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# HOW CONCURRENT CREDITORS ARE TREATED IN COMPANY'S BANKRUPTCY: A COMPARISON INTO INDONESIA AND SINGAPORE

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## ABSTRACT

During the distribution of wealth in Indonesia's corporation bankruptcy procedures, the wealth is often used to satisfy the debts owed by the debtor towards preferred creditors and secured creditors. The long process and enormous cost of the bankruptcy process before paying back the concurrent creditors puts a lack of emphasis towards these types of creditors' rights since the company is dissolved and theoretically will not allow them to get any payment towards their loans given to the company. This leads to concurrent creditors earning a status of uncertainty and confusion in earning their credits. Compared to Singapore, even if the status of payment is quite similar to Indonesia, Singapore provides a better bankruptcy law system that incorporates public opinions and provides a better system for unfair preference and undervalued transactions that provides more wealth to be distributed to concurrent creditors during the distribution of wealth.
**Keywords**: bankruptcy, concurrent creditors, company

## INTISARI

Pada saat proses pembagian harta debitur di prosesi kepailitan perusahaan di Indonesia, harta tersebut seringkali dipakai demi menyelesaikan utang debitur terhadap kreditur preferen dan separatis. Proses panjang serta pengeluaran dalam proses kepailitan sebelum membayar kreditur konkuren memberikan kurangnya penekanan terhadap hak mereka sebab perusahaan dileburkan dan secara teoritis tidak akan membiarkan mereka mendapatkan pembayaran terhadap piutang mereka kepada perusahaan. Ini menyebabkan kreditur konkuren mempunyai status ketidakpastian terhadap piutang mereka. Ketika meninjau Singapura, meskipun sistem pembayaran relatif sama dengan Indonesia, Singapura menyediakan sistem kepailitan yang lebih baik karena mereka memasukan opini publik serta sistem yang lebih baik terhadap preferensi tidak adil dan transaksi dibawah nilai yang memberikan harta lebih banyak terhadap kreditur konkuren pada saat pembagian harta debitur.
**Kata kunci**: kepailitan, kreditur konkuren, perusahaan

## INTRODUCTION

Bankruptcy law is a law that is designed to protect the debtor from incurring further losses upon the interests that will accrue when the debtor is not eligible to pay for their debts and pay back creditors with what the debtor has left. Losses that are accrued needs to be prevented since the debtor itself should have the rights for a blockade of payments that is necessary since a financially unstable debtor will contradict itself in becoming even more financially unstable through the pursuit for a payment by the creditors. This will cause more deterioration towards the debtor's life either through economical stance, social stance, and their own health.

However, a conundrum occurs if the debtor is not a natural person as seen in the case of a legal entity such as a corporation. A corporation distinguishes itself from a natural person as it is a form of unity in work represented by a name in which multiple natural persons work together to represent that legal entity as one whole body of ideas and work. Since Indonesia has already created the legal framework for a separation of liability in Law No. 40 of 2007 on Limited Liability Company ("**Law No. 40/2007**"), this inhibits certain rights for creditors to obtain the full reclamation of the debtor's debts being owed to them.

During the bankruptcy process in Indonesia, creditors are divided into two tiers which are preferred creditors and concurrent creditors. The tiers itself separates the obligations of payment where preferred creditors are always put first in an amount of payment where there must be a satisfaction of all preferred debts in order to commence towards the next payment. Preferred party owns a security over an asset or has the right given by the law to have a preferred status. Meanwhile, unsecured creditors / concurrent creditors are creditors who do not have any security over any types of assets and are paid last during the wealth distribution process in bankruptcy. This creates a bubble where the rights of ownership towards a certain money that they should have obtained to be wrongfully claimed morally by certain parties where they will not obtain a satisfactory result out of the bankruptcy process. Concurrent creditors are heavily burdened with the way Indonesia has formulated its bankruptcy law specifically if a company goes bankrupt since it loses all of its legal titles after the process has ensued and people who are responsible for conducting the company's operations will not be held liable if they did not commit any bad faith or negligence during the company's business operations. Moreover, a time frame of 1 year for *actio paulina* is deemed not substantial enough to provide the rights needed by concurrent creditors in clawing back assets used for the general auction.

Even if in Indonesia, Article 204 gives the rights for creditors to enforce a payment from their debtors after the bankruptcy process has ended if they have not received full payment for the debts owed by the debtor, a distinguishment in a company leaves them in a very vulnerable position to lose their rights towards their property. Concurrent creditors are often left with nothing since a company's bankruptcy will eventually dissolve the legal entity capable of the payment itself where no other parties will be obligated to pay back the amount of money owed to the creditor. This article is intended to identify certain problems for concurrent creditors on a company's bankruptcy contained in the Indonesian law on issues that may impede concurrent creditors' rights where

reforms will be suggested by looking into Singapore's law concerning bankruptcy. Even if Singapore has relatively the same stance for payments towards concurrent creditors, there are a lot more ways to earn extra assets for allocation of assets for the general auction being held and the distribution of wealth may be affected by public opinions which gives insights over procedures that may be held to claw back assets for the general auction. Moreover, Singapore provides a wider time frame for clawing back assets that have been allocated to undervalued transactions and unfair preference. By following several implementations in Singapore, Indonesia can provide better enforcement for concurrent creditors' rights in earning their credits. Therefore, this paper will explore how concurrent creditors rights differ between both countries and how Singapore's bankruptcy law system for concurrent creditors is more beneficial for them and what kind of reformations needs to be done to pave a better way for concurrent creditors in Indonesia.

