

SOME CHALLENGES FOR INSOLVENCY SYSTEM REFORM IN INDONESIA

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“Before the onset of the Asian financial crisis insolvency laws of many Asian economies were generally speaking, out of date and irrelevant to modern commercial needs. In many cases the insolvency laws had been imported from overseas jurisdictions at the turn of the last century, and had never been reviewed. Available statistics indicate that in many of the economies there had been no cases of corporate bankruptcy at all. In some of the economies there were no experienced judges, administrators or professionals to administer the insolvency laws. Related laws and practices, such as those relating to debt recovery and security enforcement, were similarly defective. The area of secured transactions was quite undeveloped in many of the economies.”

Ronald Harmer (Asian Development Bank)¹

“There are technical problems with Indonesian bankruptcy law, but the over-riding issue is whether Indonesian society believes that functioning bankruptcy law serves Indonesia’s interests rather than solely those of foreign creditors.... The immediate connection to the current insolvency reform debate is the way in which Indonesian debtors commonly resist foreign creditor actions by claiming their personal interest as ‘national interest’.”

David K Linnan (University of South Carolina)²

Thus far, the performance of the judiciary [in Indonesia] has been disappointing vis-à-vis important aspects of international trade such as enforcement of loan agreements..., and certainly in the enforcement of arbitration awards. Unless there is an appeal by the people themselves for improvement by the judiciary, it will be difficult for Indonesia to have significant leverage in the free markets of APEC and ASEM.”

Charles Himawan (University of Indonesia)³

¹ Asian Development Bank, “Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General-Counsel on TA 5795-REG: Insolvency Law Reforms”, (prepared by RW Harmer), at (pp 10-99) in *Law and Policy Reform at the Asian Development Bank*, April 2000 Edition, Vol. 1, p 11 (referred to hereinafter as ‘ADB, “Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General-Counsel on TA 5795-REG: Insolvency Law Reforms””).

² D Linnan, “Bankruptcy Policy and reform: Reconciling Efficiency and Economic Nationalism”, (pp 94-112) in T Lindsey (Ed), *Indonesia: Bankruptcy, Law Reform & the Commercial Court*, Sydney, Desert Pea Press, 2000 at p 94 and p 109 (cited hereinafter as Linnan, 2000).

³ C Himawan, “Indonesia”, (pp 196-262) in Poh-Ling Tan (ed), *Asian Legal Systems*, Sydney, Butterworths, 1997 at pp 255-256 (referred to hereinafter as Himawan).

1. Introduction

This session is entitled “Informal Peer Review – Indonesia”. It follows extensive discussions of judicial structures for dealing with insolvency matters. In contrast, this session is intended to review recent insolvency law reforms in Indonesia in the light of the amendments which have been made to the Indonesian Bankruptcy Law in 1998 and the establishment of the Commercial Court to deal with bankruptcy cases.

It has frequently been noted that the judicial system in Indonesia has not functioned well in dealing with bankruptcy cases.⁴ This has meant that there has not been great confidence in Indonesia in the court system as a means of dealing with bankruptcy cases.⁵ Can we have more confidence in out of court mechanisms? Yes, but the two kinds of mechanisms go hand in hand. As in more advanced insolvency law systems, non-judicial mechanisms have provided more effective means of dealing with problems of debt recovery in Indonesia. Indonesia has a long tradition of using negotiation and other informal methods of dispute handling and there is no reason why this tradition should not be drawn upon in fashioning an insolvency system more closely attuned to Indonesian circumstances.⁶

However, it could well be argued that the increasing focus upon the development of the rule of law and the court system in Indonesia is part of a wider process of political reordering which is aimed at curbing patrimonial practices that work against the interests of increasingly important business and middle classes in Indonesia. It is also aimed at the effective management of an inefficient bureaucracy. But the impact of such legalisation has also been constrained by strong centralisation pressures, which have limited the operation of the separation of powers doctrine and hence limited the independence of judges⁷. The importance of patriarchal influences in East Asian law making processes cannot be ignored, as scholars have argued in regard to others areas of Asian law reform, such as labour law and human rights law⁸.

⁴ It has been noted by David Linnan that in the five year prior to the bankruptcy law amendments of 1998 (Perpu No 1 of 1998), there were only 120 bankruptcy cases in a country of over 200 million: in Linnan, 2000 at p 95.

⁵ See generally, P Little, “Indonesia”, (pp 201-228) in R Tomasic and P Little (Eds) in *Insolvency Law & Practice in Asia*, Hong Kong, FT Law & Tax 1997 (cited hereinafter as Tomasic and Little). Also see generally: T Lindsey (Ed), *Indonesia: Bankruptcy, Law Reform & the Commercial Court*, Sydney, Desert Pea Press, 2000; and P Little and Bahrin Kamarul, “Company Law in Indonesia” (pp 475-506) in R Tomasic (Ed), *Company Law in East Asia*, Aldershot, Ashgate/Dartmouth, 1999 at pp 494ff).

⁶ See for example, T Lindsey, *Indonesia: Law & Society*, Sydney, Federation Press, 1999.

⁷ See generally, D Bouchier, “Magic Memos, Collusion and Judges with Attitude” (pp 233-252) in K Jayasuriya (Ed), *Law, capitalism and power in Asia*, London, Routledge, 1999 at p 248. Also see: B Quinn, “Indonesia: Patrimonial or Legal State?” (pp 258-268) in T Lindsey, *Indonesia: Law & Society*, Sydney, Federation Press, 1999.

⁸ A Woodiwiss, *Globalisation, Human Rights and Labour Law in Pacific Asia*, Cambridge, Cambridge University Press, 1998.

Legalism has clearly been used in Indonesia as an instrument of state strategy, leading to an increase rather than a diminution in state power.⁹

2. The place of informal mechanisms in the insolvency system

The continued reliance upon informal mechanisms will be essential in Indonesia, as no legal system is able to deal with insolvency or bankruptcy problems solely through the judicial system.¹⁰ The court should be seen as but one of the elements of an integrated insolvency system, albeit but a small part of such a larger system which is mainly comprised of insolvency practitioners and credit providing institutions. Unfortunately, it is far easier to set up a new court with a small number of specialist judges than it is to create a well trained insolvency practitioner community and the values or culture which support the work of both the courts and this practitioner community.¹¹

It should also be reiterated that bargaining is most effective when it occurs in the “shadow of the law”. In other words, informal mechanisms work best where there is easy resort to the court should there be a breakdown in negotiations. This has been seen to be relevant in regard to informal insolvency negotiations. As the ADB noted in a recent report, the main impetus for bringing creditors and debtors together is “the sanction that if the negotiation process cannot be started or breaks down there can be relatively swift and effective resort to the application of an insolvency law”.¹²

However, a credible legal infrastructure is still an essential background for an effective informal system of bankruptcy negotiation and settlement. To this end, a new draft Indonesian Bankruptcy Law has been prepared but has yet to be enacted. However, this new law seems to have been caught up somewhere within the Department of Justice.¹³ In the meantime, a number of domestic and foreign inspired informal

⁹ See further, K Jayasuriya, “The Rule of Law and Governance in the East Asian State”, (1999) 1(2) *The Australian Journal of Asian Law* 107 at 112-113.

