

Are secured creditors secured?

Supreme Court issued guidelines on bankruptcy and suspension of debt repayment – you might want to rethink your options.

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The highest judiciary authority in Indonesia, the Supreme Court (Mahkamah Agung, MA), recently issued MA Decree No. 3/KMA/SK/I/2020 on the Guidelines on the Handling of Bankruptcy and Suspension of Debt Payment Proceedings (the Guideline). This Guideline sets out, among others:

1. The administrative requirements for bankruptcy and suspension of debt repayment (penundaan kewajiban pembayaran utang, PKPU) petitions.
2. The procedural steps for examining bankruptcy and PKPU petitions.
3. The procedural details of actionable items following the issuance of the bankruptcy and/or PKPU decision.

Controversially, the Guideline states that from the creditors' side, only unsecured creditors can initiate PKPU petitions. This contradicts the provisions of Law 37/2004 on Bankruptcy and PKPU (Law 37/2004), which does not limit whether a PKPU petition can be made by secured or unsecured creditors.

This is another setback for lenders or the banks, following on from the Constitutional Court's decision that changes how creditors look at fiduciary securities, especially given that secured creditors use PKPU petitions to enforce their security more commonly than unsecured creditors.

Another key section is the statement that secured creditors should sell the assets over which it has security within two months of the date that a company has been declared insolvent, and if they fail to do so, securities will be sold through the general auction process by the appointed receiver. This is in line with our experience representing a secured creditor who was only given two months to complete the sale of the secured assets.

Although the Guideline is not law per se, rather an internal set of rules for the judiciary, it will impact how judges assess and interpret the law. As the Guideline is not subject to constitutional court review, it is now to be seen whether banks and other lenders will join forces in lobbying the MA to amend the Guideline to be in line with Law 37/2004.

Contacts



Chalid Heyder
Office Managing Partner, Jakarta
T +62 21 2788 7911
chalid.heyder@hoganlovells.com



Aditya Alam
Counsel, Jakarta
T +62 21 2788 7936
aditya.alam@hoganlovells.com



Dyah Paramita
Senior Associate, Jakarta
T +62 21 2788 7933
dyah.paramita@hoganlovells.com



Julia Nugroho
Senior Associate, Jakarta
T +62 21 2788 7926
julia.nugroho@hoganlovells.com

www.hoganlovells.com

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