

THE ROLE OF JUDGES IN INSOLVENCY PROCEDURE THE INDEPENDENCE AND ACCOUNTABILITY OF JUDGES

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Introduction

On August 20, 1998 in Indonesia, a Commercial Court was established in the District Court of Central Jakarta based on Article 281 paragraph 1 of Perpu (Government Regulation substituting Law) No. 1 of 1998 vide Law No. 4 of 1998. Since May 8, 2000, based on Presidential Decree No. 97 of 1999 vide Article 281 paragraph 2 of Perpu No. 1 of 1998 vide Law No. 4 of 1998 a Commercial Court has also been established in the District Courts of Surabaya, Makasar/Ujung Pandang, Medan and Semarang.

Since the establishment of Commercial Courts in Indonesia on August 20, 1998 all the cases on insolvency and Deferment of Obligation to Pay Debts and all other related matters have come under the absolute competence of the Commercial Court (Article 2 of Perpu No. 1 of 1998 vide Law No. 4 of 1998).

Based on the above-mentioned description it becomes obvious that since August 20, 1998 the Judge who has a role in an insolvency or its process is the Commercial Judge. Before the establishment of Commercial Courts or, in another word, before the enforcement of Perpu No. 1 of 1998 vide Law No. 4 of 1998, all the cases on Insolvency and Deferment of Obligation to Pay Debts and the related matters lie within the competence of the District Court, so it was the Judge of District Court who had a role in such cases in the past.

To comply with Article 283 paragraph 1 of Perpu No. 1 of 1998 which sets out: Commercial judges shall be appointed by decision of the Chief Justice of the Supreme Court. Therefore, on August 20, 1998, the Chief Justice of the Indonesian Supreme Court appointed a number of Commercial Judges from the District Court Judges who met the requirements prescribed in Article 283 paragraph 2 of Perpu No. 1 of 1998 to carry out the duties assigned to the Commercial Courts.

In addition, based on Article 283 paragraph 3 of Perpu No. 1 of 1998, President of the Republic of Indonesia on February 27, 1999 as proposed by the Chief Justice of the Supreme Court appointed several Ad Hoc Judges in the Commercial Courts of First Instance by Presidential Decree (Keppres) No. 71 of 1999.

Conformed to its title, this working paper will describe:

- The role of judges in insolvency procedure.
- The independence and accountability of judges.
- The role of judges in insolvency procedure.

The role of judges in insolvency procedure

The term 'Judge' means the Commercial Judge in a Commercial Court.

The role of a Commercial Judge in Insolvency Procedure is twofold:

1. As the Chief Justice or the Member Judge in a tribunal which tries and adjudicates a case of Petition for Insolvency Declaration (Article 282 paragraph 1 of Perpu No. 1 of 1998), further called Judge Tribunal.
2. As the appointed/designated Supervisory Judge in a Judgement on Insolvency Declaration.

Item 1

The role of the Tribunal (consisting of one Chief and 2 Members) which is appointed as the Judge Tribunal to try and adjudicate a case of Insolvency Petition from a Debtor or against a Debtor is conclusive, because it is

this Judge Tribunal that will independently decide to declare whether a Debtor is insolvent or not as defined in Article 6 paragraph 3. More readily, under the currently applicable Indonesian Insolvency Law, Perpu No. 1 of 1998 vide Law No. 4 of 1998, the Judgement on Insolvency Declaration of the Commercial Court is instantaneous.

The duty and authority of the Judge Tribunal who tries and adjudicates a case of Petition for Insolvency Declaration also include:

