RECENT DEVELOPMENT ON INSOLVENCY LAWS AND
BUSINESS REHABILITATION –
NATIONAL AND CROSS BORDER ISSUES

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First and foremost, I would like to take this opportunity to express my appreciation and thanks to the organizer for inviting me to present this paper. I hope this paper will be of use to all the members present here, sharing ideas and experiences towards enhancing the cooperation among the ASEAN country members and also improvement in the insolvency laws. This paper is divided into two parts. The first part will touch the recent development in Malaysian insolvency laws and the other part deals with the business rehabilitation, both on national and cross-border issues.

Introduction

Allow me to give a brief introduction on the Department of Official Assignee Malaysia. The Department of Official Assignee is one of the departments under the control and management of the Prime Minister’s Department. The Headquarters is located in Federal Government Administration Centre, Wilayah Persekutuan Putrajaya, with twenty-one (21) branches situated in towns where there is a High Court. The Official Assignee who also acts as Official Receiver administers the individual bankruptcy and the winding up of companies, trade unions and societies.

In Malaysia, the Bankruptcy Act 1967 is used to administer the individual insolvency matters and the provisions in Part 10 of the Companies Act 1965 govern the insolvency matters of corporations, trade union and societies.

Development In Bankruptcy Law

The bankruptcy law of Malaysia is governed by the Bankruptcy Act 1967 which is derived from the English Bankruptcy Act 1883 that governed the trade and commerce in England. The English Bankruptcy 1883 was adopted and modified in accordance with the local needs. The Malaysian Bankruptcy Act 1967 has been amended a few times and the most recent amendment was on March 2000 and came into force on 1.10.2003. I will now touch on the provision in the recent amendment to the Bankruptcy Act 1967.

Bankruptcy (Amendment) Act 2003 (Act A1197)

With the coming into force of the Bankruptcy (Amendment) Act 2003 (hereinafter referred to as “the Act A1197”) on 1.10.2003, the head of the Department of Official Assignee Malaysia who was formerly known as Official Assignee is now
known as the Director General of Insolvency (hereinafter referred to as “the DGI”). The change of the title has no effect to his dual functions and responsibilities in the administration of the estates of the bankrupts and companies in liquidation.

Social Guarantors

Individuals who voluntarily stood as guarantors for business or social purposes such as guarantors for education loans or hire purchase transactions are now protected with the recent amendment. They became bankrupt due to the default of the principle borrowers who refused and or neglected to perform the payment obligations under the loan agreements. Bankruptcy proceedings had always been the most favourable and the alternative proceedings taken by the creditors in order to recover their loan from either the principle borrowers or the guarantors. From the administration of the bankrupts’ estates we realized that the creditors would normally hunt for the guarantors first before proceeding with the principle borrowers in bankruptcy proceedings. Therefore, there is a need to protect these social guarantors and one of the main amendments under the Act A1197 is the definition of social guarantor which was added in Section 2. That defines as,

“a person who provides, not for the purpose of making profit, the following guarantees:

(a) a guarantee for a loan, scholarship or grant for educational or research purpose;
(b) a guarantee for a hire-purchase transaction of a vehicle for personal or non business use; and
(c) a guarantee for a housing loan transaction solely for personal dwelling.”

It is pertinent to note that a new provision was also inserted in the Act A1197 that is Section 5(3) that requires “a petitioning creditor to prove to the court that he has exhausted all avenues to recover debts owed to him by the debtor before he can commence any bankruptcy action against a social guarantor”. This is because the creditors namely the financial institutions, moneylenders and banks have been taking the easiest and shortest way out by claiming the defaulted loans from the guarantors directly after they failed to trace the principle borrowers and no proof adduced in court to show that they have taken any step to locate the principle borrowers. The attitude of the principal borrowers who refuse to service their loans could sour the good relationship established between the borrowers and guarantors because most of the guarantors are normally the relatives or friends of the principal borrowers.

By protecting this group of the guarantors, it will indirectly stop the petitioning creditors from unscrupulously petitioning in court against the guarantors who become victim of the principal borrowers who do not service their loans. Most of these guarantors who stood as guarantors especially for educational purposes are
normally not highly educated people living in remote areas and some are middle class wage earners who sincerely become guarantors for the sake of the borrowers whereby they gain no benefit from such loans. They should not be adjudged bankrupt even though they are jointly and severally liable under the guarantee with the principle borrowers.

Apart from the political and economic stability factors, we believe that education plays a major role in producing competitive and technological minded society. If these social guarantors are not protected and treated as the main borrowers in bankruptcy, it is feared that no one will want to stand as a guarantor and this situation will then affect the education system and the economic growth of the nation as a whole.