¹⁰ See generally, M Galanter, “Justice in many rooms: Courts, private ordering and indigenous law”, (1981) 19 *Journal of Legal Pluralism and Unofficial Law* 1-47; M Galanter, “Reading the Landscape of Legal Disputes: What we know and don’t know (and think we know) about our allegedly contentious and litigious society”, (1983) 31(4) *UCLA Law Review* 4-71 and FEA Sander, “Varieties of Dispute Processing” (25-43) in R Tomasic and MM Feeley, *Neighborhood Justice: Assessment of an Emerging Idea*, New York, Longman Inc, 1982.

¹¹ For an analysis of the importance of culture to the effectiveness of any insolvency system see further R Tomasic and P Little (Eds) in *Insolvency Law & Practice in Asia*, Hong Kong, FT Law & Tax 1997. The continuing importance of religious and cultural values in Indonesia is well known and needs to be seen in the context of the overriding political philosophy of facilitating national unity as expressed in the motto *Bhineka Tunggal Ika*: see further, C Himawan, “Indonesia”, (pp 196-262) in Poh-Ling Tan (ed), *Asian Legal Systems*, Sydney, Butterworths, 1997 at pp 203-205.

¹² ADB, “Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General-Counsel on TA 5795-REG: Insolvency Law Reforms”, supra p 54.

¹³ An English translation of a version of this proposed new Indonesian Bankruptcy Law is to be found in Appendix IV (pp 253-305) of T Lindsey (Ed), *Indonesia: Bankruptcy, Law Reform & the Commercial Court*, Sydney, Desert Pea Press, 2000. See however, Mrs SH Elijana, (Chair of the Bankruptcy Bill drafting team), “The Principles of Modification in the Bankruptcy Law”, Mimeo, Jakarta, September

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arrangements have played a vital role in responding to the debt crisis that has gripped Indonesia in recent years. One of these informal initiatives has been the so-called Jakarta Initiative that commenced operation in 2000 and has sought to provide a mechanism for debtors and creditors to negotiate “workout” plans. Whilst the Jakarta Initiative is somewhat like to “London approach” and has the main purpose of seeking to facilitate negotiations and to refer public interest cases to the courts. It also seeks to provide a point of reference for obtaining government approval for restructuring plans.

This said, a recent ADB report noted that 350 cases had come under the Jakarta Initiative debt restructuring program (including about 250 medium to large scale companies), but concluded that “[t]he experience of the Jakarta Initiative is somewhat difficult to discover. The local expert for Indonesia suggested that progress under this initiative has been a lot slower than anticipated and only a few restructurings have been put in place.”¹⁴ Very few of these 350 cases led to the adoption of a rescue or reorganisation plan.

The Indonesian Debt Restructuring Agency (INDRA) has also been established to facilitate the settlement of debts and restructuring of non-bank institutions in Indonesia¹⁵. One means of resolving debt problems is to in effect provide a government bail out through shrinking the value of foreign debt merely by arbitrarily strengthening the exchange value of the rupiah.¹⁶ Because the Bankruptcy Law does not provide a broad mechanism for dealing with bank debts¹⁷, in 1998 the Indonesian Bank Restructuring Agency (IBRA) was established to deal with bank restructuring by taking over many non-performing loans and to inject new funds to recapitalise banks. Although IBRA has very wide powers; it does not require court approval to take over bank assets, and its claims take priority over those of other debtors, it seems that IBRA has been reluctant to use its powers unless a matter is very clear.¹⁸ One journalist has noted that “the central bank and the Indonesian Bank Restructuring Agency (IBRA) have displayed an unpredictable pattern in combating the unholy alliance between well connected borrowers and their lenders. Sometimes the authorities have taken bold action to put a stop to such collusive practices; at other times, they have appeared almost paralysed.”¹⁹ Through IBRA, the government of Indonesia has effectively become a

2000; and OECD, “Synthesis Note: Informal Experts Meeting on Insolvency Law Design”, Mimeo, Jakarta, 14 September 2000.

¹⁴ ADB, “Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General-Counsel on TA 5795-REG: Insolvency Law Reforms”, supra pp 58 and 72.

¹⁵ Linnan 2000, supra, notes (at p 95) that two years after the 1998 financial crisis, there have been “relatively few reorganisations in an advanced negotiation stage” brought under such mechanisms: Linnan 2000, at p 95.

¹⁶ As suggested by Linnan, supra at 107.

¹⁷ Article 1(3) of the consolidated Indonesian Bankruptcy Law only permits Bank Indonesia to file a bankruptcy petition in regard to a debtor that is a bank.

¹⁸ H Sender, “Smoke and Mirrors”, (1999) *Far Eastern Economic Review* 30 September 34 at p 36.

¹⁹ Ibid at p 36. In June 2000, the Indonesian government withdrew action against Texmaco, a textile company involved in a \$1.8 billion scandal. Exposure of IBRA and other state banks amounts to about \$2 billion. An *Asiaweek* report on the dropping of this matter quoted the official explanation for this decision, that the matter had been dropped as “Texmaco has not been proven to have damaged state finances.” : JM Tesoro, “Open but Not Shut” , *Asiaweek*, 2 June 2000, p 36 at 37.

creditor in most major potential reorganisations. The main issue here is the extent to which Indonesia's banking crisis can be separated from its insolvency crisis²⁰. The effectiveness of these extra-judicial mechanisms is in need of serious assessment. Concluding its review of recent Indonesian experience a recent ADB report noted that:

“The reasons why the operation of the Indonesian informal process initiative does not appear as successful as those of Thailand, Korea or Malaysia appear to be that, firstly, the bank restructuring authority, IBRA, does not appear to exert the same leverage on corporate debtors as its Malaysian counterpart, Danaharta. Secondly, recourse by a creditor to the formal insolvency processes (in particular, liquidation) in respect of a reluctant or hostile debtor does not pose any great threat in Indonesia. Thus there is less motivation for a corporate debtor to engage in a voluntary informal workout.”²¹

3. Using Law Reform as an Instrument for Economic Reform

When the IMF agreed to provide assistance to Indonesia after the 1997 Asian financial crisis, it required Indonesia to agree to revise its bankruptcy laws and this led to the Government Decree which amended Indonesia's Bankruptcy Laws in 1998.²² The role of multilateral agencies, such as the IMF, in pushing for bankruptcy reform is not without some problems as multilateral agency expectations and timeframes may not always be in accord with local realities and expectations.²³ However, bodies like the IMF have found that they had far less leverage in being able to move opinion or change behaviour than they had thought.²⁴

A key issue in regard to bankruptcy law reform in Indonesia has been the perception that such reforms may serve the interests of foreign creditors more than they serve Indonesia's interests²⁵. The quote from David Linnan at the head of this paper also illustrates this nationalist sensitivity. That such a conclusion should be drawn is not surprising as insolvency law reformers, multilateral agencies and forums such as this all too readily seek to justify the development of new bankruptcy and secured transaction laws in terms of enhancing investor confidence. Whilst this is a factor, it should not be seen as the overriding or even the principal reason for the development of a modern insolvency regime in Asian countries such as Indonesia.