- The authority to impose an Attachment on Debtor's property partly or wholly before the Debtor being declared insolvent and appoint a temporary Curator/Receiver to supervise the management of Debtor's business and to supervise payments to the Creditor, the transfer or use of Debtor's property which, as part of Solvency, requires the approval of the Curator (Article 7 of Perpu No. 1 of 1998).
- The obligation to settle (try and adjudicate) the matters/cases related to the Judgement on Insolvency Declaration such as in the event of a counter claim against the imposition of Attachment referred to in Article 7 of Perpu No. 1 of 1998, in the case of an Actio Paulina claim, the Petition/Proposal for the Revocation of Judgement on Insolvency Declaration (Article 15), the Petition for Endorsement to a Compromise (or a Planned Compromise which has reached the quorum) and so on. The duty and authority of the Commercial Judge Tribunal in an insolvency process also include the duty and authority after the Judgement on Insolvency Declaration has been handed down, i.e., determining the amount of the Curator's (Receiver's) fee, fulfilling or dismissing the request for rehabilitation from the Insolvent Debtor or his heir. The duty and authority of the Judge Tribunal in the insolvency process are scattered in the Articles under First CHAPTER on insolvency declaration. The duty and authority of the Judge Tribunal subsequent to the Judgement on Insolvency Declaration may be performed by the Judge Tribunal which is different from the one adjudicating the case of Insolvency Petition. Generally, however, this Judge Tribunal is still assigned at the Commercial Court.

From the above-mentioned description it becomes obvious that the role of the Commercial Judge Tribunal in Insolvency Procedure is very conclusive. The fate of Creditors, who expect the settlement of their non-performing loans through their Debtors' insolvency, lies in the hand of the Commercial Judge Tribunal since it is only the appointed Commercial Judge Tribunal that is authorized to declare whether a Debtor is insolvent or not.

Item 2

In the Judgement on Insolvency Declaration a Supervisory Judge must be appointed who is nominated from the Judges of Commercial Court, thus it is clear that the role (duty and authority) of the Supervisory Judge is commenced only from the time the Debtor is declared insolvent. The duty of the Supervisory Judge is to perform control over the implementation of the Curator's (Receiver's) duty. On the other hand, the Curator's duty is to make arrangement and settlement of the insolvent assets. The Supervisory Judge is the Chairman of all Creditor meetings and also the Chairman of Verification Meetings. In the event that the Curator/Receiver encounters any difficulty in performing his duty, the Supervisory Judge is the place for him to consult. In addition, in taking certain actions such as selling the insolvent assets personally, the Curator also requires the approval of the Supervisory Judge.

The Supervisory Judge is authorized to inquire about anything concerning insolvency, hear the witnesses or order an investigation by experts.

Unless specified otherwise, all rulings on matters concerning the arrangement or settlement of insolvent assets, including those made by the Supervisory Judge, may be executed first, and similarly for the original Decree.

Moreover, before making any ruling/JUDGEMENT on something concerning the ARRANGEMENT or settlement of insolvent assets the Commercial Court must hear the Supervisory Judge first.

From the duty and authority description of the Commercial Judge Tribunal appointed to try and adjudicate a case of Insolvency Petition as well as the one of the Supervisory Judge, it could be concluded that the Commercial Court Judge has an extremely great role and is even conclusive in the insolvency process since it is in their hands (the Judge Tribunal's) that the fate of Creditors, who expect the settlement of their non-performing loans through an insolvency procedure/ process, lies. It is this Judge Tribunal that is absolutely competent in declaring a Debtor is insolvent or not. More readily, under the currently applicable Indonesian

Insolvency Law, Perpu No. 1 of 1998 vide Law No. 4 of 1998, the Judgement on Insolvency Declaration is instantaneous.

In order that the duties and authority of the Judge Tribunal and the Supervisory Judge can be performed properly, in that the Judge Tribunal's ruling as well as the arrangement and settlement measures taken by the Supervisory Judge will not disappoint the community who seek justice, a line-up of Indonesian Commercial Judges is needed who meet the requirements, at least:

- Having a good command of not only the prevailing Insolvency Law (Perpu No. 1 of 1998 vide Law No. 4 of 1998) and the Civil Law Procedure/HIR (since the Article 284 paragraph 1 even prescribes: unless specified otherwise the prevailing Civil Law Procedure shall also apply to the Commercial Court), but also the Indonesian Civil Law as prescribed in the Code of Civil Law (KUHP) and the Indonesian Commercial Law (KUHD) and all statutory regulations related to an insolvency process.
- Having a high morality standard in that a Commercial Judge must be sincere in performing his duties by holding onto the prevailing law and sense of justice and will in no way base his judgement or action on matters other than the prevailing law.