Therefore the petitioning creditors are required to take and make use of all the other avenues permitted under the law to recover their debt from the principal borrowers such as writ of seizure and sale or judgment debtor’s summons. These proceedings are much faster and more effective compared to the bankruptcy proceedings and they could recover their debts in full without having to share in “pari passu” with other creditors claiming the debtors. It is through this amendment and the insertion of the above provision, that the Malaysian government’s policy to create a loving and caring society, and ensuring social justice will be achieved for its people.

Minimum Claimable Debt

Unlike the conservative way of trading, most businesses now deal in cash or credit. The financial institutions and the banks are always willing to grant credit in big amounts compared to the risk involved should the borrowers default in servicing their loans. The economic downturn affecting the world in the year of 1997-1998 had also contributed to the failure of businesses in companies. As a result of this, most companies started retrenching their employees and once unemployed, these employees failed to service their loans. There are cases where the companies had to be wound up and at the same time, the guarantors of the companies were adjudicated bankrupt and this too, raised the statistics of the number of people being a bankrupt.

However for an individual, the financial planning of his own budget plays a vital role though there are other factors such as high cost of living, political stability and better and higher education received by the people that has led to the changing of the lifestyle to a better standard of living than before. The vast usage of the credit cards by the society has also contributed to the spending of money unwisely and living beyond their means.

Section 5 (1)(a) of the Bankruptcy Act 1967 stated that the minimum amount of debt to support a creditor’s petition is RM10,000. The amendment in the Act A1197 has increased the amount to RM30,000. We believe that an amount of RM10,000 is too small compared to the current Malaysian economic standard and the Malaysian people standard of living. This is also due to the facts that the demand in
loan applications has increased whereby people are taking credit of more than RM10,000 and the financial institutions too are ever willing to provide the credit beyond the amount of RM10,000. It is hoped that by increasing the amount from RM10,000 to RM30,000 the number of bankruptcy cases will reduce and that the DGI can concentrate more on the administration of complicated and complex bankruptcy matters.

Discharge of Bankrupt by Certificate of the DGI

The above provision which is envisaged in Section 33A of Bankruptcy (Amendment) Act, 1998 has been implemented since 1.1.1999 and states “The DGI shall not issue a certificate discharging the bankrupt from his bankruptcy unless a period of five years lapse since the date of the receiving order” regardless of the amount of debt owed to the creditors.

In the previous Section 33B(1) of the Act, it is stated that the DGI is required to give his reasons for discharging the bankrupt using his discretion. Among the reasons to discharge the bankrupt are that the bankrupt cannot be located, old age, serious illnesses and the most important are cases where the bankrupt has made contributions though small to his estate to reduce the debts. The creditors are not satisfied with the reasons given discharging by the DGI even though nothing much can be done especially in cases that has been administered since the 80s and no asset can be realized for the benefit of the estate.

Therefore, the amendment to Section 33B (1) now, by deleting the words ‘together with a statement of his reasons for wanting to do so’ gives the DGI the discretion to discharge without giving any reason and in the event the creditors object, the burden of proof that the discharge order should not be granted is placed on the creditors who objected. It is hoped that with this new provision, many bankrupts will be discharged through the certificate issued by the DGI.

Interest

Previously, should there be any surplus in the estates of the bankrupt after all the foregoing debts was paid to all the creditors an unsecured creditor will be entitled to claim his debt together with interest until the date of realization. This is for the benefit of the general body of creditors. However a bankrupt needs to be given a chance to have a normal life and start afresh. Therefore the Act A1197 has amended the provision in subsection 43 (5) of the Bankruptcy Act 1967 and states “If there is any surplus after payment of the foregoing debts, the surplus shall not be applied in any payment of interest after the date of receiving order to any creditor on any debt proved in the bankruptcy, except for the payment of interest to a secured creditor under subsection 8 (2A)”. Even for the secured creditor, he is not entitled to claim the interest if he does not realise his security within six (6) months after the date of the receiving order.
For the purposes of dividend, subsection 43(6) of the Bankruptcy Act 1967 provides that a creditor is entitled to claim the interest at a rate not exceeding six percent per annum even after all the debts proved in the estate have been paid in full. With the new amendment, a creditor is only entitled to the interest at the above rate but only up to the date the receiving order is granted by the court.

It may not be seen fair to the creditors but with the new provision, the burden on the bankrupt to settle all the debts including the accruing interest is reduced. The surplus, if any, will be paid to the bankrupt to help him to start a new life. This provision is also applicable to the company in winding up proceedings by virtue of Section 4(1) of the Civil Law Act 1956, Sections 291 and 292 of the Companies Act 1965 and as the principles enunciated in Malaysian Supreme Court case, Lian Keow Sdn. Bhd. (in liquidation) & Anor v Overseas Credit Finance (M) Sdn. Bhd. & Ors [1998] 2 MLJ 449, “the provision of the Bankruptcy 1967 Act and Bankruptcy Rules as to the respective rights of secured and unsecured creditors under the law of bankruptcy, applies mutatis mutandis to a winding up of a company”.

