

**Mitigating the Impact of the Global Pandemic COVID-19 within Indonesian
Bankruptcy Law and Legal Transactions**

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Abstract

On 11 March 2020, the World Health Organization announced the existence of the COVID-19 as a global pandemic. Due to its highly contagious nature, WHO, alongside national governments, introduced social distancing policies. As a result, government's measures have severely disrupt economic activities such as trade, tourism, even legal sector in Indonesia where business threaten to enter bankruptcy and debt restructuring. This affects hugely on how legal transactions and bankruptcy law are held in Indonesia. Global and local transactions, companies, and even small businesses are temporarily forced to halt their business due to the social distancing measures, leading to inevitable change on bankruptcy law operates in Indonesia. This article will digest the impacts of COVID-19 in the Indonesian Bankruptcy Law to build resilience and resistance towards COVID-19 from the legislature and law enforcement perspectives.

Keywords: *COVID-19, Bankruptcy Law, Insolvency, Business Restructuring, Legal Transactions*

Abstrak

Pada 11 Maret 2020, Organisasi Kesehatan Dunia mengumumkan keberadaan COVID-19 sebagai pandemi global. Karena sifatnya yang sangat menular, WHO bersama pemerintah nasional memperkenalkan kebijakan pembatasan sosial. Akibatnya, langkah-langkah yang diambil pemerintah tersebut sangat mengganggu kegiatan ekonomi seperti perdagangan, pariwisata, bahkan sektor hukum di Indonesia yang terancam pailit dan restrukturisasi bisnis. Hal ini berpengaruh besar pada bagaimana transaksi dalam bidang hukum dan hukum kepailitan diselenggarakan di Indonesia. Transaksi global dan lokal, perusahaan, bahkan usaha kecil terpaksa menghentikan usahanya untuk sementara waktu karena langkah-langkah pembatasan sosial, sehingga menyebabkan harus diadakan perubahan pada hukum kepailitan yang berlaku di Indonesia. Artikel ini akan mencerna dampak COVID-19 dalam UU Kepailitan Indonesia untuk membangun ketahanan terhadap COVID-19 dari perspektif legislatif dan penegakan hukum.

Kata Kunci: COVID-19, Hukum Kepailitan, Insolvensi, Restrukturisasi Bisnis, Transaksi Hukum.

A. Introduction

1. Background

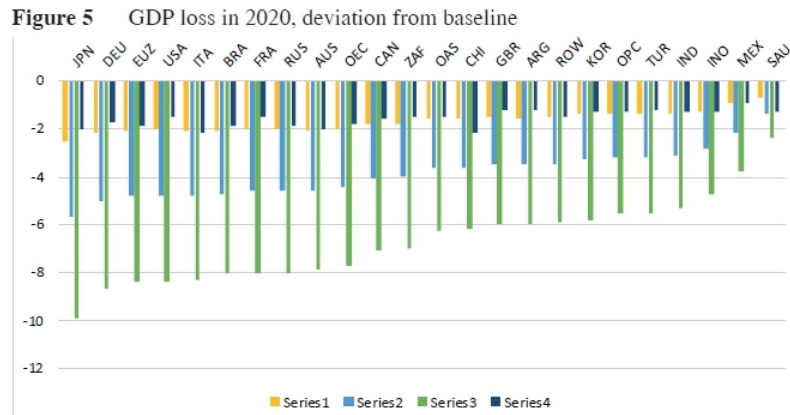
Taking a closer look into the history of bankruptcy laws in Indonesia, most of the major bankruptcy phenomenon was led by an economic crisis, such as the Asian Financial Crisis that has also affected Indonesia in 1998. The purpose of bankruptcy law on its economic purpose is to protect creditor for the assets it held in another person's company. The other purpose is to help debtor from its inability to repay creditor their unpaid debts.¹⁷⁴ In Indonesia, the law relating to bankruptcy is regulated under Law No. 37 of 2004 regarding Bankruptcy and Suspension of Debt Payment Obligations, or more colloquially known as 'Bankruptcy Law.' Due to the existence of COVID-19 and its impact on Indonesia's economy, some major businesses has been forced to enter bankruptcy. This raises the question of whether or not the Indonesian Bankruptcy Law has sufficed and able to mitigate the bankruptcy during COVID-19 economic crisis.