## METHODS

Normative methods are used as there will be no statistics provided in the paper but only through judicial comparison in which tries to answer the possibility of heightening the rights for Indonesia's concurrent creditors during the bankruptcy process by comparing it to statutes in Singapore. Hence, a juridical normative method for research is deemed necessary since the author is determined to obtain legal knowledge between the law by seeing issues that happen between entities in the society by studying statutory regulations. The source for writing this article is contained in the form of primary, secondary, and tertiary legal materials. This article is written through the method of online research and reading books or journals by viewing the statutes and explanations contained in both Singapore's bankruptcy law and Indonesia's bankruptcy law.

## RESULTS AND DISCUSSION

### 1. How Concurrent Creditors are Treated in Indonesia:

### 1.1 A Short Note on the Bankruptcy Process in Indonesia

In Indonesia, the procedure of a company going bankrupt in general is relatively simple where there must be a requirement of owing debts to at least 2 debtors where the company fails to pay either debtor in the time determined by the agreement,[1] then the debtors may file for a declaration of bankruptcy to the district court of the company's domicile.[2] A differentiation of creditor specifically if the company is a bank and is in need of a declaration of bankruptcy, then only the Indonesian Bank owns the jurisdiction to give the request for a declaration of bankruptcy.[3] Moreover, other types of companies such as financial institutions and insurance companies have different governmental institutions that are eligible to declare them as bankrupt pursuant to Article

[1] Law No. 37 of 2004 on Bankruptcy & Suspension of Debt Payment Obligation ("**Law No. 37/2004**"), Article 2 paragraph 1.
[2] Law No. 37/2004, Article 3.
[3] Law No. 37/2004, Article 2 paragraph 3.

2 paragraph 3, Article 2 paragraph 4, Article 2 paragraph 5 of Law No. 37 of 2004 on Bankruptcy & Suspension of Debt Payment Obligation ("**Law No. 37/2004**").

In general, other companies in Indonesia that are not mentioned in the above can file for bankruptcy if it was deemed necessary by the basic budget of the company, a decision of the shareholders meeting when a company keeps incurring loss, or if the access to a conduct of business was prohibited by the government.[4] Post filing for bankruptcy, the judge will either accept the document and conclude the commencement of the bankruptcy process. This will in turn cause the company to seize all of its action and loses all rights to represent itself in a conduct of business[5] to other parties and will start the commencement of the liquidation process. After about 14 days, the company must determine the last time for creditors to issue the debts that the debtor owes and determine the tax concerned with the processes that are going to be established and all assets plus money that they own. Moreover, they shall establish the date, time, and location for the curator to compare and examine all the debts that the creditors have issued forward with a time frame of at least 14 days between the deadline for creditors to issue forward the bills and the determination of tax incurred.[6] Creditors will not be able to ask for a payment on the debt which causes a temporary state of "frozen debt"[7] where the interests on the debts after the filing of bankruptcy will not be accumulated unless it comes from a secured asset with a title of execution in which the interests will not be executed if the asset itself is not enough to satisfy the debtor's debt.[8]

Article 114 of Law No. 37/2004 states that the curator must state the company's bankruptcy in at least 2 news outlets and the country news of Indonesia.[9] This is done in order to give certain information towards the public and anyone that has any legal relationships specifically if they act as either a creditor or a debtor towards the company where they will be given adequate notice in order to gather all the documents and necessary evidence to not miss the opportunity of claiming their legal rights during the bankruptcy process. The creditors will have to submit necessary evidence that links the debt from the company to give such clarity on their position which will be separated by the curator and be put into 2 lists of admitted and not conclusive debts. Debts that are not conclusive will be brought before a judge to either deny it or put it in the list of debts that are fully admitted pursuant to Article 124.[10] The curator will need to separate the debts that contain special rights in them and so will be divided into the tiers of preferred and concurrent creditors

4 Law No. 40 of 2007 on Limited Liability Company ("**Law No. 40/2007**"), Article 142.
5 Law No. 40/2007, Article 143 paragraph 1.
6 Susanti Adi Nugroho, *Hukum Kepailitan di Indonesia: Dalam teori dan Praktik Serta Penerapan Hukumnya* (1st edn, 2018), p. 137.
7 Shanti Rachmadsyah, 'Kepailitan (2)' (Hukumonline, 2010), <https://www.hukumonline.com/klinik/detail/ulasan/cl4504/kepailitan>, accessed 15 July 2021.
8 Law No. 37/2004, Article 134.
9 Law No. 37/2004, Article 114.
10 Law No. 37/2004, Article 124.

