrupt Debtor and its creditors in the Bankruptcy proceedings. The Bankrupt Debtor may submit a settlement plan (*an accord*, or the **Composition Plan**) for approval by the unsecured creditors. As the secured creditors are able to enforce the security rights and set off the sale proceeds against their claims, the secured creditors are exempted from any voting rights on the Composition Plan unless they release their rights as secured creditors.

In order to be valid and effective, the Composition Plan must be approved in a creditors' meeting by affirmative votes of:

(a) more than 1/2 of the unsecured creditors (or their proxies) which are present in the meeting; and

(b) those unsecured creditors that hold at least 2/3 of all accepted or provisionally accepted unsecured claims held by the concurrent creditors present in the meeting.

Please note that votes are only taken from the concurrent creditors present in the meeting. The Composition Plan, which has been ratified, shall bind all of the unsecured creditors. It also binds those unsecured creditors who voted against the acceptance of the Composition Plan and those unsecured creditors who were not present or represented at the voting hearing.

2.19 Meaning of "Insolvency Event"

Unlike the position in other jurisdictions where, in principle, insolvency refers to a situation where one's liabilities are greater than one's assets, the Bankruptcy Law refers to insolvency as an event that occurs when:

(a) no Composition Plan is offered by the Bankrupt Debtor;

(b) the unsecured creditors do not accept the proposed Composition Plan; or

(c) the Court does not ratify the agreed Composition Plan.

An insolvency event triggers the right for secured creditors to commence the enforcement of the security granted in their favour.

3. Suspension of Payment Proceedings

A creditor that foresees that its debtor will not be able to continue to pay its debts when they become due and payable, and a debtor that is unable, or predicts that it would be unable to pay its debts when they become due and payable, may file a PKPU petition with the relevant Court. The PKPU is intended to provide the debtor with more time either to meet its obligations, or to come to an agreement with its creditors to restructure the relevant debts. Please note that a PKPU can be easily converted into a bankruptcy when it is clear that the PKPU will not be successful, as will be discussed below.

3.1 Commencement of the PKPU Proceedings

The PKPU petition must be signed by the petitioner and its legal counsel admitted to practice before the Court[2]. If the petitioner is the debtor itself, the petition must be accompanied by a schedule list comprising the nature of its debts/claims and the creditors to whom these debts are owed (ie the creditors' names, addresses, and the amount of receivables), and other relevant documentary evidence including compliance with the debtor's corporate documents. If the PKPU petition is filed by the creditor, the Court must summon the debtor (through the court bailiff) with registered mail at the latest seven days before the hearing.

Pursuant to the Bankruptcy Law, a debtor may also file a PKPU petition after the Bankruptcy petition has been filed against it by its creditor. If petitions for both PKPU and Bankruptcy are reviewed by the Court at the same time, the PKPU petition prevails and must be decided first. Although it is not a form of a legal remedy (such as appeal or civil review), a PKPU petition will effectively postpone the Bankruptcy process for a certain period of time.

3.2 Composition Plan under PKPU Proceedings

In addition to the Composition Plan recognized under Bankruptcy proceedings mentioned in Section 2.18 above, the Bankruptcy Law also allows for a settlement under the PKPU proceedings by way of submission of a Composition Plan.

The Bankruptcy Law requires the debtor petitioning the PKPU (the **Applicant**) to submit its Composition Plan with its creditors at the time of or after the debtor files the PKPU petition. A Composition Plan with creditors is an agreement made between the Applicant and its creditors for the settlement or discharge of the debts of the Applicant. The Composition Plan should set out the proposed timetable under which the Applicant will repay its debts and also whether the debts will be fully or partially repaid. The Applicant and all of its creditors are free to agree any terms of payment they choose. The Bankruptcy Law does not contain any requirements with respect to the contents of the Composition Plan.

The Composition Plan shall be automatically aborted if, after its submission (but before its approval by the creditors), the PKPU proceedings are terminated (at the end of its intended period or earlier, by the Court upon its own initiative, or upon request of either the Supervisory Judge, the Administrator, or one or more of the creditors, on any of grounds stipulated in Article 255 of the Bankruptcy Law). The PKPU proceedings may also be terminated by the Court upon request of the Applicant on the grounds that the assets of the Applicant are sufficient to allow it to undertake repayment of its debts again.

One distinguishing feature with the Composition Plan under the Bankruptcy proceedings in Section 2.18 above is that the Composition Plan under the PKPU proceedings will bind all of its creditors. The Bankruptcy Law prescribes that dissenting secured creditors are entitled to compensation amounting to the lesser of the value of their security and the debt amount as covered by their security package.

