

SECTION J – CASE MANAGEMENT OF INSOLVENT ENTERPRISES

J1. Administration of insolvent procedures generally

- (a) The administrative organ(s) involved in the administration, implementation and management of particular insolvency procedures in Malaysia are:

Liquidation

- A liquidator, who can appoint a “special manager” to assist him. It is common for the Official Receiver of Malaya to be appointed liquidator rather than a private insolvency practitioner.

Scheme of Arrangement

- A scheme administrator.

Special Administration

- A special administrator who is overseen by an “Oversight Committee”.

Receivership

- A receiver or receiver and manager.

- (b) In Malaysia, the qualifications of each respective administrator of insolvency procedures are as follows:

Liquidation

- A liquidator or provisional liquidator must be an approved company liquidator within the meaning of section 8(3) of the Companies Act. In order to be an “Approved company liquidator”, the person has to be an approved company auditor, and has to have been approved of by the Minister of Finance.

Scheme of Arrangement

- There are no special qualifications save that it is common for an approved company auditor or liquidator to be appointed.

Receivership

- Only an approved company liquidator can be appointed as a receiver.

Special Administration

- Under the provisions of section 51(2) of the Pengurusan Danaharta Nasional Berhad Act 1998, only an approved company auditor who has, in the opinion of Danaharta Nasional Berhad, the requisite experience and is who is, in the opinion of Danaharta Nasionalw (experienh 0

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High Court OR the committee of inspection. Creditors may also summon meetings of creditors to make their views known to the liquidator, and the liquidator is bound to have regard to their views under section 237.

Special Administration

- Only “secured creditors” as defined in the Pengurusan Danaharta Nasional Berhad Act 1998 have the right under section 46 to be consulted on a “proposal” that is under consideration.

Schemes of Arrangement

- Creditors of all classes are entitled to vote at class meetings and to propose modifications to the proposed scheme under section 176 of the Companies Act. A scheme can only be submitted for approval and sanction of the High Court after the requisite statutory majorities have been attained. A majority of 75% in value and simple majority in number of those creditor in each class present and voting have to approve the scheme. Under a very recent amendment that took effect on 1.1.98, creditors now have the right to have a director appointed onto the board of the corporate debtor [as to which see Section Q of this Paper].

J2. Powers of the Administrator

- (a) The powers of “administrators” of insolvency procedures in Malaysia for each type of procedure can be described in brief as follows:

Liquidation

- The liquidator’s powers are set out in section 236(1) and (2) of the Companies Act 1965. The liquidator can, with the consent of the court or the committee of inspection:

for that purpose, to take such proceedings as may seem to him expedient.

5. Power to sell or otherwise dispose of the assets of the affected person by public auction or private contract.
6. Power to raise or borrow money and grant security therefore over the assets of the affected person.
7. Power to appoint a solicitor or accountant or other professionally qualified person to assist him in the performance of his functions.
8. Power to bring or defend any action or other legal proceedings in the name and on behalf of the affected person.
9. Power to refer to arbitration any question affecting the affected person.
10. Power to effect and maintain insurances in respect of the assets of the affected person.
11. Power to use the common seal of the affected person.
12. Power to do all that is necessary to execute in the name and on behalf of the affected person any deed, receipt or other document.
13. Power to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the affected person.
14. Power to appoint any agent to do any business which he is unable to do himself or which can more conveniently be done by an agent and power to employ and dismiss employees.
15. Power to carry on the business of the affected person.
16. Power to establish subsidiaries of the affected person.
17. Power to transfer to subsidiaries of the affected person the whole or any part of the assets of the affected person.

18. Power to grant or accept a surrender of a lease or tenancy of the assets of the affected person, and to take a lease or tenancy of any asset required or convenient for the assets of the affected person.

19. Power to make any arrangement or compromise on behalf of the affected person.

20. Power to call up any uncalled capital of the affected person.

21. Power to rank and claim in the bankruptcy, insolvency or liquidation of any person indebted to the affected person and to receive dividends, and to accede to trust deeds for the creditors of any such person.

22. Power to present or defend a petition for the winding up of the affected person.

23. Power to change the location to the affected person's registered office.

24. Power to perform any function and exercise any power, that the affected person or any of its directors or officers could perform or exercise if a Special Administrator had not been appointed.