The Independence and Accountability of Judges

The Indonesian Judge, including Commercial Judge, is independent in performing his duty, i.e., in trying and adjudicating any case submitted to him and in making the rulings as the Supervisory Judge in insolvency. 'Independent' means free from any interference of other State's authorities, in terms of the one coming either from the executive or the legislative power, and free from any coercion, directive or recommendation coming from extra-judicial parties. The independence given to the Judge is not absolute because a Judge is to uphold the law and justice through the cases referred to him to be tried and adjudged by rendering a judgement based on the true interpretation of law, the legal findings in the issues not yet governed by the existing law, by finding out the grounds and the underlying principles. The independence of the Indonesian Judge as outlined above can be concluded from Article 1 of Law No. 14 of 1970 concerning the Principal Provisions on Judiciary Power and Elucidation of this Article 1 and substantiated by Article 4 paragraph 3 which provides:

Any interference in judicial affairs by other parties beyond the Judiciary Power is prohibited except in such matters as prescribed in the Constitution.

And also Article 32 paragraph 5 of Indonesian Law No. 14 of 1985 on the Supreme Court which provides:

The supervision and authority referred to in paragraphs (1) through (4) may not mitigate the independence of the Judge in trying and adjudicating a case.

From the above-mentioned description it could be stated that the independence of Indonesian Judges in trying and adjudicating a case is only limited by the mastery of the prevailing relevant laws, the subject matter of the case and his own conscience. A question comes out: How would it be if the Judge in performing his duty, trying and adjudicating a case, had violated his independence leading to an abuse of power or any other disgraceful deeds? Can the Judge concerned be called to account and to whom the Judge should account for his conduct/deed?

With regard to the Judge's account it could be stated that this matter is not much addressed in Indonesian laws. It could be stated that Law No. 14 of 1970 on PRINCIPAL PROVISIONS ON JUDICIARY POWER, Indonesian Law No. 14 of 1985 on the Supreme Court as well as Indonesian Law No. 2 of 1986 on Ordinary Courts do not explicitly provide for the accountability of judges because although Article 23 paragraphs 1, 2, 3, 4 of Law No. 14 of 1985 provides that the Supreme Court:

- performs the highest supervision over the judicial administration in all judicial circles in exercising the judiciary power;
- supervises the conduct and deeds of Judges in all judicial circles in performing their duties;
- is authorized to inquire about anything related to the techniques of judicial administration in all judicial circles;

- is authorized to provide the necessary directives, reprimands or warnings to the courts in all judicial circles;

but no sanction has been defined in the event that the Judge is found to have violated his independence in performing his duty which leads to an abuse of power/ independence or committed any other disgraceful deeds, even in paragraph 5 of Article 32, Law No. 14 of 1985 above it is provided that:

The supervision and authority referred to in paragraphs (1) through (4) may not mitigate the independence of the Judge in trying and adjudicating a case.

From the provisions of Law governing the independence of Judges above, being associated with the wording of Article 4 paragraphs 1 and 3 of Law No. 14 of 1970 as follows:

Paragraph 1 The judicial administration shall be performed “For Justice Based on the One and Only God”.

Paragraph 3 Any interference in judicial affairs by other parties beyond the judiciary power is prohibited except in the matters set forth in the Constitution.

It could be concluded that the original intention is that the Indonesian Judges are only responsible for the performance of their duties to the One and Only God.

With the spreading opinion in the community that many judgements of Indonesian Judge Tribunal are allegedly passed on the basis of an abuse of power/independence/freedom of the Judge or other disgraceful deeds, the Government has proactively prepared the Bill concerning the Revision of Law No. 14 of 1985 on the Supreme Court which in its CHAPTER V sets out the Judge Honorary Council as an independent External Institution having a function to receive complaints/reports from the community on judicial performance which constitute the abuse of power/independence or other disgraceful deeds. the organization structure, competence, procedure and honorarium of the Judge Honorary Council will be governed further by a Presidential Decree.

May in the near future the Bill on the Revision of Law No. 14 of 1985 which in its CHAPTER V sets out the Judge Honorary Council serving as an independent External Supervisory Institution soon become a Law. Similarly for the Presidential Decree which governs the organization and competence, so there will be an independent institution that controls the performance of the Judge’s freedom/independence in performing his duties.