[2] Please note that the qualifications in Section 2.2 above are also applicable to the submission of a PKPU petition.

3. Suspension of Payment Proceedings (cont.)

3.3 Effects of PKPU

One effect of a PKPU is that the debtor cannot be forced to pay its debts within the PKPU period (ie. the 45-day provisional PKPU period as may be extended to a definitive PKPU period). Unlike in Bankruptcy proceedings, a debtor in PKPU proceedings may still manage or dispose of its assets and even obtain loans and secure its unsecured assets, provided that those actions have been authorized by the administrator and/or the Supervisory Judge.

3.4 Provisional PKPU

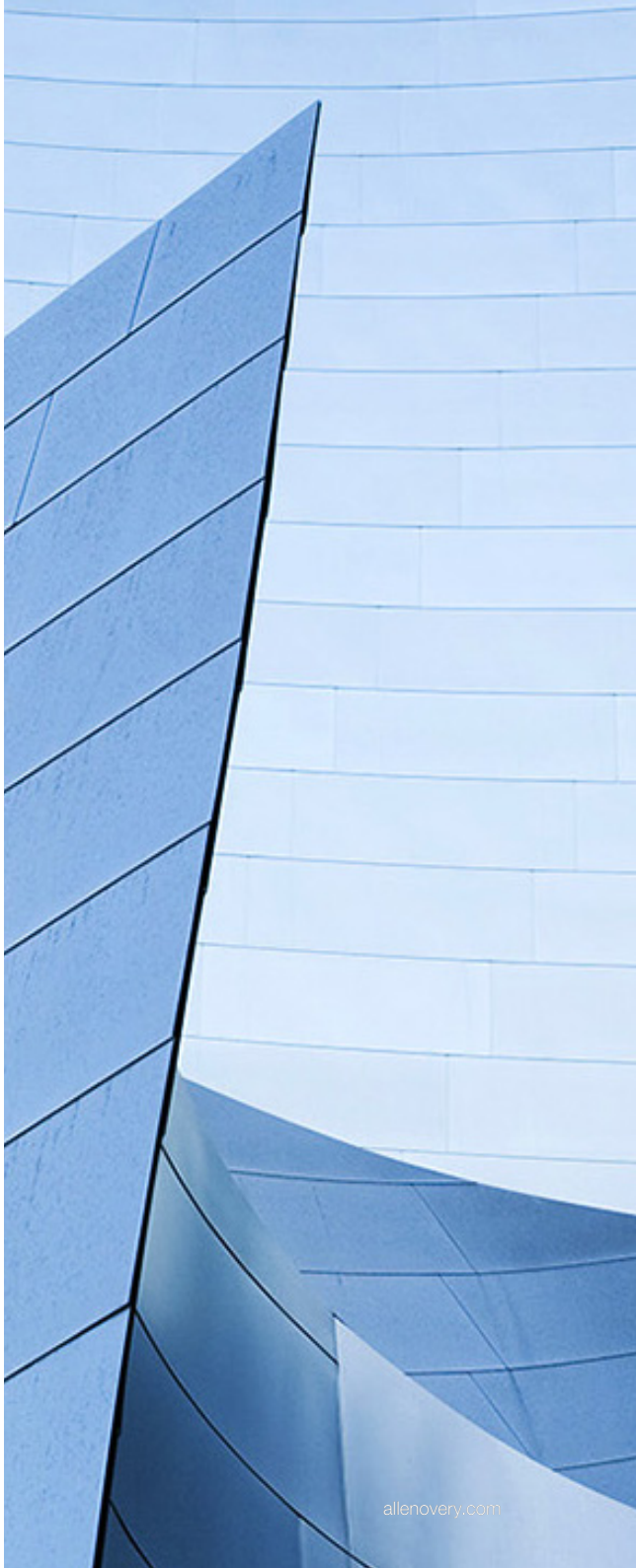
Within two weeks after the registration of a PKPU petition, the Court is obliged to issue its decision on the petition for provisional PKPU, and (if the petition is granted) appoint a Supervisory Judge and (an) administrator(s) after receiving the PKPU petition. The provisional PKPU is effective from the date of the PKPU order until the date of the next court hearing determined in the order, but this period shall not exceed 45 days.

Immediately after the provisional PKPU has been declared, the Court, through the administrator, would summon the Applicant and all recognized creditors, by registered mail or courier, to attend a hearing held at the latest 45 days after the granting of the provisional PKPU. Under the Bankruptcy Law, the hearing is technically called a judge's deliberation meeting (the **Hearing**).