²⁰ Linnan, 2000, supra at p 108.

²¹ ADB, “Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General-Counsel on TA 5795-REG: Insolvency Law Reforms”, supra p 58.

²² M Reksodiputro, “Bankruptcy Reform: Lessons from the First Nine Months”, (pp 48-51) in Lindsey (Ed), *Indonesia: Bankruptcy, Law Reform & the Commercial Court*, supra at p 48.

²³ See further, WE Holder, “Indonesian Bankruptcy Reform: The IMF Approach”, (pp 44-47) in T Lindsey (Ed), *Indonesia: Bankruptcy, Law Reform & the Commercial Court*, supra.

²⁴ H Sender, “IMF in Indonesia: Insufficient Leverage”, (1999) *Far Eastern Economic Review* 30 September pp 38-39.

²⁵ Linnan, 2000, supra at p 94.

A fundamental issue in the adoption of new laws and legal institutions into Asian countries has been the concern over the imposition of law²⁶. It has long been understood that simply seeking to impose a foreign derived law onto an alien social setting may mean that the law may not take root in the new land or social setting. This is because law is not an abstract instrument but a product of particular social and economic conditions. The attempt to uncritically impose a foreign derived law on a new society may lead to implementation games being played in the new environment by those seeking to avoid or undermine this Law.²⁷ This is especially likely where the social conditions in the new society differ significantly from those from which the law was derived.

Unless laws become embedded within a social and legal system they are unlikely to be accepted by local political and economic forces. One of the most important ways of seeking to embed a law into the social fabric is to undertake extensive programs of education and training for the professional, business and other communities subject to it.²⁸ Indeed, it can be said that the passage of a new law by itself is not very important. This is so even where the law is only seen as an instrument of changing social practices (such as in the way that debt problems are handled); this is because law is a poor instrument of social change.²⁹

The acceptance of commercial law reforms by local elites is also of critical importance. Indeed, the development of any effective insolvency system in Indonesia must be accompanied by the development of an overarching corporate governance framework which provides an appropriate set of values and culture for accountability in business management. A recent ADB insolvency report has echoed this theme when it stated that there is “ a significant need to encourage the development of and compliance with proper standards of corporate governance and corporate management. Serious deficiencies in these areas undermine the effect of even the most advanced forms of corporate insolvency law regimes.”³⁰

4. Characteristics of the Indonesian Insolvency System

The first thing for an Australian lawyer to note about the Indonesian legal system is that it has elements of a civil law system, based on the European civil law tradition. This may sometimes lead to differences

²⁶ This has of course been a basic theme of law and society scholarship over many year : see generally, SB Burman and BE Harrell-Bond (Eds), *The Imposition of Law*, New York, Academic Press, 1979; and A Allott, *The Limits of Law*, London, Butterworths, 1980. This has also been an issue canvassed by Tim Lindsey and Veronica Taylor in “Rethinking Indonesian Insolvency Reform: Contexts and Frameworks”, (pp 2-14) in T Lindsey (Ed), *Indonesia: Bankruptcy, Law Reform & the Commercial Court*, supra, at 12ff.

²⁷ See generally, E Bardach, *The Implementation Game: What happens After a Bill Becomes a Law*, Cambridge, Mass, MIT Press, 1977; Tomasic, R (Ed), *Legislation and Society in Australia*, Sydney, Allen & Unwin, 1980.

²⁸ M Hiscock, “Remodelling Asian Laws” (pp 28-42) in T Lindsey (Ed), *Indonesia: Bankruptcy, Law Reform & the Commercial Court*, supra, at p 37.

²⁹ J Griffiths, “Is Law Important?”, (1979) 54 *New York University Law Review* 339-74

³⁰ ΑΔΒ, “Ινσολωενχψ Λαω Ρεφορμς ιν τηε Ασιαν ανδ Παχιφιχ Ρεγιον: Ρεπορτ οφ τηε Οφφιχε οφ τηε Γενεραλ-Χουνσελ ον ΤΑ 5795-ΡΕΓ: Ινσολωενχψ Λαω Ρεφορμς”, συπρα ατ π 12.

between civilian and common law lawyers as to the proper shape of law reforms. It also creates problems for those foreigners who may be used to the system of precedent used in common law systems. This has caused concern with insolvency cases decided by Indonesian courts that have come to what have been seen as “seemingly irreconcilable conclusions”.³¹ This uncertainty presents obvious problems for achievement of greater consistency in judicial decision making (although it has to be said that this doctrine of precedent should not be pushed too hard as it is a standard that is not always met even in common law systems)³². Having said this, it is reasonable to expect a degree of legal certainty in any rule of law system; this is so at least in regard to core areas of law, if not at the boundaries of the system.

Fortunately, in commercial law area there are signs of an increasing convergence and this has had an effect upon the insolvency laws of some countries, such as through the work that has occurred on the UNCITRAL Model Law on Cross-Border Insolvency.³³ The use of arbitration in dealing with commercial disputes has also led to some convergence in commercial practice. Both the World Bank and the IMF have also sought to develop principles of good practice relating to insolvency,³⁴ and the Asian Development Bank has now published a number of comparative reports on good insolvency practice.³⁵ The use of broad-based principles of good practice in regard to insolvency is a systematic and useful means of evaluating any one insolvency system, provided that some flexibility is adopted.³⁶ The Asian Development Bank on “Insolvency Law Reforms in the Asian and Pacific Region” makes some useful contributions in this regard.³⁷

³¹ *Ιβιδ* ατ 77.

³² Τησ ωριτινγσ οφ Προφεσσορ θυλιουσ Στονε, ωηιχη ρεφερ το τησ δοχτρινε οφ πρεχεδεντ ασ χατεγοριεσ οφ ιλλυσορψ ρεφερενχε, συγγεστ τηατ ωε νεεδ το αδοπτ α ρεαλιςτιχη ωιεω οφ νοτιονσ οφ πρεχεδεντ. Ηαπινγ σαιδ τηις, ιτ ισ νοτ υνρεασοναβλε το εξπεχτ το φινδ α γρεατερ δεγγρε οφ χοηερενχε ιν Ινδονεσιαν φυδιχηιαλ δεχισιον μακινγ: θ Στονε, *Legal System and Lawyers' Reasonings*, Σψδνεψ, Μαιτλανδ Πυβλιχατιονσ Πτυ Ατδ, 1968, Χη 7.

³³ *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment*, New York, United Nations 1999. Also see generally, JS Ziegel (Ed), *Current Developments in International and Comparative Insolvency Law*, Oxford, Clarendon Press, 1994. In Indonesia its bankruptcy law takes a territorial and foreign insolvency decrees or orders will not be recognised: see further, ADB, “Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General-Counsel on TA 5795-REG: Insolvency Law Reforms”, *supra*, pp 51-53.