Additional Powers of Director General Of Insolvency

Despite their financial predicament, we realized that some bankrupts are still living beyond their means and concealing their assets from being detected and taken possession by the DGI, more so when the DGI has limited powers to enforce the law on these bankrupts. Therefore the duty to investigate and prosecute could not be carried out effectively.

A new Section 84A was inserted in the Act A1197 and stated as “In addition to, and without prejudice to the powers duties and functions conferred under his Act, the Director General of Insolvency shall, for the purposes of this Act and Section 421, 422, 423 and 424 of the Penal Code have all the powers of a Commissioner of Police as in Police Act 1967 and Criminal Procedure Code” (Penal Code is the Act governing criminal law in Malaysia), that is to investigate and to prosecute the bankrupt for contravening the said laws and this power is to be exercised by the DGI personally. He is also empowered to appoint fit and proper persons to be investigation officers who shall have all the powers of a police officer to investigate offences committed under the Bankruptcy Act 1967 or the Penal Code such as cheating the creditors, which carries imprisonment sentence. This also allows any statement taken from the bankrupt by the said officer while investigating the bankrupt’s affairs (property and misconduct) to be used as evidence in court.

Section 84A of the Act A1197 also empowers the DGI to “direct any creditors to render such assistance in the administration of the debtor’s estate as he deems necessary”. This is necessary in cases where the bankrupt could not be located and we could not proceed with the administration of the property of the bankrupt. There are creditors who refused to cooperate with the DGI yet they blame the DGI for being inefficient. As a result, the bankrupt will still have to remain in
bankruptcy. With this new provision, the creditors can be committed for contempt of court if they refuse to give their cooperation to the DGI.

Fraudulent Debtors

There are cases where the bankrupt has taken credit without informing the person giving the credit or loans that he is an undischarged bankrupt. Previously, the amount of credit that can be taken by a bankrupt as stated in Section 109 (1)(m)(i) of the Bankruptcy Act 1967 was only limited to RM100.00 but the Act has been amended and the amount has been increased to RM1000. The amount is appropriate considering the current economic situation where RM100 is too small and unreasonable to convict an undischarged bankrupt for an offence when the amount is not enough to support one’s life based on the current standard of living and economic value.

Amendment of Bankruptcy Rules 1969

Search Fee

The search fee for individual status was fixed at RM5.00 per search and this amount had never been reviewed since 1969. Taking into consideration that in this new millennium era, the amount was far too low especially with the introduction of the new technology involved in the process of printing and the usage of machineries that enable speedy and quality search. The amount of RM5.00 was very small compared to the current economic situation and this could not cover the cost and expenditures of the machineries and stationeries used in search processing. This will also increase the revenue of the country. Therefore, with effect from 14.8.2003 the search fee has been increased from RM5.00 to RM10.00 per search.

Development In Companies Winding Up

The administration of the winding up of companies, societies and trade unions in Malaysia are governed by the provisions in Part 10 of the Companies Act 1965 and the Bankruptcy Act 1967. However, other provisions in the Companies Act 1965 are within the jurisdiction of the Ministry of Domestic Trade and Consumer Affairs. The Department of Official Assignee Malaysia is now in the process of setting up a committee to work together with the Ministry of Domestic Trade and Consumer Affairs towards reviewing the said Part 10 of the Companies Act 1965.

Companies (Winding Up) Rules 1972

Before the amendment to Rule 32(1)(a) of the Companies (Winding-Up) Rules 1972, the deposit that had to be deposited with the DGI was at RM300. As a deposit, this sum is too small to cover the fees and expenses of the liquidator not only in carrying out his duties such as recovering the assets of the companies, but also the cost of gazetting, advertising, issuing notices to the creditors and not forgetting the
increase of court filing fees. The said Rule was amended and with effect from 14.8.2003, the amount for the deposit is now increased from RM300 to RM3,000.

Business Rehabilitation

Despite being discharged from bankruptcy either by the bankrupt’s own application or issued by the Certificate of the DGI, no specific courses or business training is offered to the discharged bankrupt. It is at the liberty of the discharged bankrupt to decide whether to involve in business or carry on with his current job. This is because many of discharged bankrupts have a steady job to support their family.

For the winding up of a company, once the administration of the estate has been completed and no asset or cash left in the estate to operate the business, the liquidator may under Section 239 of the Companies Act 1965 apply to court to dissolve the company. The Trade Unions Act 1959 and the Societies Act 1966 apply to the winding up of the trade unions and societies respectively.