The administrator must announce the provisional PKPU no later than 21 days before the planned Hearing and must include an invitation to attend the Hearing, with the date, venue and time of the Hearing, identity of the Supervisory Judge and the name and address of the administrator, as well as the Composition Plan (if any). Notwithstanding the administrator's obligation to summon the creditors to attend the Hearing, each creditor will have the right to attend it, even if it did not receive the summons.

3.5 Verification Meeting

After its appointment, the Court appointed administrator will arrange a meeting(s) known as a verification meeting(s) to verify the amount of each creditor's claim. The result of such meeting(s) determines the calculation of the amount of votes that each creditor may have. A verification meeting should be attended by the Supervisory Judge, the administrator, the debtor and the creditors.



3. Suspension of Payment Proceedings (cont.)

3.6 Permanent PKPU: Composition Plan under the Bankruptcy Proceedings and Voting Rights

If the Composition Plan is not available in this first hearing or the creditors have not yet cast votes on the Composition Plan, the creditors, at the request of the Applicant, must decide whether or not to grant a permanent PKPU, so that the Applicant and the creditors may continue to negotiate the Composition Plan during the permanent PKPU.

If the permanent PKPU is agreed, the period for the PKPU and any other extension of it may not exceed 270 days. If it is not agreed, or if at the expiry of the PKPU there is no decision on the Composition Plan, the administrator must notify the Court, which will forthwith declare the Applicant as bankrupted.

The permanent PKPU will be granted if it is approved by:

(a) more than ½ of the unsecured creditors (or their proxies) present, provided that the majority represents at least 2/3 of the value of all accepted unsecured claims held by the concurrent creditors present at the hearing or meeting; and

(b) more than ½ of the secured creditors (or their proxies) present, provided that the majority represents at least 2/3 of the value of all accepted secured claims held by the secured creditors present at the hearing or meeting. Should there be any disagreement among the administrator and the creditors on the creditors' voting rights, the disagreement will be settled by the Supervisory Judge.

As mentioned above, if the creditors decide not to grant or extend the permanent PKPU, the debtor would immediately be declared bankrupt. It is therefore mandatory for the Applicant to ensure at the very beginning (before submitting the PKPU application) that a sufficient number of its unsecured creditors (or their proxies) who represent the qualified acknowledged debt claims will be present at the hearing or meeting and would consistently approve the granting of the permanent PKPU. The Court will then have to ratify the approved PKPU.

3.7 Termination of PKPU Proceedings

A PKPU proceedings may be terminated by the Court on a request submitted by either the Administrator, the Supervisory Judge, or any of the creditors, or on the Court's own initiative, if:

(a) the Applicant, in bad faith, takes action during the PKPU proceedings which is detrimental to its assets or the interests of its creditors;

(b) during the PKPU, the Applicant performs actions of management or transfers rights over any part of its assets, without authorization from the Administrator;

(c) the Applicant neglects to do what the Court ordered at the time or after the PKPU was granted, or neglects to do what the Administrator requires in the interests of the debtor's assets;

(d) the Applicant's assets are in such a state that a PKPU would no longer be feasible; and/or

(e) the Applicant is in such a condition that it cannot be expected to fulfil its obligations towards the creditors on time.

Comparative Table – Bankruptcy v Suspension of Payment

Items	Bankruptcy	Suspension of payment
Petitioning party	A petitioning party, either a creditor or a debtor, may submit a Bankruptcy petition to the Court having jurisdiction over the debtor's legal domicile.	The borrower or a lender can file a PKPU petition. A debtor may also file a PKPU petition after the Bankruptcy petition has been filed against it by its creditor. If petitions for both PKPU and Bankruptcy are reviewed by the Court at the same time, the PKPU petition prevails and must be decided first. Please note that a PKPU can be easily converted into a bankruptcy when it is clear that the PKPU will not be successful.
Requirements	The debtor has more than one creditor; and the debtor has failed to pay in full one of its debts which is already due and payable.	A creditor that foresees its debtor would not be able to continue to pay its debts when they become due and payable, and a debtor that is unable, or predicts that it would be unable, to pay its debts when they become due and payable.
Timeline	The Court to render its judgment on the petition within 60 days after the date the petition is registered.	Within two weeks after the registration of the PKPU petition, the Court is obliged to issue its decision on the petition for provisional PKPU, and (if the petition is granted) appoint a Supervisory Judge and (an) administrator(s) after receiving the PKPU petition. The provisional PKPU is effective from the date of the PKPU order until the date of the next court hearing determined in the order, but this period shall not exceed 45 days. If the Composition Plan is not available in this first hearing or the creditors have not yet cast votes on the Composition Plan, the creditors, at the request of the Applicant, must decide whether or not to grant a permanent PKPU, so that the Applicant and the creditors may continue to negotiate the Composition Plan during the permanent PKPU. If the permanent PKPU is agreed, the period for the PKPU and any other extension of it may not exceed 270 days. If it is not agreed, or if at the expiry of the PKPU there is no decision on the Composition Plan, the administrator must notify the Court, which will forthwith declare the Applicant as bankrupted.