pursuant to Article 118.[11] However, a remedy may occur in the form of delayed payment. The delay of payment is discussed in Article 229 (1) Law No. 37/2004 where a delay of payment will be decided by the district court based on the agreement of at least ½ of concurrent creditors with ⅔ of all parts of assets of the concurrent creditors, and ½ of preference creditors with ⅔ of all parts of assets of the preference creditors.[12]

### 1.2 A Long List of Preferred Creditors

The system of payments regarding the tiers of creditors is determined in Article 189 paragraph 4 Law No. 37/2004.[13] The tier is divided into 2 which are preferred and concurrent. However, another tier is to be considered which are separated creditors which generally holds a safe condition of executing their assets separately since they own a title of execution once the debtor fails to pay certain debts on the determined deadline of payment. This right over a certain property stems from a will to give a sense of security of payment from the debtor to creditor[14] in which it must be recorded to give the ultimate right over the object[15] and their rights for an execution are guaranteed in Article 55 Law No. 37/2004. However, certain conditions may enforce them to halt their title of execution specifically if the debtor files for bankruptcy. Pursuant to Article 56 paragraph 1 Law No. 37/2004, the court will enforce a halt on execution rights / automatic stay for 90 days and the curator in which the curator may do a general auction in that time period pursuant to Article 56 paragraph 4.[16] However, if the curator fails to auction the property or decides to allow the creditor to execute the property themselves, the creditor will retain the amount of money acquired during the general auction.[17] Certain conditions like market volatility, depreciation of asset value, may be reasonable grounds for a creditor to request to the judge for an appeal.[18] This action gives a sentiment towards creditors to execute their property before a debtor files for bankruptcy hence decreasing the amount of asset available for the distribution of wealth in the liquidation process. However, if they decide to allow the curator to execute their property, there will be subjugations to the money they will earn during the wealth distribution of the liquidation process as there will be deductions incurred by certain costs for procedures and preferred creditors like taxes, execution fee, and worker's fee.[19] However, they still have a right to enjoy the money acquired after the

[11] Law No. 37/2004, Article 118 paragraph 1.
[12] Law No. 37/2004, Article 229 paragraph 1.
[13] Law No. 37/2004, Article 189 paragraph 4.
[14] Titik Triwulan Tutik, *Hukum Perdata dalam Sistem Hukum Nasional*, (5th Edn, 2015), p. 176-177.
[15] Elyta Ras Ginting, *Hukum Kepailitan Pengurusan dan Pemberesan Harta Pailit* (1st edn, 2019), p. 374.
[16] Law No. 37/2004, Article 56 paragraph 1 and 4.
[17] Elyta Ras Ginting, *Op. Cit.*, p. 380.
[18] Elyta Ras Ginting, *Op. Cit.*, p. 377.
[19] Rizky Dwinanto, 'Urutan Prioritas Pelunasan Utang dalam Kepailitan', *Hukum Online, 12 November 2019* <https://new.hukumonline.com/klinik/detail/ulasan/lt5dca8aad69118/urutan-prioritas-pelunasan-utang-dalam-kepailitan/> accessed 8 June 2021.

general auction on their objects after a payment to several preferred parties has been completed.[20] Even if their rights for payments before concurrent creditors are guaranteed in 1132 Indonesian Civil Code, the amount of subjugations to the money and incorporating assets to the general distribution process provided does degrade their status on earnings available to much like that of a concurrent creditor specifically for excess debts that are not satisfied from the earnings of the general auction[21].

The preferred debts are the debts where an act of payment is required in order to satisfy the tier itself where the payment requires a special treatment which will always get paid first before having the leftovers be divided to concurrent creditors. However, the distribution of wealth on preferred debts will not override the rights to the curator's bill and costs to file bankruptcy. This is demonstrated in Article 138 Law No. 37/2004 in the condition where the money of the debtor will not be sufficient to pay for the preferred debt, then the wealth that is going to be used for paying concurrent debts will be overturned and be given to cover the preferred in order to satisfy the owner of the preferred debt.[22] The principle used in the division of asset and money to cover the preferent bill using the concurrent bill will be done using *pro rata pari passu* pursuant to Article 189 paragraph 5 Law No. 37/2004.[23] A division of wealth acquired during the general auction will be given towards creditors using a percentage of the debt that they are owed to divided by the total debts of other creditors pursuant to Article 189 paragraph 3 Law No. 37/2004.[24]