³⁴ ΙΜΦ Ρεπορτ, “Ορδερλψ ανδ Εφφεχτιωε ινσολωπενχηψ Προχεδυρεσ: Κεψ Ισσυεσ, Ιντερνατιοναλ Μονεταρψ Φυνδ, Καψ 1999; Ωορλδ Βανκ, “Βυιλδινγ Εφφεχτιωε Ινσολωπενχηψ Σψςτεμσ: Τοωαρδσ Πρινχιπλεσ ανδ Γυιδελινεσ, Ωορλδ Βανκ, Φεβρυαρψ 2000.

³⁵ ΑΔΒ, “Ινσολωπενχηψ Λαω Ρεφορμσ ιν τηε Ασιαν ανδ Παχιφιχη Ρεγιον: Ρεπορτ οφ τηε Οφφιχε οφ τηε Γενεραλ-Χουνσελ ον ΤΑ 5795-ΡΕΓ: Ινσολωπενχηψ Λαω Ρεφορμσ”, ατ (ππ 10-99) ιν *Law and Policy Reform at the Asian Development Bank*, Απριλ 2000 Εδιτιον, ζολ. 1.

³⁶ Συχη αν αππροαχη ηασ βεεν αδοπτεδ ιν οτηερ χουντριεσ, συχη ασ Χηινα, σεε φυρτηερ, Ρ Τομασιχ, “Ινσολωπενχηψ λαω Πρινχιπλεσ ανδ τηε Δραφτ Βανκρυπτηψ Λαω οφ τηε Πεοπλε'σ Ρεπυβλιχ οφ Χηινα”, (1998) 9 *Australian Journal of Corporate Law* 211 ανδ Τομασιχη ανδ Λιττλε (Εδσ), *Insolvency Law & Practice in Asia*, *συπρα*.

³⁷ ΑΔΒ, “Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General-Counsel on TA 5795-REG: Insolvency Law Reforms”, *supra*.

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Finally, the growth of international accounting and auditing firms applying international accounting standards and the importance of international lending have introduced some further degree of commonality.³⁸ Such international service firms have responded to the corporate culture and practices that has been internationalised. International business education, such as the standard MBA courses which have become so popular around the world, has also facilitated this process of convergence of business practices and values. The growth of multinational corporations and international trade has facilitated the process of greater harmonising of commercial laws.

Having said this, it should be added that it may be dangerous to draw too sharp a distinction between different legal families as each legal system should be understood within the context of its own cultural experience, as has been argued in the case of Japan³⁹ and would also be applicable to Indonesia as well where local cultural factors extremely important, especially in relation to insolvency matters.⁴⁰ Indeed, enthusiastic talk about the globalisation of laws (such as insolvency law) should be tempered, as law is one of the least readily globalised features of any society.⁴¹

It should also be noted that legal systems, regardless of their family resemblances, do develop what has been described as a kind of “path-dependency”, which leads them along set paths of development and makes it difficult to easily change directions.⁴² In the case of Indonesia, for example, the overriding importance of national unity as a goal may overshadow the achievement of democratic goals which may conflict with this overriding goal. As Professor Himawan from the University of Indonesia notes, “[n]o legislation will be tolerated [in Indonesia] if it encourages diversity at the expense of unity, the basic legal strategy of Indonesia’s founding fathers and of today’s development practitioners.”⁴³

However, the existing Indonesian Bankruptcy Law is based on nineteenth century Dutch legislation⁴⁴ and upon amendments made in 1998. In 1998 Government Regulations made amendments which introduced new provisions such as by amending a Chapter dealing with the creation of a moratorium on debt repayment,⁴⁵ as well as by introducing a new Chapter III which established the new Commercial Court

³⁸ J Flood, “The cultures of globalization: professional restructuring for the international market”, (pp 139-169) in Y Dezalay and D Sugarman (Eds), *Professional Competition and Professional Power*, London, Routledge, 1995.

³⁹ A Marfording, “The Fallacy of the Classification of Legal Systems: Japan Examined”, (pp 65-89) in V Taylor (Ed), *Asian Laws Through Australian Eyes*, Sydney, LBC, 1997.

⁴⁰ P Little, “Indonesia”, (pp 201-228) in Tomasic and Little supra at 204-05.

⁴¹ See generally, M Waters, *Globalisation*, London, Routledge, 1995.

⁴² M Roe...

⁴³ C Himawan, “Indonesia”, (pp 196-262) in Poh-Ling Tan (Ed), *Asian Legal Systems*, Sydney, Butterworths, 1997 at p 203.

⁴⁴ Faillissements-Verordering Staatsblad (StateGazette) *Year 1905 Number 217 jo. Staatsblad (StateGazette) Year 1906 Number 348.*

⁴⁵ Articles 212-217E, 22-226, 228, 230, 231A, 234, 237, 240-241, 246-247, 250, 252-254, 258, 261, 264-269, 273-275 and 279.

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which now has exclusive jurisdiction to deal with petitions for declarations of bankruptcy and moratoriums on debt repayment. Various other changes were made by the 1998 Government Regulations to the earlier Bankruptcy Law so as to correct, supplement and delete “provisions that are deemed irrelevant to the requirement and development of law in the society and leaving the other provisions to remain applicable”⁴⁶. Other changes were made to references to other courts so as to align the amended Law with the new provisions establishing the Commercial Court.⁴⁷

The 1998 Bankruptcy Law provides two basic means of dealing with bankruptcy problems; firstly, it provides for liquidation proceedings⁴⁸ and secondly it provides for a moratorium on debt repayment through a system of court-supervised compromise, based on a proposal prepared by the debtor and filed with the Court.⁴⁹ The Law provides for a degree of conversion from reorganisation to liquidation, satisfying Harmer’s suggested general principle of “one law, two systems” aimed at providing greater flexibility to insolvency law procedures.⁵⁰ The 1998 revisions to the compromise procedures have however created a procedure that has been seen to be “relatively weak”.⁵¹

It has been argued that the 1998 reforms do not cater for the types of debt so prevalent in Indonesia; thus it is said that the 1998 Reforms are suitable for dealing with the kinds of problems that would arise from slow paying debtors; they are simply inadequate when one needs to deal with what have been described as the “deeply-underwater debtor”. The latter type of debtor requires a system that facilitates reorganising companies in terms of shedding businesses and recasting debt as equity. Instead, the focus of discussion has been on more modest issues, such as the settlement of foreign currency debts.⁵² As Linnan notes, “[t]he underlying problem with Indonesia’s deeply-underwater debtors may be that their manager-controlling equity-holders simply lack sufficient incentives to resolve the status of financially distressed enterprises under their control. Once the real value of their equity stake is gone they become *de facto* option-holders.” He adds that in this situation:

Once his equity interest loses substantially all its value, the manager/controlling equity-holder has all the wrong incentives from a creditor perspective as long as he is protected by the insolvent corporation’s limited liability shield...There is no immediate economic loss to the extent that,

⁴⁶ Mrs SH Elijana, (Chair of the Bankruptcy Bill drafting team), “The Principles of Modification in the Bankruptcy Law”, Mimeo, Jakarta, September 2000, at p 2.