As of 31 August 2020, the COVID-19 cases have reached 213 countries and affecting 25,317,812 persons, followed by 848,926 deaths. In response to the contagious nature of the global pandemic Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-Co-V2) or known as the COVID-19, World Health Organization and national government across the world, including Indonesia, has been enacting a great measure upon navigating and continue to tackle the spread of the virus. The purpose of this measure is to what is commonly known as 'flattening the curve,'¹⁷⁵ where the action has been deemed to effectively decrease and slowing down the spread rate through community transmission.¹⁷⁶ The national government measures vary from the small-scale social distancing measures up to the stage 4 lock down whilst scientists and epidemiology experts are working towards the vaccine as initiated by Balasa (2020). On 2 March 2020, the Indonesian Health Ministry announced its first COVID-19 case, and on the 10th of April, the Indonesian government announced a large scale of social restrictions that forces companies to be closed temporarily. However, the consequences from the said measure will greatly impact the world's spending and economic and trade activities.

¹⁷⁴ Brietzke, P. (2001). Securitisation and Bankruptcy in Indonesia: Theme and Variations. *Global Jurist Topics*, Vol. 1 (1)

¹⁷⁵ Zhilan et al. (2020). On the benefits of flattening the curve: A perspective. *Mathematical Biosciences*, 326:108389. <http://dx.doi.org/10.1016/j.mbs.2020.108389>

¹⁷⁶ Balasa, A.P. (2020). COVID-19 on Lockdown, Social Distancing, and Flattening the Curve – A Review. *EJBMR, European Journal of Business and Management Research*, 5(3), 1-4. <http://dx.doi.org/10.24018/ejbmr.2020.5.3.316>



There has been an estimation of GDP loss in several countries, as predicted by McKibbin and Fernando. The degree of severity varies from one country to another. In the graph of estimation, the hardest-hit country would be Japan with the 10% GDP loss followed with Germany and the United States in the 8% loss.¹⁷⁷ However, this study may still change over time, depending on how severe the impact of COVID-19 on a certain country. Indonesia, as trading partners of those prominent countries, should also take good consideration of their economic policy to strive during the COVID-19.

Noting that several neighboring countries of Indonesia such as Singapore had entered the technical recession on the Q2 with a 13,2% decrease in the economic growth linked to the COVID-19 measures. This was also followed by Malaysia, which has had its technical recession in Q2, with the economic growth fell to 16,5%. Looking at the patterns provided by economists and data, Indonesia has just been waiting for its turn to enter the recession. Indonesia announced that its extraordinary circumstance has led many companies to have been hindered or even failed to meet their financial obligations due to the large scale of social distancing measures such as fulfilling contract obligations or conducting general meetings. Bankruptcy laws and regulations in financial institutions could potentially help to prevent another financial crisis, or, when it does happen, it would help to mitigate it.¹⁷⁸ The state plays a huge role in preparing legislatures and laws adjusting to the current global pandemic situations. In such situations, bankruptcy handling needs an efficient way to address the problems faced during the COVID-19 crisis. Addressing and mitigating the impacts brought by COVID-19 in bankruptcy law and legal transactions potentially result in an improvement in the state of economy in

¹⁷⁷ Baldwin, R. & Di Mauro, B.W. (Eds.). (2020). *Economics in the Time of COVID-19*. London, UK: Centre for Economic Policy Research (CEPR) ISBN: 978-1-912179-28-

¹⁷⁸ Paletta, D. (2009). Agencies In a Brawl For Control Over Banks. *Wall Street Journal* A1

Indonesia that is currently predicted to go down in Q3. The government should provide a set of new bankruptcy law rules during the COVID-19 global pandemic, which can be used permanently even when the extreme measures or circumstances as such strikes again in the future.¹⁷⁹ There needs to be a reasonable and appropriate scheme to minimize the impact of COVID-19 in the bankruptcy law of Indonesia, and there are several measures that have to be taken in the bankruptcy law sector and legal transactions.

2. Problems

a. Indonesia's Economy State During the COVID-19

The fears of the global economy collapsing have spread easily throughout nations following the continuous social distancing measures viciously shutting down companies and small businesses. The WTO report has suggested that the COVID-19 global pandemic's impact will exceed the worst Global Financial Crisis, with the world trade expected to fall between 13% and 32% in 2020.¹⁸⁰ As a result of this global crisis, bankruptcy policies and legal transactions are highly affected, and some are forced to stop temporarily. Several countries have undergone such a financial crisis due to the effect of COVID-19.¹⁸¹ The threat of economic recession is inevitable, including in Indonesia. The possibility of Indonesia's economy entering a recession in the third quarter is getting higher as stipulated by Indonesia's notable Finance Minister, Sri Mulyani noting that Indonesian economy shrinking in the third quarter and will result in recession which had not happened since the Asian financial crisis in 1998. The prediction of Indonesia's economic growth would be around 2,3%, and in the worst possible scenario, it will be plunged to 0,4%.¹⁸² This article attempts to analyze and digest the impact of COVID-19 whilst mitigating the Indonesian Bankruptcy Law and the legal transaction process.