Article 189 paragraph 5 Law No. 37/2004 gives a division of preferred creditors into two tiers which are special privileged debt and common privileged debt. Special privilege will earn the payment first and after the special privileged debt has been paid, the curator will pay the rest towards the common privileged debt. The list of special privileged debt is held in an order where the whole payment for the debts must be accomplished in order to move on to the next part of the list stated below. Special privileged debt is determined in 1139 Indonesian Civil Code which consists of:[25]

a. Case cost, including the auction fee, rent fee and cost to repair immovable property

b. Cost of buying movable objects that has an executable right where the curator thinks that paying it back will increase the money that the auction towards the object may be able to generate

c. Cost to save objects from perishing

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20 *Ibid.*
21 Metalia Puspitasari, 'Eksekusi Objek Jaminan Fidusia Atas Debitor yang Dinyatakan pailit' [2016], Thesis Universitas Airlangga, p. 42.
22 Law No. 37/2004, Article 138.
23 Law No. 37/2004, Article 189 paragraph 5.
24 Elyta Ras Ginting, *Op. Cit.*, p. 401.
25 Indonesian Civil Code, Article 1139.

d. Labour fees for renovating or repairing the asset to be auctioned (maximum payment of 3 years and as long as the freehold title is recorded to be of the debtor's)

After paying the whole list of special privileged debt, the payment will occur towards common privileged debt. The list of common privileged debt is held in an order where the debt must be exhausted from full payment in order to move on to the next part of the list stated below. Common privileged debt is determined in 1149 Indonesian Civil Code which consists of:[26]

a. Cost of the case in court.

b. Burial fee of the Debtor.

c. Cost of the hospitalization of the debtor.

d. Worker's fee that has not been paid for the work 1 year prior, that year's pay and future raises that may arise from working in that company in the year where it goes through bankruptcy pursuant to Article 95 paragraph 4 Law no. 13 year 2003 and Article 39 Law No. 37/2004.

e. Food fee towards the debtor for 6 months.

f. Cost of education and living expenses in school dorm.

g. Cost of child support if the debtor is a parent.

During a company's bankruptcy, several costs such as burial fee, hospitalization, food fee, cost of child support and cost of education are not to be accounted for. Then, pursuant to other existing laws, a determination towards the status of a certain debt may be incurred as a preferred debt under the status of common privileged debt. These types of debts are:[27]

a. Tax will earn a preferred debt status more than separated creditors[28] pursuant to Article 10 paragraph 5 Law No. 37/2004 as tax collection will be given specialty in terms of the order of payment. Then, Article 113 Law No. 37/2004 gives an obligation for the bankrupt to register all of their assets in order to have a determination of the nominals of their tax.

b. Payment for the work of the company's employee as they earn a preferred status above tax pursuant to the decision of the constitutional court no. 67/PUU-XI/2013 in which only the payment for their work will earn a preferred status above taxes and remunerations for firing the employee will earn a status of preferred creditors under tax and separated creditors.[29]

[26] Indonesian Civil Code, Article 1149.
[27] Elyta Ras Ginting, *Op. Cit.*, p. 393, 398, 399.
[28] Susanti Adi Nugroho, *Op. Cit.*, p. 369.
[29] Susanti Adi Nugroho, *Op. Cit.*, p. 405-406.

c. Rights to Reclamation: Rights that stick to the object held by the debtor for the creditor to get the object back since the creditor is unable to pay for the moving object pursuant to Article 1145, 1132 Indonesian Civil Code and Article 230 Indonesian Commercial Code. The curator will determine to either give it back where the curator will be getting past payments of money for the object or pay the rest to retain the object.

d. Retention Rights pursuant to Article 61 and Article 185 paragraph 4 Law No. 37/2004, where a creditor has the rights to retain the object if the debtor is unable to pay.

Hence, we can deduct that there are multiple interpretations of statutes scattered across several regulations and laws being put forth which creates more disarrangement and uncertainty on which creditors have a preferred status above the other. This issue is quite prevalent as it requires for the constitutional court to conclusively decide on who or what earns a preferred status in achieving their credits.

After all the creditors have earned their payment, concurrent creditors will earn a share of the amount of money left. They are stated in Article 189 paragraph 3 Law No. 37/2004 where the judge will determine the share of the debt to be distributed towards the specified concurrent creditor.[30] If the payments towards concurrent creditors are satisfied, shareholders will be able to earn assets after all creditors are paid in full. The problem is, the Bankruptcy Law in Indonesia is trying to divide the asset of the debtor in the principle of *pro rata pari passu,* but it determines a lot more allocation of assets from the debtors towards the preferred creditors and separated creditors. This will often lead to concurrent creditors obtaining no allocations of debt if the debtor goes bankrupt since all the money obtained from the debtor's assets will be allocated to preferred creditors. Less money will also be obtained by the auction since the cost will go to the cost of the case and the curator's cost from dealing with the case. Moreover, their rights to earn payment will be marched over by preferred creditors and separated creditors.[31] Even if there is no principle of debt recharged hence after the process of bankruptcy, creditors still have the rights to earn the unpaid debts owed by the debtor either through his future financial earnings or new assets that he may accrue pursuant to Article 204 Law No. 37/2004.[32] The rights for the creditors who have not earned a full payment will be active after *Closing List of Share* and *Handover Report of Debt Matching* will be used as the evidence for the debts still owed by the debtor. This method of no debt recharged will be concurrent creditor's last strive for achieving an equal amount of payment towards the debts they owe as Indonesia's bankruptcy law gives such a huge advantage for preferred creditors in earning their share when compared to concurrent creditors.[33]

### 1.3 Issues that Arise when a Company goes Bankrupt for Concurrent Creditors

30 Law No. 37/2004, Article 189 paragraph 3.
31 Metalia puspitasari, *Op. Cit.*, p. 19.
32 Law No. 37/2004, Article 204.
33 Elyta Ras Ginting, *Op. Cit.*, p. 403.