⁴⁷ The English language text of the consolidated amended Indonesian Bankruptcy Law is to be found in Appendix III of T Lindsey (Ed), *Indonesia: Bankruptcy, Law Reform & the Commercial Court*, Sydney, supra at p 193. Also see the translation in J Hoff and GJ Churchill, *Indonesian Bankruptcy Law*, Indonesian Law and Practice Series: 2, Jakarta, PT Tatanusa, 1999.

⁴⁸ See Chapter I of the consolidated Indonesian Bankruptcy Law 1998, (Government Regulation in Lieu of Law, and No 1 of 1998.

⁴⁹ Articles 212 to 279 of the Indonesian Bankruptcy Law 1998.

⁵⁰ ADB, “Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General-Counsel on TA 5795-REG: Insolvency Law Reforms”, supra at pp 29-31.

⁵¹ Linnan, 2000, supra p 95.

⁵² Ibid at pp 98-99.

pending reorganisation, there is no residual value to be captured by his equity interest. The incentives, while he remains in control of the financially distressed enterprise, are all wealth diminishing at the social level. At best he behaves as an option holder, adopting too-risky strategies, or less favourably as a potential corporate looter stripping assets for his personal benefits.”⁵³

Unfortunately, the Bankruptcy Act procedures apply to both natural persons and to corporate entities.⁵⁴ A failure to make a clear differentiation between corporate and individual debt handling procedures is undesirable, as different policy considerations would arise in regard to each. For example, in regard corporate debtors it is more likely that broader commercial and economic considerations will be relevant than in the case of a personal bankruptcy. Policies in regard to individual debt may be more protective than those in regard to corporate debt. Harmer has, for example, noted that this problem has caused problems in the application of insolvency laws in Thailand where the criteria regarding the commencement of insolvency proceedings have been narrowly interpreted.⁵⁵

5. Liquidation proceedings under the Perpu No 1 of 1998

Liquidation proceedings may be brought against a debtor who has two or more creditors where the debtor has failed to pay at least one debt that has matured and become payable. A debtor may file bankruptcy petitions on his own petition or at the request of one or more creditors; they may also be brought by the public prosecutor where it is considered to be in the public interest to initiate such proceedings. However, the term “debt” is not defined, nor is the phrase “due and payable”. Any discussion of the meaning of the term debt should also have regard to Articles 1233 and 1234 of the Indonesian Civil Code.⁵⁶ An ADB report has noted in this regard that “Indonesia has a particularly good, low threshold, criteria for its reorganization process. It states that a debtor who is unable or expects to be unable to continue to pay matured debts may apply for reorganization.”⁵⁷ In the case of a debtor that is a bank, only the Bank of Indonesia may petition for a declaration of bankruptcy, whilst in regard to a debtor that is a securities company, only the Capital Market Supervisory Agency (Bapepam) may petition for a bankruptcy

⁵³ Ibid at pp 106 and 107.

⁵⁴ It should also be noted that Chapter IX of the 1995 *Companies Act* provides three procedures for the winding up a company; in each case the dissolution of a company is followed by the administrative process of liquidation. The three methods of dissolution available under the Company Law are firstly, the dissolution of the company as a result of a resolution passed at a general meeting of shareholders; Secondly, the company will be dissolved at the expiration of the period of time for which the company was established; Thirdly, the District Court may dissolve a company following receipt of a request from the public prosecutor, or as a result of a request from one or more members representing at least 10% of the voting shares, or as a result of a request from a creditor after it is declared bankrupt, or at the request of a party claiming a defect in the company’s deed of establishment: see further, Tomasic and Little, *supra* at p 208.

⁵⁵ See ADB, “Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General-Counsel on TA 5795-REG: Insolvency Law Reforms”, *supra* at p 28.

⁵⁶ See further, K Muljadi, “A Critical Assessment of Recent Bankruptcy Law reforms”, (pp52-56) in T Lindsey (Ed), *Indonesia: Bankruptcy, Law Reform & the Commercial Court*, Sydney, at p 54.

⁵⁷ ADB, *supra* at 32.

declaration.⁵⁸ Where the debtor has not initiated bankruptcy proceedings, the Court is required to summon the debtor.

The bankruptcy petition must be granted if there are facts or circumstances which prove the existence of the bankruptcy and a bankruptcy decision must be made within 30 days of the registration of the bankruptcy petition. Under Article 6, the Clerk of the Court must summon the debtor no later than seven days prior to the hearing of the Petition. Lawyers acting for debtor respondents have noted that this is usually too short a time for them to prepare a full response and the 30 day period set by the Law for making a decision on the bankruptcy petition has also been seen as being too short a time for the judges to be able to make their decisions.⁵⁹ Where a declaration of bankruptcy is made, the court may order the appointment of a supervising judge and a receiver; the receiver must be independent and not have a conflict of interest with either the debtor or the creditor.⁶⁰ The debtor forfeits his rights to manage or control his assets from the commencement of the bankrupt⁶¹. Legal proceedings against the bankrupt estate must be suspended and claims by creditors must be made through the receiver and proceedings initiated by the debtor may be taken over by the receiver or otherwise adjourned.⁶²

However, a debtor may seek to appeal to the Supreme Court against a declaration of bankruptcy. Most Indonesian court cases are the subject of an appeal and there are at least 6000 appeals to the Supreme Court each year. Indeed, one Indonesian commentator has noted that “losing parties now often use it simply as a tactic to extend the period for settlement of the case.”⁶³ One recent report noted that of 59 insolvency cases in which decisions were handed down by the new Commercial Court, 25 went on appeal to the Supreme Court and 14 of these subsequently underwent a further review before a differently constituted panel of the Supreme Court.⁶⁴ To deal with possible problems of delay in this area, the Supreme Court is required by Article 10 to hold a hearing within 20 days from the date of the registration of the bankruptcy appeal and a determination must be made by the Supreme Court within 30 days from this date. The tight time lines which have been provided in the Bankruptcy Law may well avoid problems of delay and prevent cases from disappearing from the judicial system, but many of them fail to recognise the considerable time that it may take creditors, especially foreign creditors, to identify a debtor’s assets, liabilities and other creditors.

⁵⁸ Article 1 of the Indonesian Bankruptcy Law 1998. In regard to BAPEPAM, see generally, B Ruru, “Development of Equity and Bond Markets: History and Regulatory Framework Indonesia”, (1995) 5 *Australian Journal of Corporate Law* 326.

⁵⁹ K Muljadi SH, *supra* at p 52-53

⁶⁰ Article 13.

⁶¹ Article 22.

⁶² Articles 25 and 26

⁶³ E Rajagukguk, “Judicial Reform: A Proposal for the Future of the Commercial Court” (pp 57-60) in Lindsey (Ed), *Indonesia: Bankruptcy, Law Reform & the Commercial Court*, *supra* at p 58.

⁶⁴ ADB, “Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General-Counsel on TA 5795-REG: Insolvency Law Reforms”, *supra* p 77.