Comparative Table – Bankruptcy v Suspension of Payment (cont.)

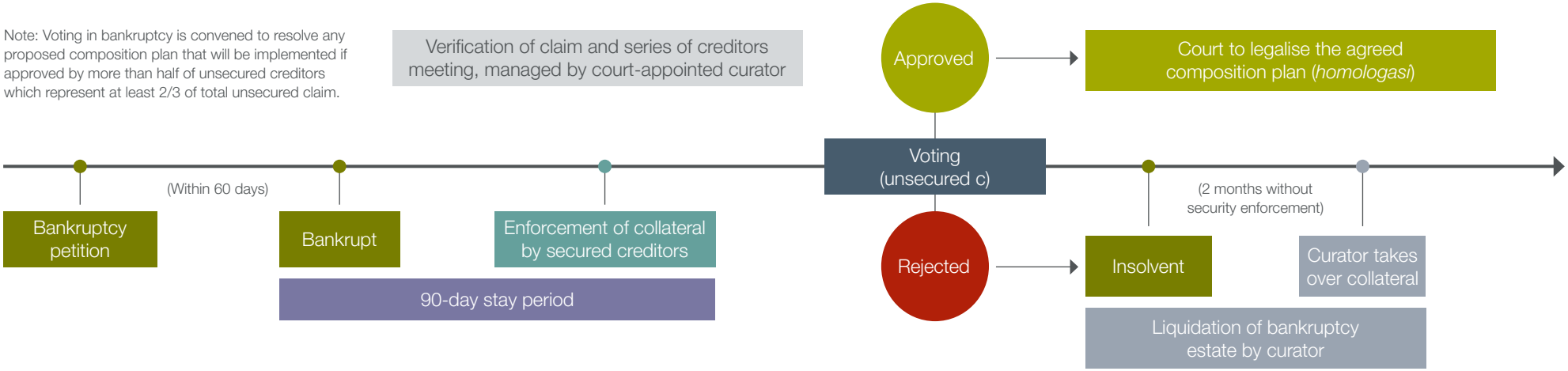
Items	Bankruptcy	Suspension of payment
Petitioning party	A petitioning party, either a creditor or a debtor, may submit a Bankruptcy petition to the Court having jurisdiction over the debtor's legal domicile.	The borrower or a lender can file a PKPU petition. A debtor may also file a PKPU petition after the Bankruptcy petition has been filed against it by its creditor. If petitions for both PKPU and Bankruptcy are reviewed by the Court at the same time, the PKPU petition prevails and must be decided first. Please note that a PKPU can be easily converted into a bankruptcy when it is clear that the PKPU will not be successful.
Requirements	The debtor has more than one creditor; and the debtor has failed to pay in full one of its debts which is already due and payable.	A creditor that foresees its debtor would not be able to continue to pay its debts when they become due and payable, and a debtor that is unable, or predicts that it would be unable, to pay its debts when they become due and payable.
Timeline	The Court to render its judgment on the petition within 60 days after the date the petition is registered.	Within two weeks after the registration of the PKPU petition, the Court is obliged to issue its decision on the petition for provisional PKPU, and (if the petition is granted) appoint a Supervisory Judge and (an) administrator(s) after receiving the PKPU petition. The provisional PKPU is effective from the date of the PKPU order until the date of the next court hearing determined in the order, but this period shall not exceed 45 days. If the Composition Plan is not available in this first hearing or the creditors have not yet cast votes on the Composition Plan, the creditors, at the request of the Applicant, must decide whether or not to grant a permanent PKPU, so that the Applicant and the creditors may continue to negotiate the Composition Plan during the permanent PKPU. If the permanent PKPU is agreed, the period for the PKPU and any other extension of it may not exceed 270 days. If it is not agreed, or if at the expiry of the PKPU there is no decision on the Composition Plan, the administrator must notify the Court, which will forthwith declare the Applicant as bankrupted.