A certain issue arises if the company is to declare bankruptcy and the bankruptcy process has ensued til the end. As a company's status as a legal entity has been dissolved, it loses the rights to actively participate in any payment of debt towards creditors who have not earned the amount of money to the respect of the company's debts. Even if unpaid debts are still to be paid by a person who declared bankruptcy after they have achieved financial stability in the upcoming times, companies have a different standard as there is a division of the legal entity's assets and the company's shareholders, board of directors, and board of commissioner's assets. Pursuant to Article 3 Law No. 40/2007, we can infer that there is a separation between an individual shareholder's ownership of assets and the amount of liability that can be incurred towards the shareholders.[34] The amount of liability for a bankruptcy is only as far as the shareholder's amount of funds being put in the company. Other approaches are also seen in other positions which manage the company such as directors and board of commissioners who are held liable to restitute an amount of loss that occurs from mismanaging the company.[35] Pursuant to Article 3 paragraph 2 Law No. 40/2007, a shareholder may only be inflicted with a larger percentage of liability if the shareholder is involved in a tort committed by the company and acts in bad faith on the usage of the company's assets. Directors and board of commissioners will also not be held liable for the company's bankruptcy if they did their job without committing any ultra vires pursuant to the Law No. 40/2007, the company's outline and any other existing regulations that are involved in the conduct of their business[36]. They are obliged to prove their good faith if they are declared at fault for the company's failure upon managing the conducts of the company's business in order to release them from the liability being put forth as they will be held guilty until proven innocent upon appointment of mismanagement.[37]

Unless they are in breach of their duties of management, are not responsible for the company's loss and act in good faith upon running the company, no parties will be able to be held liable for certain debts incurred that might lead to a company's bankruptcy.[38] This in turn creates an urgency towards concurrent creditors as there will be no one held liable for their credits since the company will be dissolved. With multiple ladders of payment for preferred creditors before the sum of money acquired during a general auction, concurrent creditors are often left with no choice but to forget the debts that the company owes them which certainly lacks fairness and justice as the credits they own are their right of ownership.

Furthermore, there is yet to be any extensive regulations upon the determination of unfair preference and undervalued transactions in Indonesia. Pursuant to Article 41 paragraph 1 Law No. 37/2004, a curator may file a lawsuit of *actio paulina* to obtain back the assets of the company if the company has committed a transfer of asset or money that impedes the rights of creditors for 1

34 M. Yahya Harahap, *Hukum Perseroan Terbatas*, (6th Edn, 2016), p. 74.
35 Susanti Adi Nugroho, *Op. Cit*., p. 363.
36 Abdul Halim Barkatullah, *Hukum Perseroan di Indonesia* (1st Edn, 2018), p. 34.
37 M. Yahya Harahap, *Op. Cit*., p. 386, 461.
38 M. Yahya Harahap, *Op. Cit*., p. 383-384, 463-464.

year prior to the company declared as bankrupt.[39] The creditor or the curator will have to issue a lawsuit to earn an order of the court to declare the transaction void of law where he shall provide the court on the debtor's intent and/or action during the transaction that leads to a loss incurred by the creditor.[40] The requirements of this settlement are: (1) the action by the debtor incurs a loss on the creditor; (2) the action is not forcibly taken and must be a decision that the debtor makes; and (3) the action is committed within one year prior to the declaration of the company's bankruptcy.[41] This lack of specification and 1 year time frame may lead to certain parties earning a favorable status of unfair preference for obtaining a payment of debts as this Article opens the implication for payments that are intended with a company's bad faith to secure its asset either through a beneficiary or a nominee. As one year is deemed too short as a time frame and leads to decisions prior to that time frame being a huge loss for concurrent creditors in achieving their rights. Furthermore, a manipulation towards the company's decision may occur considering the decisions applied by the company prior to the time stated which certainly is favorable for parties who yearn for a preferred status on debt payments. Then, a lack of regulation on undervalued transactions gives the company a way to satisfy certain shareholders or employees that may benefit either directly or indirectly from undervalued transactions before a company goes bankrupt. This will hurt concurrent creditors as they will be left further behind for payment without any guarantee of obtaining a payment for their credits.

Moreover, concurrent creditors are very likely to starve from the division of money earned after the division of assets carried out. It is common where the assets of the bankrupt act as a guarantee for separated creditors or the wealth collected from the general auction of the assets fail to pay separated creditors. When the wealth from the asset used to pay secured creditors is not fully satisfied, their position will step down into concurrent creditors which creates even more competition for other concurrent creditors.[42] Even if concurrent creditors have the power to intervene and join on decisions for payment delay which halts the chances of being unjustly paid, they are still in competition with other types of creditors to earn the payment necessary to satisfy their credits. This hurts their rights to the extremity specially if a legal entity such as a corporation goes bankrupt which in terms of legal action forces them to pursue a payment delay even if they should just hope and pray for the company to achieve financial stability after fully paying other preferred creditors.[43] To fully cement it, a concurrent creditor's status within Indonesian bankruptcy law is full of uncertainty.