¹⁷⁹ Enriques, L. (2020). Pandemic-Resistant Bankruptcy Law: How to Help Companies Cope with Existential Threats and Extreme Uncertainty During the COVID-19 Crisis. *European Bankruptcy Governance Institute* 530/2020. <http://dx.doi.org/10.2139/ssrn.3641505>

¹⁸⁰ World Trade Organization. (2020). *Trade set to plunge as COVID-19 pandemic upends global economy*. https://www.wto.org/english/news_e/pres20_e/pr855_e.htm

¹⁸¹ Ozili, P.K. (2020). Spillover of COVID-19: Impact on the Global Economy. *University of Essex*
DOI: 10.2139/ssrn.3562570

¹⁸² Anshori et al. (2020). The Threat of Economic Recession and Its Impact on Global Terrorism. *Journal of Terrorism Studies* 2(1)(1). <https://doi.org/10.7454/jts.v2i1.1014>

b. Impacts of COVID-19 in Indonesian Bankruptcy Law and Legal Transactions

The impacts of COVID-19 through the Indonesian economy and the legal system as it is spreading through the community. This article will elaborate on the main impacts of COVID-19 in Indonesian Bankruptcy Law and how it also hinders the Legal Transactions process.

I. COVID-19 Impacts on Indonesian Bankruptcy Law

Indonesian bankruptcy law during the COVID-19 Pandemic is under an extreme stress during the COVID-19; this has proven by many businesses undergoing the threat of bankruptcy due to the effect of COVID-19 disruptions. Based on Central Java Province Manpower and Transmigration office monitoring, 8 companies have been threatened to enter bankruptcy. One of the causes of this nightmare in their production process has been stalled due to the disruption of the shipping process and materials available from China.¹⁸³ And this situation leads to the need for business restructuring and remodeling due to the company's situation under financial duress.

After enacting the new normal (*Adaptasi kebiasaan baru*) on 1 June 2020, business and companies that were ceased and reducing their trading activities are allowed to resume only to face another challenge in a form of fulfilling their contractual obligations such as loan payment and debt to banks. In a situation where they cannot fulfill their obligations, businesses are forced to file a bankruptcy claim.

The situation is aggravated by the fact that the Indonesian Bankruptcy Law is lacking the necessary means to protect companies that are entering bankruptcy during the COVID-19 financial crisis. Several key issues, such as stipulated in Article 2 subsection (1) Law No. 37 2004, the requirement for a person or a body to file a bankruptcy, a debtor shall have at the very minimum two or more creditors. During the COVID-19 Pandemic, this requirement will hinder the debtor that only has one creditor resulting in them not being able to file a bankruptcy for not fulfilling this requirement. This requirement is quite unfair to creditors and will only further complicate filing bankruptcy wherein the case of one debtor has passed the date of debt maturity with one creditor but has not passed the date of the debt maturity for another creditor. Consequently, other

¹⁸³ Bhwana, P.G. (2020, March 9). 8 Companies in C. Java Threatened with Bankruptcy due to COVID-19. *Tempo.co*. Retrieved from <https://en.tempo.co/read/1317206/8-companies-in-c-java-threatened-with-bankruptcy-due-to-covid-19>

creditors will have to file bankruptcy despite their condition of having not passed the debt maturity period.

Moreover, the period for business restructuring and reorganizing the company is deemed to be quite short. Stipulated in the Indonesian Bankruptcy Law, 45 days is the company's time frame to conduct restructuring. This time frame is deemed short for a company to reorganize its businesses and restructure their debt. Consequently, this can lead to debtor's failure to organize their company and eventually damage the company.

II. COVID-19 impacts on Indonesian Legal Transaction

The disruption of COVID-19 has impacted economic activities and livelihood, legal transactions are also one of process that is highly affected. Law firms and several court activities were halt during the large-scale social restrictions (*Pembatasan Sosial Besar-Besaran* or "PSBB"), this affects to the inability for physical meetings including for a client to meet their attorneys, for business partners to negotiate their contracts, and for clients to sign their contracts. This has imposed a great challenge for the Indonesia's legal transactions in Indonesia and could potentially infringe the contract and continuance the legal process such as court proceedings.