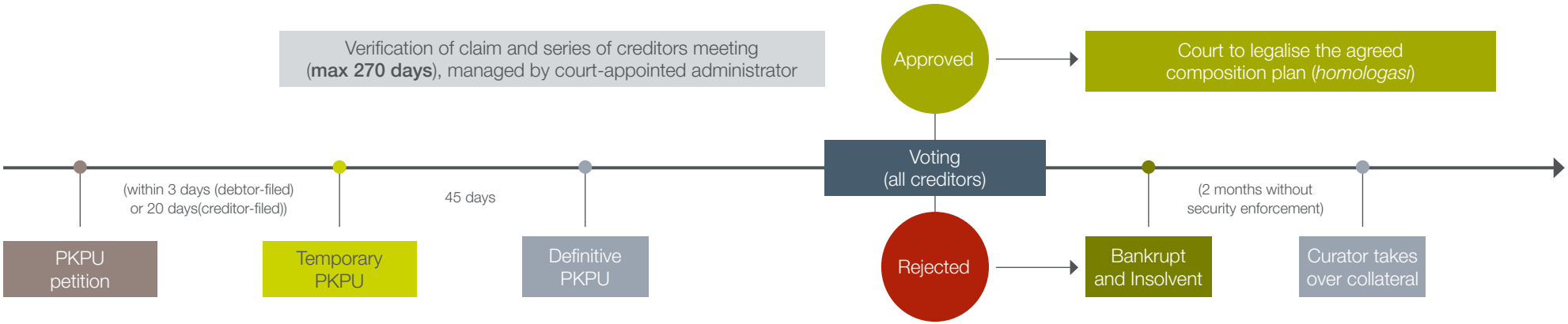
Comparative Table – Bankruptcy v Suspension of Payment (cont.)

Items	Bankruptcy	Suspension of payment
Creditors quorum and vote	More than half of the unsecured creditors (or their proxies) which are present in the meeting; and	More than half of the unsecured creditors (or their proxies) present, provided that the majority represents at least two-thirds of the value of all accepted unsecured claims held by the unsecured creditors present at the hearing or meeting; and
	at least two-thirds of all accepted or provisionally accepted unsecured claims held by the unsecured creditors present in the meeting.	more than half of the secured creditors (or their proxies) present, provided that the majority represents at least two-thirds of the value of all accepted secured claims held by the secured creditors present at the hearing or meeting. Should there be any disagreement between the administrator and the creditors on the creditors' voting rights; it will be settled by the Supervisory Judge.
Appeal	The Bankrupt Debtor, any of the petitioning creditor(s), or any other non-petitioning creditor(s) by filing a request for cassation (kasasi) may submit an appeal against the Court's judgment to the Supreme Court by submitting a memorandum of cassation with the Registrar with the Court within eight days after the Bankruptcy judgment. The Supreme Court must commence adjudicating the request for cassation within 20 days as of the filing of the request for cassation, and render its decision within 60 days of the date the request for cassation is filed.	The Bankruptcy Law prescribes that no appeal is available against a PKPU order, On December 2021, the Constitutional Court issued a judgment stipulating that a PKPU order may be subject to cassation (kasasi) for examination by the Supreme Court if the PKPU petition was submitted by a creditor and the debtor's proposed composition plan is rejected by its creditors. The Constitutional Court does not clearly define which judgment that may be subject to appeal, ie. whether it is of provisional PKPU order or of PKPU termination which by its order shall be resolved by the end of 45-day provisional PKPU period. An implementation of cassation mechanics remains subject to definitive guidelines that the Supreme Court should enact in response to this recent update.

Milestones of court-sanctioned restructuring

Note: Voting in bankruptcy is convened to resolve any proposed composition plan that will be implemented if approved by more than half of unsecured creditors which represent at least 2/3 of total unsecured claim.





Note: Voting in PKPU is convened to resolve any proposed extension of moratorium period or composition plan and applies this threshold:

- Approval by more than half of unsecured creditors which represent at least 2/3 of total unsecured claim; AND
- Approval by more than half of secured creditors which represent at least 2/3 of total secured claim.

Stay period throughout the term of PKPU (max 270 days)

Enforcement of collateral by secured creditors

Liquidation of bankruptcy estate by curator

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If you require advice on any of the matters raised in this document, please contact any of our partners or your usual contact at Allen & Overy, or email rab@allenovery.com.

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