## 2. Difference in Singapore's Bankruptcy Law during a Company's Bankruptcy for Concurrent Creditors

[39] Elyta Ras Ginting, *Op. Cit.*, p. 174.
[40] Susanti Adi Nugroho, *Op. Cit.*, p. 311.
[41] Susanti Adi Nugroho, *Op. Cit.*, p. 315.
[42] Elyta Ras Ginting, *Op. Cit.*, p. 402.
[43] *Ibid.*

### 2.1 System of Payment

Upon filing for Bankruptcy, unlike Indonesia where there is a legal remedy for cassation, there are no legal remedies available in Singapore towards the bankrupt or its creditors as all matters regarding the filing of a bankruptcy is decided by the federal court which is acting as the highest court in the hierarchy of Singapore's judicial system.[44] Pursuant to Article 311 of the Insolvency, Restructuring and Dissolution Act, a creditor may file for bankruptcy or its creditors if there is a debt of over $ 15,000.-, the debt shall be in liquidated form or money that is payable directly to the creditor, the debtor is unable to pay the debt or each of the other debts, and if they are owing a debt to a creditor outside Singapore where through a judgement or award in Singapore, the claim of the debt can be executed.[45]

Unlike Indonesia, Singapore has consistently conducted the process of judicial management and provided room for a breather to the debtor. The procedure allows for an agreement between the creditors to prolong the deadline for the debts with an appointed judicial manager to conduct the company's business and finance where an agreement by half of the total creditors with at least half of all accumulated debts shall be met.[46] Under section 70(4)(ii)(B) of the Insolvency, Restructuring, and Dissolution Act sought to provide solution to the "technical" issue by means of providing the flexibility of allowing shareholders to retain their shares in the company's restructuring and payment delay, even if unsecured creditors are not paid in full.[47] This does put unsecured creditors in a disadvantageous position when compared to Indonesia as Indonesia has a higher threshold for the minimal quorum of creditors required for this type of approval.

A particularity that stands out in all insolvency procedures either through judicial management or other procedures in Singapore is an allowance for court orders that has the public interest as a ground in making the order[48] given in Article 264 subsection 6(A)(III) of the Insolvency, Restructuring and Dissolution Act. Singapore treats insolvency as not only a private matter but also through community interests[49] specially if the company has conducted serious breaches of

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44 Megawaty and Elvira Fitriyani Pakpahan, 'Legal Settlement Efforts That Should Be Done by Indonesia and Singapore in Completing Debt by Curators to Creditors through Bankruptcy', *Proceedings of the International Conference on Culture Heritage, Education, Sustainable Tourism, and Innovation Technologies (CESIT 2020)*, <https://www.scitepress.org/Papers/2020/103260/103260.pdf>, p. 486, accessed 13 July 2021.

45 Insolvency, Restructuring and Dissolution Act §311.

46 Singapore Legal Advice, 'What is Judicial Management and How It Works in Singapore' (Singapore Legal Advice, 2 September 2020), <https://singaporelegaladvice.com/law-articles/judicial-management#what>, accessed 14 July 2021.

47 Kevin Teo Chuanzhong, 'A Critical Evaluation of the New Cram-Down Tool in Singapore's Restructuring Regime' [2021], International Insolvency Review 2021, p. 8.

48 Tracey Evans Chan, "The Public Interest in Judicial Management" [2013], Singapore Journal of Legal Studies, p. 279.

49 Liquidator of W&P Piling Pte Ltd v. Chew Yin What, SGHC 1081, OS 115/2004.

regulations and misconducts.[50] This situation will imply a certain burden that will be enforceable towards the leaders of the company and puts extra charges or debts based on public outcry that is deemed necessary by the public. However, this power is not exercised on the opportunity but must come as a form of importance thus calculating economic and social impacts into account.[51] Hence, if there is a very urgent need considering actions that may benefit the execution or clawing back assets, the court will consider public sentiments on an action in a certain case which most likely will increase the rights earned by creditors.

Moreover, during bankruptcy proceedings in Indonesia, there is a huge amount of incentive by concurrent creditors towards financial restructuring and payment delay where there is a statute that controls their rights to keep earning data and supervising the company's finances since there is a requirement to provide the company's data once every three months pursuant to Article 238 Law No. 37/2004. Meanwhile in Singapore, there is usually a concentrated creditor during the financial restructuring with extensive security collateral which creates enhanced incentives for monitoring the company's financial condition and economic prospects by the concentrated creditor and consequently increases discipline on management.[52] Judicial managers will also be responsible to the creditors to provide them with a detailed information of the company's debts and affairs over time.[53] Their opinion and supervision will sharpen the return available towards all types of creditors as the company will be extra careful when conducting business operations with multiple inputs and insights from other parties. Hence, the aspect of data provision by the company is quite extensive in both countries and gives benefits towards creditors and their right to earn payments from their credits.

