
Supreme Court Decision a Blow to Restructuring After PKPU

The Supreme Court recently issued a decision¹ cancelling a settlement agreement despite creditors' approval. In this decision, PT Bank CIMB Niaga Tbk. ("**CIMB**") filed an application to the Supreme Court to cancel the settlement agreement of PT Arpeni Pratama Ocean Line Tbk. ("**APOL**"), despite approval from the majority of APOL's creditors to amend such agreement.

In the first instance, CIMB's application to cancel the court-approved settlement agreement was rejected by the Commercial Court, which found the amendment to be valid and binding on all parties. The Supreme Court overturned the Commercial Court's decision based on the following considerations:

1. a court-approved settlement agreement must be treated in the same manner as a final and binding court decision, and therefore it cannot be amended privately by the parties; and
2. amendment to the court-approved settlement agreement contradicts the fairness and equity principle in bankruptcy law as it nullify the assurance of debtor's performance under the settlement agreement.

The Key Role of Amendment

In Indonesia, a court-sanctioned suspension of debt payment (commonly referred to as "**PKPU**" (*Penundaan Kewajiban Pembayaran Utang*)) process is concluded if more than ½ of the total number of creditors attending the creditors' meeting holding at least 2/3 of the total amount of debts owed to the vote, in each of secured and unsecured creditors classes, in favour of the settlement agreement submitted by the debtor. The approved settlement agreement will then be ratified by the court and it will have the same force as a final and binding court decision. If the debtor violates such agreement, then on application by any creditor, the court may cancel the settlement agreement and declare the debtor bankrupt.

¹ Supreme Court Decision No.718 K/Pdt.Sus-Pailit/2019, dated 10 September 2019.

In reality, it is difficult for the debtor and creditors to foresee the debtor's long term business performance. As such, they would usually agree to a best case scenario to push the debtor's capability to repay the creditors as much and as soon as possible. This is where the amendment plays a role. It is market practice that a violation by the debtor of the settlement agreement would trigger an amendment instead of a termination (and subsequent bankruptcy). Parties would amend the court-approved settlement agreement based on the same voting requirements in a PKPU process.

For this reason, the amendment mechanism is an important issue in a PKPU process and plays a significant role in preventing a company from bankruptcy and maintaining its status as a going concern.

Our Initial Takeaways

Based on the Supreme Court decision, we understand that a default of the settlement agreement cannot be waived by a creditors' meeting. Further, it is interesting to note that the Supreme Court's decision was based on the principle of fairness and equity. If this is true, then the Supreme Court should have considered APOL's other creditors who also have a direct interest in ensuring the continuity of the company's operation and upheld the amendment. Instead, this decision seems to disregard the fact that the amendment was approved by the other creditors based on the same voting quorum as in the PKPU process. Approval from creditors should be a major consideration for the judges, especially when the creditors are all independent and unaffiliated, as presumably, they want the best possible recovery outcome.

Moreover, this decision did not consider the reasons for APOL's failure in implementing the original settlement agreement. It appears that the Supreme Court interpreted the Bankruptcy Law² strictly and therefore, in deciding the cancellation of the settlement agreement, it neither takes into account other creditors' interest nor the triggering event for the amendment.

In light of this decision, amendment of a settlement agreement will now need to be made *prior* to a default to avoid the possibility that dissenting creditors would file for a cancellation. This is difficult for the debtor because if there is no default, the debtor would have neither a strong leverage nor an urgency to renegotiate the settlement agreement.

² Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations.

It also throws the prevailing market practice in doubt. Moving forward, it would be prudent for parties not to rely solely on amendment to the settlement agreement as a means to restructure debts after the PKPU process. As a result of this decision, the risk of an amended settlement agreement being annulled is now higher than it used to be.

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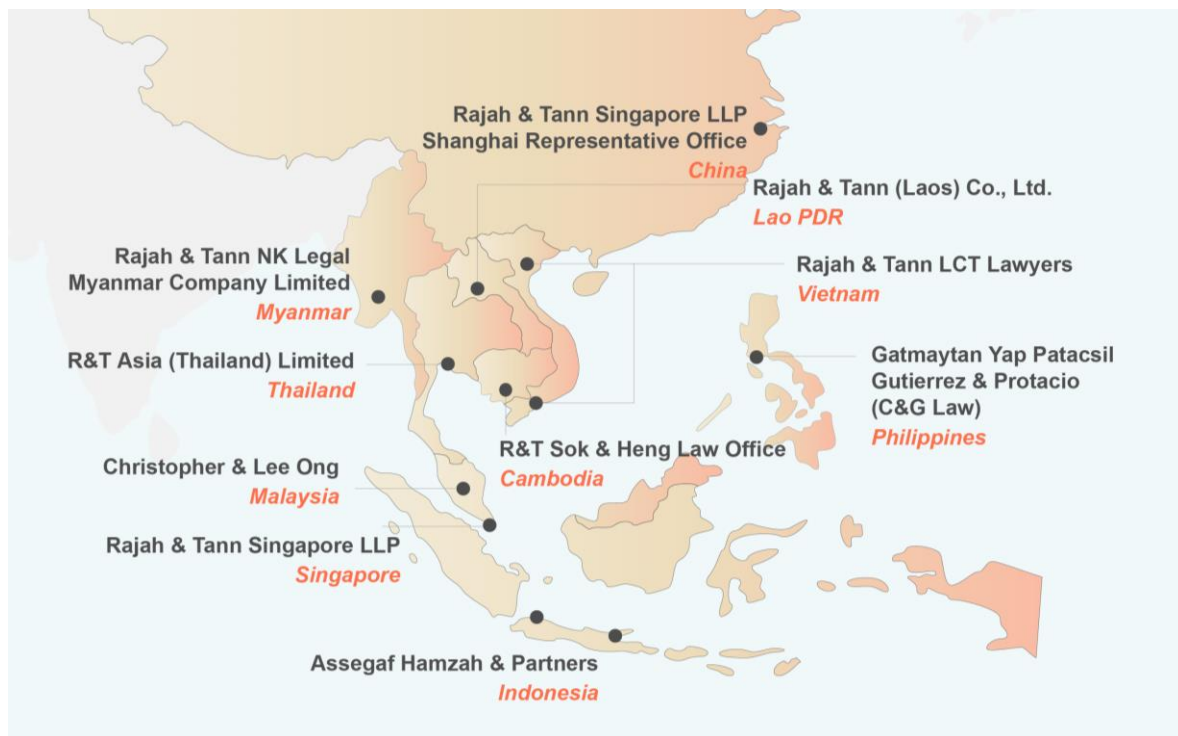
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