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Where the debtor has disposed of property to creditors prior to the declaration of bankruptcy, at a time that it was known that such an “act of bankruptcy” would cause damage to other creditors, such a transaction may be annulled. Such loss to creditors will be deemed to have occurred where the transactions took place up to one year prior to the declaration of bankruptcy, unless it can be proved to the contrary.⁶⁵ Thus Article 42 applies this deeming provision to preferences involving family members, and in the case of a debtor that is a corporate entity, it is applied to preferences involving directors or management of the debtor company, or of a related company. Gifts made by the debtor may also be annulled if it is proved that, at the time that the gift was made, the debtor was aware that the making of the gift would cause loss to a creditor.⁶⁶ However, Article 50, para 3, provides that “[r]ights acquired by third parties acting in good faith shall be respected.”

Missing from the consolidated Indonesian Bankruptcy Law of 1998 are adequate sanctions for insolvent trading by directors of the kind found in other national laws. Such laws would impose a personal civil liability on directors where they allowed their company knowingly to incur debts, which the company would be unable to pay.⁶⁷

The rights of secured creditors are protected (by Article 56), subject to the requirement that any enforcement of such rights must be deferred for up to 90 days from the date of the bankruptcy declaration being made; creditors may apply to the receiver to remove such deferment or to alter any conditions applying to it: Art 56A(1) and (5). A secured creditor must however exercise any rights that they have within two months of the commencement of the insolvency.⁶⁸ The Bankruptcy Law also provides a procedure for the verification of claims by creditors and for the challenging of such claims by the debtor: Arts 104-133.

Provision is made for forming a committee of creditors and for creditors’ meetings: Articles 72 and 77. However, decisions at such meetings are to be made only on the basis of votes cast by unsecured creditors (see Articles 72(2) and 141), and no provision is made for meetings of different classes of creditors or casting votes by a class of creditor. This is not satisfactory, as a recent ADB study has also suggested.⁶⁹ It may be noted that the recent ADB Report has reiterated the good practice standard that “[a]n insolvency law regime should, as far as possible, preserve the principle of equal treatment for all creditors...” The aim

⁶⁵ Articles 41-42.

⁶⁶ Article 43.

⁶⁷ See generally, ADB, “Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General-Counsel on TA 5795-REG: Insolvency Law Reforms”, supra pp 50-51.

⁶⁸ Article 57. There has been some debate as to whether secured creditors were entitled to file a bankruptcy petition against a debtor, but this has now been settled by the Supreme Court in the *Dharmala Agrifood* Case in favour of the rights of secured creditors to bring such action: see further, K Muljadi, supra at p 53.

⁶⁹ ADB, “Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General-Counsel on TA 5795-REG: Insolvency Law Reforms”, supra at pp 42-44.

of this is to limit priority of claims as much as possible after the payment of secured creditors and the costs of the insolvency administration.⁷⁰

Under Article 134 the debtor is entitled to offer a composition to all of his creditors. However, where no composition is offered, the bankrupt estate will be regarded as being insolvent: Art 168. Where a composition is offered by the debtor, the receiver and the committee of creditors are required to provide written opinions in regard to this composition offer: Art 136. If the creditors agree to the proposed compromise, the Court will need to ratify the composition before it will have effect; however the court may decline to ratify the composition in a number of circumstances, such as where the performance of the composition is insufficiently assured: Art 149. The debtor may appeal where the court refuses to ratify the composition that has been agreed upon. However, once the ratification of the composition becomes final, the bankruptcy will terminate: Art 157. Following the termination of the bankruptcy, the bankrupt debtor may seek rehabilitation (under Article 205) from the Court that declared the bankruptcy.

6. Moratorium on Debt Repayment under the Perpu No 1 of 1998

Chapter II of the consolidated Indonesian Bankruptcy Act 1998 provides a procedure for debtors to request that a moratorium be placed on their obligation to repay their debts on the grounds that the debtor intends to prepare and present a composition which is to include an offer to repay all or part of the debt owed to unsecured creditors: Art 212. The moratorium petition must be filed by the debtor with the Court and the Court must immediately grant a “temporary moratorium” on debt repayment and appoint a supervising judge and one or more trustees to manage the debtor’s assets; the debtor and the creditors will have no more than 45 days before they will be required to appear again in Court at a session to consider making a “permanent moratorium”. If a permanent moratorium is approved at this meeting, the moratorium must not exceed 270 days from the making of the decision on the temporary moratorium on debt repayment: s 217(4).

Once a moratorium has been granted, the debtor must not take any part in the management of the debtor’s assets or take any actions to transfer any of these assets: Art 226. However, subject to this, the debtor is entitled to dismiss his employees after the commencement of the moratorium and any unpaid salaries will become the debts of the debtor’s estate: Art 237. Also, once the moratorium has commenced, any execution action against the debtor must be postponed: Art 228. Where a moratorium on debt repayment has been granted by the Court, Article 224 provides that one or more experts may be appointed by the supervising judge to conduct an investigation and to prepare a report regarding the condition of the assets of the debtor; a copy of this report must be made available to the Clerk of the Court; also, the trustee is required to report every three months on the condition of the assets (per Art 225). The granting of a moratorium on repayment

⁷⁰ Ibid at pp 48-9.

of a debt will not apply to secured claims, such as those secured by a pledge or mortgage or to preferred claims in respect of certain goods belonging to the debtor: Art 230.

The moratorium may be terminated by the Court under Article 240 if : (i) the debtor has acted in bad faith in the management of his assets, (ii) if the debtor attempts to prejudice the creditors, (iii) if the debtor fails to perform various acts that are required of him by the Court or the trustee; (iv) if the debtor takes part in the management of the assets or transfers rights to any assets (as provided under Article 226); (v) if the circumstances are such that the continuation of the moratorium becomes unfeasible; or (vi) if the debtor cannot expect to fulfil his obligations to his creditors within the time provided for.

Once a composition proposal has been filed with the Court, it must be available for inspection by interested persons: Art 250. The Clerk of the Court must announce the latest day on which claims by persons affected by the moratorium may be submitted to the trustee: Art 252. The trustee under Article 256 will then prepare a list of claims. A meeting of creditors will then be able to vote on the composition proposal and this proposal may be accepted once it is approved by more than half of the unsecured creditors whose rights have been admitted or provisionally admitted and are present at the meeting, as provided for in Articles 252, 264 and 265.

If the composition is accepted, the supervising judge must submit a written report to the Court for the purposes of gaining the Court's ratification of the composition. A Court hearing will be held to ratify the composition and this hearing must be held no more than 14 days after the creditors approve the composition proposal. The moratorium will end upon the Court's ratification of the composition: Art 273. However, the Court may yet decide not to ratify the composition if, for example, it concludes that the composition was reached as a result of fraud or collusion with one or more creditors or if it concludes that the implementation of the composition is not sufficiently assured. A refusal to ratify the composition must lead the Court to declare the debtor bankrupt: Art 269. Once the Court has ratified the composition, it will bind all creditors to whom the moratorium of debt was applicable: Art 270.