After a declaration for bankruptcy, a liquidator will manage the liquidation of assets and its distribution towards the creditors. Similar to Indonesia, the debts will be frozen as well in which creditors will not be allowed to sue the debtor for their debts.[54] The system of payment is very similar to Indonesia as there will be three tiers of creditors that will earn a payment. Secured creditors are considered generally safe where they have a right to execute their property in respect to their title of execution on that property.[55] However, an excess of claims towards the actual value of the security will be accounted for in the status of concurrent creditors[56] which is similar to

50 Tracey Evans Chan, *Op. Cit*., p. 280.
51 Re Bintan Lagoon Resort Ltd., SGHC 151, OP 3/2005
52 Tracey Evans Chan, *Op. Cit*., p. 293.
53 Singapore Legal Advice, *Loc. Cit*.
54 Singapore Legal Advice, 'Process of Filing Bankruptcy in Singapore & What's Next?' (Singapore Legal Advice, 2021), <https://singaporelegaladvice.com/law-articles/filing-for-bankruptcy-singapore/> accessed 16 July 2021.
55 Angelia Thng, Esther Lim and Crystal Tan, Braddell Brothers LLP, 'Restructuring and Insolvency Overview: Singapore', Thomson Reuters Practical Law, 21 March 2021, <https://uk.practicallaw.thomsonreuters.com/w-010-9476?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 16 June 2021.
56 *Ibid.*

Indonesia's stance. This ensures that every number of excess claims may benefit the general welfare for concurrent creditors as they also adopt a doctrine of *pro rata pari passu* based on Article 172 of the Insolvency, restructuring and Dissolution Act. Then there is the list of preferred creditors determined in Article 203 of the Insolvency, Restructuring and Dissolution Act. Here is the list of preferred creditors:

a. Costs and expenses of winding up of the Official Receiver and the liquidator.

b. Costs of the applicant for the winding up order.

c. Wages or salary including allowance or reimbursement.

d. Retrenchment benefits or ex gratia payments under employment contracts.

e. All amounts due in respect of workmen's compensation under the Work Injury Compensation Act accrued before, on or after the commencement of winding up.

f. Contributions payable by the company as employer.

g. All remuneration payable to any employee in respect of vacation leave, accrued in respect of any period before, on or after the commencement of winding up.

h. All tax assessed under any written law before the commencement of the winding up or assessed at any time before the time fixed for the proving of debts has expired.

There is a significant difference between the number of preferred creditors that has been given a priority of payment by the law when comparing between Singapore and Indonesia. Furthermore, there is no priority of payment towards retention rights or an amount of that year's work money towards the employee. This in turn allows a more flexible number of payments that are beneficial to concurrent creditors. Then, shareholders will not earn any assets until concurrent creditors are paid in full[57] which is similar to Indonesia. Furthermore, Singapore has a conclusive omnibus law regarding their bankruptcy which in turn cements the status of preferred creditors that are able to earn their credits without multi-interpretations and contradictions from other statutes. Even if Singapore is deemed tidier than Indonesia's, concurrent creditors will still not be allowed to steal a march over other creditors in the enforcement and discharge of their debt during a judicial management nor after the distribution of wealth after insolvency procedures have occurred.[58] This in turn means that Singapore's position for concurrent creditors in terms of who will earn their credits first is relatively similar to Indonesia's with more wealth available for the wealth distribution process that will ensue after the general auction has been held. Moreover, the debtor

57 *Ibid.*
58 Tracey Evans Chan, *Op. Cit.*, p. 286

will still have to pay certain amounts of money after the bankruptcy process has been finished just like in Indonesia.

### 2.2 Unfair Preference

Singapore has established a system similar to Indonesia where a director, board of commissioner, and shareholders can only be held liable if they committed an act of bad faith upon the premise of business operations that resulted in bankruptcy. A well-established system between both countries has put a separation of liability between all parties involved where they will be held liable if they are responsible for a failure of their fiduciary duties. But, upon proving a separation of their liability, there needs to be considerations on the acts they commit that may reduce the amount of money generated for the distribution of wealth to concurrent creditors.

Even if Singapore has the same routine of payment towards creditors during the bankruptcy process,[59] Singapore has a regulation that mandates the assessment of certain debts to be determined as an unfair preference and undervalued transactions. Unfair preference itself is the condition where the debtor transfers a certain amount of assets or money towards a creditor when a company is insolvent. Meanwhile, undervalued transactions are transactions by the company to trade its asset with a lackluster amount of money when being compared to the actual value of the object itself. This leaves the rights of other concurrent creditors in jeopardy as this will reduce the amount of money divided with the doctrine of pro rata pari passu towards concurrent creditors.