Dispute resolution in times of COVID-19 should also be considered when deciding to conduct a legal transaction. In normal times, court proceedings are done inside a tribunal before the judge. However, in times of crisis, the court shall provide more sustainable alternatives aside from ceasing the court process all at once during the social distancing condition. In the alternative, a virtual proceeding is a viable option to provide access for people to court. Despite the situation, the people shall still have the rights and access to justice.¹⁸⁴

B. Analysis

1. Mitigating the COVID-19 Impact in Indonesia: Taking An Example From The United States of America, Financial Crisis Governance

1.1 Indonesia

Anticipating the impact of COVID-19 in business sectors, Indonesian government through Financial Services Authority (*Otoritas Jasa Keuangan* or "OJK") to provide a

¹⁸⁴ Pistor, K. (2020). *Law in the Time of COVID-19*. United States: Columbia Law School Books 240. <https://scholarship.law.columbia.edu/books/240>

form of supervision specifically for banks which are facing liquidity issues and urging banks to provide some type of debt relief during the COVID-19 pandemic.¹⁸⁵

On mitigating insolvency issues in Indonesia during the COVID-19, the government through the Supreme Court of the Republic of Indonesia to issue a letter of guidelines in the purpose of preventing the COVID-19 spread. Based on the guidelines, submission of a case during the COVID-19 shall be executed through e-filing from 23 March 2020 to 5 April 2020. As a result, the insolvency proceedings still has to be submitted in person due to the e-filing system has not covered submission as such. This results to insolvency proceedings could not be filed under in Commercial Court at District Court of Central Jakarta since 23 March and only conduct the hearing for the cases before the 23rd of March.¹⁸⁶ The guideline allows companies to delay the court proceedings and help them to regain their financial stability and possibility for a business restructuring. However, these are not enough to actually help and facilitate companies in the times of financial crisis and there should be a legislature navigating on the rehabilitation of companies, which are facing financial distress when facing a situation such COVID-19.¹⁸⁷

As for the legal transaction process, law firms, as one of the entities affected the most by the large-scale social restrictions has to adapt to the new environment such as using the digital or electronic signature for document signing which have been regulated and admitted in Indonesian jurisdictions under Law No. 11 of 2008 which have been amended with Law No. 19 of 2006 concerning Electronic Information and Transaction or (“EIT Law”) which deemed that electronic signature is valid to use. However, the application and enforcement of electronic signature has not been recognized in all courts in Indonesia and limited to only several legal documents such as bankruptcy documents and legal transfer. In tackling this issue, Indonesia should be more proactive in terms of updating the regulations and informing all Indonesian courts in the use of electronic signature in the midst of COVID-19.¹⁸⁸ Aside from that the contract negotiation shall also

¹⁸⁵ Denny and Mahareksa. (2020, August 7). Indonesian Bankruptcy and PKPU Proceedings in a Time of COVID-19. *SSEK Law Blog*. Retrieved from <https://www.ssek.com/blog/indonesian-bankruptcy-and-pkpu-proceedings-in-a-time-of-covid-19>

¹⁸⁶ Dentons. (2020, April 16). Changes in Bankruptcy Law: An overview of (temporary) measures in response to COVID-19. Retrieved from <https://www.dentons.com/en/insights/alerts/2020/april/23/changes-in-insolvency-law>

¹⁸⁷ Finch, V. (2009). *Bankruptcy Insolvency Law: Perspectives and Principles*. Cambridge, UK: Cambridge University Press. ISBN-13 978-0-511-53991-6

¹⁸⁸ Pardede, D. R. (2020, 3 April). Indonesia: Use of Electronic signature during COVID-19. Retrieved from <https://www.bakermckenzie.com/en/insight/publications/2020/04/use-of-electronic-signatures-during-covid19>

continue despite the current circumstances, law firms and law offices shall be more flexible when setting up a meeting with their clients and navigate their transactions from home-office.

1.2 Lesson from other states

In Australia, the government has passed legislation that tweaked the measures in regard to insolvency trading for a director not to be liable for the insolvent debt incurred during the COVID-19 pandemic, this regulation works as an exception to allow directors to continue trading despite the insolvent condition. The function of this legislation helps directors to be more flexible when operating the company and trading during the COVID-19 crisis. The previous regulations in Corporations Act 2001 (Cth) in section 588G and 588V in regards to the prevention of insolvent trading in Australia, would not be applicable if used in a condition of COVID-19 financial situation in which applied will make the director be liable of the debt and credits incurred during the crisis.¹⁸⁹

In Indonesia, similar to the regulation of insolvent trading in Australia, it has been covered under Indonesian Company Law and Indonesian Bankruptcy Law. A combination of regulations which stipulate the director's duties in an insolvent company situation.¹⁹⁰ In this regard, the Indonesian Company Law and Bankruptcy Law does not define what insolvent trading is per day, quite differs to what Australian bankruptcy law contained, that board of directors in Indonesian company shall be held liable individually of the decision resulting in the insolvency of a company under the condition of (i) the insolvency was generated by any type of breach of director's duties and when (ii) assets of a company is not sufficient enough to cover the losses by such action.¹⁹¹ During the exceptional circumstances, director's duties and obligations in regards to the insolvent trading or incurring debt during the COVID-19 situation in Indonesia should have been more relaxed to increase the company's resistance during the COVID-19 financial crisis and increase the chance of survivability. Such regulation can be made temporary as to what the Australian government has done regarding the exception or 'safe harbour' of insolvent trading regulations which have been made into active until 24 September 2020.