7. The Commercial Court

Chapter III of the 1998 consolidated Indonesian Bankruptcy Law established a new Commercial Court to process bankruptcy petitions and moratorium on debt repayment petitions. The Court is being established progressively in different parts of Indonesia and in the first instance it will hear and decide cases by resort to a panel of judges (usually with three judges): Art 282. In its first nine months of operation, one practitioner has noted that “[t]he court had heard only 58 cases as at mid 1999 and some of its decisions had raised questions about the competence of the judges in understanding the goals of the Bankruptcy Court.”⁷¹ Similarly, another commentator has noted of the judges of the Commercial Court that “[t]heir

⁷¹ M Reksodiputro, *supra* at p 51.

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performance, most who have been involved agree, has not been stellar. Charges of incompetence and corruption began to circulate within a month or so of their inauguration.”⁷² A recent ADB funded report noted that Commercial Court judges have little commercial knowledge or experience and quoted an Indonesian expert who said that “many of the [cases] involve modern and sophisticated [commercial transactions]” but that the Commercial Court judge “presiding over the hearing does not understand the transactions [and this] leads to misinterpretations or narrow interpretations of the document.”⁷³

The criteria for appointment of judges to the new Commercial Court require some expertise in areas of jurisdiction dealt with by the Commercial Court, but probably the most important criterion for appointment, at this point in time, is that which requires that appointees are “...honest, being just and being free of any misconduct...” (Article 283). However, once this basic requirement is satisfied, some expertise on the part of the judges in handling insolvency cases will become very important.

As most cases go on appeal (cassation) to the Supreme Court, it may also be necessary to improve the training of Supreme Court judges in the area of insolvency law and practice. As this may be asking too much, ways should be found to further limit appeal to the Supreme Court or at the very least to avoid the tendency of the Supreme Court appeal becoming a rehearing rather than the review of questions of law, as is required in Indonesia. As Rajagukguk argues, “the Supreme Court should emphasise its role as an institution conducting judicial review, not as a forum for retrials.”⁷⁴

Court supervision of the reorganisation or rescue process is desirable for a variety of reasons, such as to ensure the efficient conduct of the process, to resolve disputes or uncertainties, to ensure proper procedures are followed and to determine whether the plan that is ultimately approved is fair to the creditors as a whole. As yet, the Commercial Court does not full play such a general supervisory role in reorganisation matters.⁷⁵

The new Commercial Court has not gone without some criticism, as David Linnan has noted in a book published in the year 2000.⁷⁶ Linnan is critical of the decision to staff the court with judges without significant business experience, but who were to be given special training in areas relevant to the jurisdiction of this new court. The presence of corrupt practices amongst the Indonesian judiciary has meant that the mere retraining of existing judges might not be enough to deal with problems of corruption.

⁷² DS Lev, “Comments on the Course of Law Reform in Modern Indonesia”, (pp 74-93) in T Lindsey (Ed), *Indonesia: Bankruptcy, Law Reform & the Commercial Court*, Sydney, supra at p 89.

⁷³ ADB, “Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General-Counsel on TA 5795-REG: Insolvency Law Reforms”, supra p 77.

⁷⁴ E Rajagukguk, supra at p 59.

⁷⁵ ADB, “Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General-Counsel on TA 5795-REG: Insolvency Law Reforms”, supra at p 47.

⁷⁶ Linnan, 2000, supra, at pp 97-98.

One Indonesian practitioner has noted that the “lack of confidence in the judicial system is a major constraint to recreating Indonesia as a country which upholds the rule of law - it is useless to have modern and just laws if the courts cannot enforce them.”⁷⁷ As is well known in other legal institutions (such as police forces), the existence of an entrenched culture of corruption is extremely difficult to overcome within such a group. The need to improve the judicial culture of Indonesian judges has also been recognised in Indonesia.⁷⁸

However, as judges do not work alone, but are part of a larger court room work group, which extends into the professional communities working in the courts, it is vital that private insolvency practitioners are in a position to influence to decision-making processes of the Commercial Court. However, there are limits to the extent to which private practitioners might be drawn upon to fill positions as judges on the Commercial Court due to the financial sacrifices that such persons would need to make because of poor judicial salaries.⁷⁹ One senior Jakarta lawyer has noted in this regard that before Indonesian courts have real authority, the remainder of the legal profession should also be reformed as “[o]nly through a strong legal profession can misuse and abuse by the courts be held in check.”⁸⁰ However, as Linnan also notes, because bankruptcy petitions are “rarely” admitted by judges many of these court-related problems have been avoided.⁸¹

8. Recent Indonesian Insolvency Reform Developments

It is beyond the scope of this paper to provide a detailed assessment of the current draft of the Indonesian Insolvency Law.⁸² However, some brief comments on this draft are appropriate. Based on the information currently available to me, the structure of the Draft Law is as follows:

Chapter I contains general provisions (Article 1) which provide definitions of key terms such as “debts”, “creditor” and “debtor”.

This definition provision is a welcome addition to the Law and is aimed at eliminating the kinds of differences in interpretation, which have occurred in the past.⁸³ Chapter II largely follows the provisions currently found in Chapter I of the present Indonesian Bankruptcy Law provisions. Newer provisions

⁷⁷ M Reksodiputro, *supra* at p 50.

⁷⁸ E Rajagukguk, *supra* at p 57.

⁷⁹ DS Lev, *supra* at p 90.

⁸⁰ M Reksodiputro, *supra* at p 50. Daniel Lev has also noted that private lawyers are in a position to make a much greater contribution to changing the culture and practices of the court: DS Lev, *supra* at pp 90-91.

⁸¹ *Ibid* at 98.

⁸² An English version of the Proposed Draft is to be found in Appendix IV of T Lindsey (Ed), *Indonesia: Bankruptcy, Law Reform & the Commercial Court*, *supra* at p 253.

⁸³ SH Elijana, (Chair of the Bankruptcy Bill drafting team), “The Principles of Modification in the Bankruptcy Law”, Mimeo, Jakarta, September 2000, at p 8.

stemming from the 1998 amendments have remained largely unchanged, whilst the older provisions have not been significantly changed.

The eleven Parts of Chapter II in the proposed Draft Law are as follows:

- Part One: The Bankruptcy Judgement (Arts 2-18)
- Part Two: The consequences of bankruptcy (Arts 19-60)
- Part Three: Management of the Insolvent Assets (Arts 61-88)
- Part Four: Remedies following the declaration of bankruptcy and the duties of the receiver (Arts 89-108)
- Part Five: Verification of Claims (Arts 109-139)
- Part Six: Composition (Arts 140-173)
- Part Seven: Settlement of Insolvent Assets (Arts 174-199)
- Part Eight: Legal Status of the Bankrupt Debtor after Settlement (Arts 200-202)
- Part Nine: Bankruptcy of the Estate of a Deceased Person (Article 203-207)
- Part Ten: Provisions of International Law (Arts 208-209)
- Part Eleven: Rehabilitation (Arts 211-217)

Chapter III deals with the Moratorium on Debt Repayment and is in two parts, as follows:

- Part One: Granting of Moratorium and its Consequences (Arts 218-259)
- Part Two: Composition (Arts 260-289)

The moratorium provisions in the new Art 218 are identical to those in the present Art 212. Indeed, virtually all of Part One is identical to the provisions in the present Bankruptcy Law (as amended in 1998) dealing with the granting of a moratorium in regard to debt repayment. It is understandable that these earlier provisions have been preserved as many were only recently introduced. Similarly, the composition procedures currently found in Articles 249 to 279 are virtually identical to the proposed new Composition procedures. It is unfortunate that the new Draft Law does not provide for additional forms of dealing with corporate insolvency, such as for voluntary administration procedures. Chapter III of the present Bankruptcy Law, dealing with the Commercial Court, is not covered by the new draft as it is assumed that such a provision should more properly be contained in a separate law governing the Commercial Court or in the Law concerning Principles of Judicial Power.⁸⁴ This is an appropriate position to adopt especially as the jurisdiction of the Commercial Court is likely to be somewhat broader than merely entertaining bankruptcy cases.

