

SECTION K - ASSETS AVAILABLE TO CREDITORS

K1. Assets available to creditors generally

- (a) In Malaysia, the following would be a brief description of the types of assets that are available to satisfy claims of creditors under each of the insolvency procedures outlined herein:

Liquidation

- All assets, whether moveable or immovable, and things in action that are beneficially owned by the corporate debtor in liquidation and not the subject of a charge are available to the liquidator as “administrator” for satisfaction of liabilities of the debtor to its creditors.

Private Receiverships

- Any assets that are subject to any fixed charge under the debenture and the crystallised floating charge, whether movable or immovable, tangible or intangible, can be applied by the receiver towards satisfaction of the debenture holder’s claims. Proceeds from the sale of assets subject to a floating charge have to be applied in the first instance towards certain preferential debts under section 191 of the Companies Act 1965.

Special Administration

- Under section 47(4) of the Pengurusan Danaharta Nasional Berhad Act 1998, any asset of the corporate debtor qua “affected person” that is the subject of a secured creditor’s security can be dealt with by the special administrator once a proposal under section 46 has been approved and the manner of dealing is set out in the proposal.

K2. Avoidance of past transactions affecting the assets of a corporate debtor

Liquidator

- Section 293 of the Companies Act 1965 provides that a liquidator may set aside any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by the corporate debtor in liquidation which if it had been made by an individual, would have been set aside under the provisions of the Bankruptcy Act 1967, would have been void or voidable. The liquidator can also set aside any transfer or assignment of the property of the corporate debtor to trustees for the benefit of its creditors. Furthermore, the liquidator can also set aside a floating charge created within 6 months of commencement of winding up under section 294. Under section 295, in the case of sale and purchase transactions up to a period of 2 years from the commencement of winding up between the corporate debtor and a director or person connected to a director, the liquidator can recover from any person an amount that corresponds to the difference in value between the value of the asset sold or purchased and the actual consideration paid or received.

Special Administrators

- Similarly under section 42(1) of the Pengurusan Danaharta Nasional Berhad Act 1998, a special administrator may set aside any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by the corporate debtor in liquidation which if it had been made by an individual, would have been set aside under the provisions of the Bankruptcy Act 1967, would have been void or voidable.
- (b) In so far as powers or mechanisms that are available to administrators of insolvency procedures to investigate the affairs of the business organization, the position in Malaysia is as follows:

Liquidation

- The court can summon and examine on oath officers of the company or persons known or suspected to have in their possession assets of the company, or persons who can give information as regards the promotion, formation, trade dealings, affairs or dealings of the company: section 249 of the Companies Act 1965. The court can, where a liquidator has filed a report stating that fraud has been committed or any officer has not acted honestly or diligently or been guilty of impropriety or recklessness in relation to the affairs of the company, compel any such person or banker, advocate or auditor to attend a public examination in which process the liquidator is entitled to participate: section 250.

Special Administration

- The special administrator is conferred with powers of investigation under section 37 of the Pengurusan Danaharta Nasional Berhad Act 1998. If he finds fraud, misfeasance or other misconduct in the course of his investigation, he is obliged to report the same to the regulatory body concerned under section 54.
- (c) Under Malaysian law, liquidators, receivers and special administrators are all empowered to initiate legal proceedings to compel restoration or restitution of property or money, or book and papers of a corporate debtor from any person, including directors. Liquidators and special administrators would be empowered under their respective statutes and receivers would derive their powers from the debenture.