25. Power to make any payment which is necessary or incidental to the performance of his functions.

Receivership

□ A privately appointed receiver and manager has the following powers generally through the security instrument and under general law:

1. Power to collect the property charged
2. Power to investigate and conduct a public examination
3. Power to make calls
4. Power to protect the property charged

5. Power to pay unsecured creditors
6. Power to make compromises and arrangements
7. Power to repair and insure
8. Power to retain the books, papers and documents of title
9. Power to carry on the business
10. Power to borrow
11. Power to lease and hire
12. Power to contract
13. Power to employ, dismiss and delegate
14. Power of sale.

- (b) “Administrators” of insolvency procedures who are appointed by the Court, such as liquidators and court appointed receivers can generally seek the assistance of the court, in particular through an application for directions, as in section 237 of the Companies Act 1965, where a liquidator can seek directions. Privately appointed receivers and managers can seek directions under section 183 of the Companies Act. All of them can appoint advocates and solicitors and other professionals to advise them on matters arising, as can a special administrator under the Pengurusan Danaharta Nasional Berhad Act 1998.

J3. Duties of the Administrator

- (a) Generally, the duties of insolvency “administrators” in each type of insolvency “procedure” in Malaysia are:

Liquidator

- A liquidator has inter alia the following duties:
 - (a) take control and custody of the property and things in action to which the corporate debtor is entitled to under section 233 of the Companies Act;
 - (b) submit a preliminary report to court regarding the matters set out in section 235;
 - (c) submit a preliminary report to Bank Negara Malaysia where the corporate debtor is an insurance company that is licensed under the Insurance Act 1996;
 - (d) retain the book and papers of the company under section 277;
 - (e) prepare a set of accounts every six months verified by statutory declaration and lodged with the Registrar of Companies under section 281;
 - (f) apply the property of the corporate debtor pari passu towards satisfaction of liabilities and distribute assets to the members generally under the Companies Act 1965 provisions read with the Companies (Winding up) Rules 1972.

Scheme Administrator

- The scheme administrator's duties in relation to a scheme of arrangement that has been approved by the court are dependent on the terms of the scheme. Generally he has a duty to ensure payments are made to creditors as per the terms, and new monies are applied towards the purposes for which they were made available and to terminate the scheme when it has been implemented or when it is clear that it cannot be implemented.

Receiver and Manager

- A privately appointed receiver and manager would inter alia have the following duties imposed on him by general law:

- A duty to gather in, manage and realise the assets charged with a view to liquidating the secured creditor's debt.
- A paramount duty to the debenture holder who appointed them.
- A general duty to subsequent encumbrancers, including other debenture holders and to the mortgagor company.
- A duty to act in good faith and to use their powers for the sole purpose of securing repayments of the moneys owing to the debenture holder.
- A duty to the guarantors of the mortgage debt in exercising a power of sale.
- A duty to act in good faith.

Special Administrator

- The special administrator under the Pengurusan Danaharta Nasional Berhad Act 1998 has to, inter alia, prepare a "proposal" within the meaning of section 44 and submit it to the Corporation. Under section 31(1) he also has to take into custody or control all assets to which the "affected person" (or corporate debtor) is entitled and under section 31(2) he has to manage the affairs of the corporate debtor. He is also required under sections 46 and 48 to send to secured creditors of the corporate debtor the proposal or any modifications thereto for their consideration and approval. Once a proposal is approved, he is under a duty to implement the proposal: section 47. Section 54 also requires him to report any fraud, misfeasance or misconduct to any regulatory body concerned.

J4. Breach of duty and liability of administrators

- (a) Briefly, the remedies and/or sanctions that are available or applicable in the case of breaches of duty or transgressions by each type of insolvency administrator are:

Liquidators

- Liquidators appointed by court can be removed by court under sections 232 and 266 of the Companies Act 1965 on various grounds. Under section 277(2) the court is empowered to look into complaints into conduct of liquidators. The Registrar of Companies or the Official Receiver may report to the court any matter of misfeasance, neglect or omission by the liquidator, and the liquidator may be ordered to make good any loss which the estate of the corporate debtor has sustained. Under section 305 of the Companies Act, any liquidator, past or present who is guilty of

therefore capable of being visited with all liabilities attendant upon an “officer”.

Scheme Administrators

- There is no specific provision for scheme administrators and therefore they can be civilly and criminally liable under the general law for breaches of duty, breach of trust and other misconduct. As the scheme would have been approved by court, there is the prospect of the scheme administrator being called to answer to and be punished by court for any dereliction of duty.
- (b) There are no reported instances of any breaches of duty or actual