Once the liquidator has filed a lawsuit declaring unfair preference, the court may reverse the transaction or the act of unfair preference to restore the state of the company before the act has occurred in order to protect the rights for other creditors pursuant to Article 224 paragraph 2 and 225 paragraph 2 of the Insolvency, Restructuring and Dissolution Act. Pursuant to Article 225 paragraph 3 of the Insolvency, Restructuring, and Dissolution Act, unfair preference will be given only if the creditor is one of the company's creditors, surety, or a guarantor for the company's debts that affects the creditor beneficially if the company ends up bankrupt.

Not only that a creditor may be forced by court be held liable to restore the payments after an unfair preference, but a director may also be held equally as liable to compensate if he committed a breach of fiduciary duties.[60] If the practice of transferring money over a period of time has been well established between the debtor and a creditor, this will release a portion of the amount of money that needs to be returned for the liquidators to distribute back to other creditors only if those payments have been made before foreseeing whether a company is going to be wound up.[61] However, it is not enough to fully negate the status of unfair preference as the court found that payments must have been made in order to find new values to continue a business' operations.[62]

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59 Angelia Thng, Esther Lim and Crystal Tan, Braddell Brothers LLP, *Loc. Cit*.
60 Living the Link Pte Ltd. v. Tan Lay Tin Tina [2016] SGHC 67.
61 *Ibid.*
62 *Ibid.*

Moreover, if the creditor is an "associate" of the company, this will put incur a status of unfair preference.[63] This is shown in *Show Theatres Pte Ltd v. Shaw Theatres Pte Ltd* where Shaw Theatres holds a ¼ share of Show Theatre's company's share and has a connection through the same director which associates them in the decision to provide an unfair transaction towards Shaw Theatres Pte Ltd.[64]

Since the commencement for a declaration for an undervalued transaction is 5 years prior to the date of winding up application[65] and unfair preference is for about 1 year prior to the date of winding up application[66] or 2 years prior to the date of the winding up application if the unfair preference is given to an associate of the company,[67] this will guarantee the rights for concurrent creditors as the company will be restricted in committing actions that are against the spirit of law. Companies must plan ahead far beyond an expected bankruptcy which halts the chances of an unfair preference to be given to other parties. Unlike Indonesia where a one-year time frame is eligible for clawing back assets obtained through unfair preference, the liquidators in Singapore will be eligible to claw back on assets being put forth through unfair preference after a long and determined period of time specially if an unfair preference or undervalued transaction is given to a company's associates. The lackluster amount of 1 year is incomparable to the period of 5 years for an undervalued transaction which can allow a company in Indonesia to disperse its assets to protect them from utterly failing during bankruptcy.

## CONCLUSION

Singapore and Indonesia are very similar in terms of payment and status for concurrent creditors. Both have very similar positions for concurrent creditors where they will not be able to march a steal over other preferred creditors and separated creditors which puts them at a very low position in terms of capabilities to earn their credits on the company. Both countries do give a preference towards separated creditors in earning their payment through the secured asset with the rest of unpaid debts going towards the tier for concurrent creditors which increases the number of concurrent creditors available for the distribution of assets. This hence reduces the amount of money earned from the distribution of wealth going into concurrent creditors. Even though Singapore has a relatively similar stance to Indonesia regarding concurrent creditors, there is a well-established principle that gives it an advantage over one another. Singapore does not hold the principle of debt recharged unless there is an order of discharge from the court unlike Indonesia which puts an advantage for concurrent creditors in Indonesia to earn unpaid debts after the bankruptcy procedure has been finished. However, they have a shorter list of preferred creditors available for payment during the distribution of wealth process. Moreover, another advantage

63 Show Theatres Pte Ltd. (in liquidation) v. Shaw Theatres Pte Ltd. and Another [2002] SGCA 42, CA 37/2002.
64 *Ibid.*
65 Singapore Insolvency, Restructuring and Dissolution Act, §226 (1)(a).
66 Singapore Insolvency, Restructuring and Dissolution Act, §226 (1)(c)
67 Singapore Insolvency, Restructuring and Dissolution Act §226 (1)(b)

specially upon securing the assets from unfair preference and undervalued transactions is astonishingly well established and gives concurrent creditors an advantage in earning their credits since companies will be reluctant to participate in those types of actions due to a large time frame.

If Indonesia wants to protect and give more rights towards concurrent creditors, there needs to be amendments on the bankruptcy law provided in Law No. 37/2004. Particularly there needs to be an update on the list of preferred creditors that are given the status of preference by Indonesian law to guarantee for more money that will reach concurrent creditors after the distribution of wealth post general auction and a requirement to update and release an omnibus law regarding bankruptcy as there are preferred creditors scattered across several laws which creates multi-interpretation and contradictions. Moreover, the pressing matter of this issue is about unfair preference and undervalued transactions that only have a 1-year time frame prior to the declaration of bankruptcy. By following Singapore, Indonesia can restrict these types of actions by putting a larger time frame like the 5-year term of Singapore's and a regulation on a company's associates that may earn benefits throughout the years prior to the company's bankruptcy.

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