However, if experience in other jurisdictions is any guide, the new draft of the Bankruptcy Law should be seen as a transitional Law which might make way for a more modern piece of legislation which seeks to reflect the greater range of models that are available in some other insolvency jurisdictions. For example, the Judicial Management provisions found in the Singaporean insolvency provisions might have served as a useful model for more rescue oriented provisions.

9. Conclusions: Bankruptcy Reform, Bank Bali and Beyond

⁸⁴ Ibid at p 9.

Indonesia still has a long way to go until it has developed a well-rounded and effective insolvency system that is comparable to the systems found in other developing countries in the region. International best practice provides many useful solutions to what are common problems of debt. The use of informal methods and the creation of a credible rescue culture will depend upon having in place a qualified insolvency practitioner community and a real commitment to finding efficient solutions to corporate debt problems. However, progress in reform has been frustratingly slow. This is not unusual as insolvency reform is rarely amongst the issues that are seen by governments as most urgent, at least until there is a crisis.

If one reviews the press reports of the last few years that have chronicled Indonesia's progress in responding to the recent Asian financial crisis, there is not much comfort to be had for the more optimistic or impatient amongst us. In September 1999, the *Far Eastern Economic Review* noted that "[d]elay, not determination, seems to mark Asia just two years after the region's financial crisis started".⁸⁵ This report went on to refer to an episode which still echoes almost 18 months later, when it noted:

"Illusions about the extent to which the Indonesians were fixing their banks were shattered by the revelation that Bank Bali made a \$70 million payment to an official of the ruling Golkar Party – a payment that was only discovered because a foreign bank went over the books. Soon after, Indonesian authorities, citing ethical concerns, stripped the Widjaya family of control over Bank Internasional Indonesia."⁸⁶

Prior to this scandal breaking, Bank Bali had been regarded as Indonesia's soundest private bank. Interestingly, the former CEO of Bank Bali was said to be seeking to regain control of the Bank and undisclosed sources seemed to have acquired almost 40% of the shares in the company. This seemed to be aimed at blocking a takeover of the bank by Standard Chartered.⁸⁷ One Jakarta-based World Bank official was reported to have said in September 1999 that the Bali Bank affair was "a real test for foreign confidence" as it was an indicator of systemic problems in Indonesia.⁸⁸ This proposition is hard to refute if the affair is seen as an illustration of the oversight ability of the central Bank of Indonesia, which had responsibility for monitoring banks like Bank Bali.⁸⁹

In a further interesting comment on the Bank Bali affair, a team of *Far Eastern Economic Review* journalists noted in 1999 that "the siphoning-off of funds from Bank Bali is a prime example of how corruption undermines economic reforms – and why both agencies [the IMF and the World Bank] have

⁸⁵ H Sender, "Smoke and Mirrors", (1999) *Far Eastern Economic Review* 30 September 34 at p 34.

⁸⁶ *Ibid* at 34.

⁸⁷ M Shari, "The Haunting of Bank Bali", *Business Week*, 13 September 1999, 20-21.

⁸⁸ Quoted by H Sender, "IMF in Indonesia: Insufficient Leverage", *Far Eastern Economic Review* 30 September 1999, 38 at p 39.

⁸⁹ D Murphy, "New Dogs, Old Tricks", *Far Eastern Economic Review* 19 August 1999, p 12.

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warned that any attempt at a coverup is unacceptable.”⁹⁰ Later in 1999 it was reported that a consequence of the Bank Bali affair was that the program of recapitalising banks had been stalled.⁹¹ However, the IMF seems to have negotiated further agreements (the 12th by January 2000) with the Indonesian government that are apparently aimed at achieving greater transparency and control in the banking system and within the Bank of Indonesia in particular.⁹² The Bank Bali affair was first dismissed as but a one off matter, but it has come to signal serious problems at the central Bank of Indonesia.⁹³

In relation to the Bank Bali affair, by late December 2000 little progress had been made in dealing satisfactorily with this financial scandal.⁹⁴ Meanwhile, corporate restructuring activity in Indonesia seems to have stalled with four large and heavily indebted business groups (Barito Pacific; Texmaco Group; Gajah Tunhhal Group and Salim Group) together holding 107 trillion rupiah or \$12.2 billion in outstanding corporate debt. This figure is a large part of the 257 trillion rupiah that is owed to IBRA. The owners of these four companies have nevertheless remained in control of them.⁹⁵ It seems that IBRA has managed to dispose of less than 20% of the assets under its control and in regard to the remaining entities, the original owners seem to have remained in control and few new investors have been sought out.⁹⁶

By allowing former owners to remain in control of management the performance of that company can be controlled so as to ensure that it is not attractive to potential buyers; Also, the original owners have little interest in reviewing past management practices, with the consequence that new corporate governance ideas are unlikely to be adopted. The *Far Eastern Economic Review* even suggested recently that the momentum for structural reform in the Indonesian economy is now passing with a new focus on growth. The latter was seen as being more readily achieved by reviving the old conglomerates than waiting for new business players to grow.”⁹⁷ None of this augurs well for the development of an effective corporate insolvency system or for an effective insolvency law in Indonesia.

⁹⁰ J McBeth et al, “Indonesia: Double Whammy”, *Far Eastern Economic Review* 23 September 1999, 8 at p 8.

⁹¹ M Shari and P Engardio, “A Nation Holding its Breath”, *Business Week*, 11 October 1999, 24 at p 25.

⁹² M Shari, “Will Candor Pay Off”, *Business Week*, 31 January 2000, pp 18-19.

⁹³ See generally, M Shari, “Where Did the Billions Go: Investigations tangled offshore dealings”, *Business Week*, 28 February 2000, pp 26-27.

⁹⁴ W Caragata, “A Comedy of Errors”, *AsiaWeek*, 22 December 2000, pp 22-23.

⁹⁵ M Vatikiotis, “Going Backwards: Indonesia’s corporate landscape isn’t changing – because politicians in need of funds have started protecting their cronies again”, *Far Eastern Economic Review*, 19 October 2000, pp 76-79.

⁹⁶ *Ibid* at p 76.

⁹⁷ *Ibid* at p 79.