¹⁸⁹ Steel, S. & Ramsay, I. (2019). Insolvent Trading in Australia: A Study of Court Judgments from 2004 to 2017. *Insolvency Law Journal* 27(3), 156-184. SSRN: <https://ssrn.com/abstract=3490475>

¹⁹⁰ Roman et al. (1996). Insolvency Law Administration and Culture in Six Asian Legal Systems. *Australian Journal of Bankruptcy Law* 6, pp. 248-288

¹⁹¹ Fitzpatrick, D. (1998). Bankruptcy Governance, Economic Crisis and the Indonesian Banking Sector. *Australian Journal of Bankruptcy Law* 178(9)

In mitigating the impact of COVID-19 we have first must find an effective way to address the situation through the studies of how bankruptcy governance bounce back even after the financial crisis that has happened in 2008 how the government fix and shift the bankruptcy along those years.

When the market wavered in in 2008 and nightmare of the systemic global collapsing, the United States government responded to the financial crisis 2008-2009 was manufacturing new legislation. *The Dodd-Frank Act of 2010* was the answer to the 2008 financial crisis through creating an agency which helps the consumer and protects them from predatory lending practices and regulating the credit rate agencies, and hedge funds in the mortgage investment.¹⁹² One of the lead destruction on the 2008 financial crisis was an excessive risk-taking by financial institutions such as Citigroup Bank and serious failures of bankruptcy governance which results in those institutions taking more risks than what they could afford,¹⁹³ in mitigating that, the US government has found the fundamental solution through the program called TARP (Trouble Assets Relief Program) to help banks and financial institutions before *The Dodd-Frank Act* and changing the bankruptcy governance in the United States.¹⁹⁴ The key takes from how the United States handled the financial crisis in 2008 is dissecting the root of the problem and generate options to bail-out banks and create a new protective legislature to avoid another financial crisis to happen. Such measures can be applied in Indonesian Bankruptcy law even before entering a financial recession due to COVID-9, the legislature can vary in a form of subsidy and loans made for the banks originated from the Bank of Indonesia (*Bank Indonesia*).

C. Conclusion

The Indonesian government has fairly done a notable job in terms of navigating the economy through such aforementioned regulations and policies. However, ideally, certain things can be improved in terms of tackling the impact of COVID-19 in bankruptcy law and legal transactions such as regulating the director's duties and liability in the insolvent trading during COVID-19, shareholder meeting regulations, and fixing

¹⁹² Vasudev, P. M. & Watson, S. M. (2012). Bankruptcy Governance after the Financial Crisis. *Edward Elgar Ltd*. DOI: 10.4337/9780857931535

¹⁹³ Keeley, B. & Love, P. (2020). *From Crisis to Recovery: The Causes, Course, Consequences, and The Great Recession*. United States of America: OECD Insights. ISBN:978-92-64-06911-4

¹⁹⁴ Gullifer, L. & Payne, J. (3rd Ed). (2020). *Bankruptcy Finance Law: Principles and Policy*. Oxford, UK: HART PUBLISHING, Bloomsbury Publishing. ISBN: PB: 978-1-50992-917-7

the e-filing and e-court systems to accelerate the court proceedings in Indonesia. There are approaches that need to be shifted from the Indonesian legal culture with regards to the way bankruptcy firms handle legal transactions. The Indonesian government has to be able to build pandemic-resilience bankruptcy law to safeguard the stability of the socio-economic aspects in Indonesia. Through the regulations and leeway made by the government of Indonesia for companies and business to play their part into strengthening Indonesia's economic stability. In the case of the financial crisis, it's contingent to look upon the weakness of the current state-enforced and created legislatures on bankruptcy laws and financial regulatory regimes and use the available tools to repair regulations as such.¹⁹⁵

¹⁹⁵ Gevurtz, F.A. (2010). The Role of Bankruptcy Law in Preventing Financial Crisis: Reflections on In re Citigroup Inc Shareholder Derivative Litigation. *McGeorge Global Business and Development Law Journal* 23(113).

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