In the Societies Act 1966, it is stated in Section 17 that “The DGI shall pay the surplus assets to the consolidated fund if the registration was refused or cancelled by the Registrar and pay to the members of the societies according to the rules of the societies and if there is no such rules, the DGI shall apply to the court for a scheme of application of the surplus, for the approval of the High Court. The surplus assets can also be paid to the new societies (if any) provided the constitution and the rules of the new societies are substantially similar to the deregistered society”.

In Regulation 39 the Trade Unions Regulations 1959, it is just stated that the surplus assets of the trade unions be divided amongst the members of the trade union according to its rules or if there is no rule, the DGI shall apply to the court for a scheme of division of assets for the benefit of its members or the public in general.

Yet a company can still continue operating its business after stay of proceeding is granted by the court under Section 243 (2) of the Companies Act 1965 provided it complies with the summarised principles enunciated in the case of Vijayalakshmi v Jegadevan s/o Nadchatiram [1995] 2 MLJ 709, a Federal Court case :-

1) The granting of a stay under Section 243 of the Act is discretionary and the onus is on the party seeking a stay to make out a positive or sufficient case.
2) The attitude of creditors, contributories and the liquidator is a relevant consideration.
3) That in exercising its discretion, the court will consider not only the interest of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large.
4) Last, and which by no means least, is that a stay will be refused if there is evidence of misfeasance or of irregularities demanding investigation.

The above principles are not exhaustive and the whole circumstances of a case must be taken into consideration. This has been laid down in the case of *Ting Yuk Kiong v Mawar Bira Sdn. Bhd* [1993] 2 MLJ 7000. They are:-

a) The granting of a stay is a discretionary matter and there is a clear onus on the applicant to make out positive for a stay;
b) There must be service of notice of the application for a stay on all creditors and contributories and proof all this;
c) The nature and extent of creditors must be shown and whether or not all debts have been discharged;
d) The attitude of creditors, contributories and the liquidator is a relevant consideration;
e) The current trading position and general solvency of the company should be demonstrated. Solvency is of significance when a stay proceedings in the winding up is sought;
f) If there has been non compliance by the directors with their statutory duties as to the giving of information or furnishing a statement of affairs, a full explanation of the reasons and circumstances should be given;
g) The general background and circumstances which led to the winding up order should be given;
h) The nature of the business carried on by the company should be demonstrated and whether or not the conduct of the company was in any way contrary to “commercial morality” or “public interest”.

The above principles are the guidelines to the winding up companies to prove that their business can operate as though they had never been wound up. It has to be noted that some companies have cash and assets but been wound up because of the attitude of the petitioning creditors who would not tolerate or negotiate with the companies especially when the companies are not able to pay their debt in time for various reasons. As we know, companies which are well funded and managed always contribute to the growth of the economy, locally and internationally.

**Insolvency Law On Cross Border Issues.**

Under **Section 104 of the Bankruptcy Act 1967**, Malaysia has reciprocal provision relating to Republic of Singapore and designated countries. For the purpose of this section, the United Kingdom and Australia are the designated countries that had been gazetted in Malaysia. The DGI of the Department of the Official Assignee Malaysia and the Official Assignees of the above countries can seek assistance among themselves in relation to bankruptcy matters provided the court order or judgement of the above countries be registered locally as if it is the judgement made by the Malaysian High Court as stipulated in the **Reciprocal Enforcement of Judgment Act 1958**. This includes a judgement debt of a creditor
from the above countries who wish to file his claim against the estate of a bankrupt and also to determine the rate of exchange prevailing at the date of the judgement of the original court. This also applies to a foreign creditor in a winding up company and he will be treated equally like the local creditors.

Section 104 of the same Act also provides a reciprocal agreement between the Republic of Singapore and Malaysia to recognize the Official Assignee of the Republic of Singapore. Under the said provision, the courts in Malaysia shall recognize the adjudication order granted by the courts in Singapore and every property of the bankrupt in Malaysia shall vest in the DGI as if he had been adjudged a bankrupt in Malaysia provided that the petition of bankruptcy has never been presented against the said bankrupt in Malaysia or the receiving order has been rescinded and adjudication order has been annulled.

It is worth noting that the current situation has seen many bankrupts leaving Malaysia for various countries and for various reasons. There are a few of them who have never returned and this has affected the administration of their estates. It is our hope that this assembly would extend our above provision to all the members of the ASEAN countries in seeking aids to assist us in the administration of the bankrupts’ estates.

It is to be noted that the above provision confines to the individual insolvency only and it does not apply to the corporate insolvency matters. It is hoped that the same provision can be extended to corporate insolvency matters in Malaysian Companies Act 1965 especially in cases where the directors are believed to have left the country to avoid his responsibilities under the Companies Act 1965. However, a person can only commence a proceeding against a company in liquidation in Malaysia provided he obtains a leave from the court in Malaysia as stipulated in Section 226 (3) of the Companies Act 1965.

Conclusion

As the administrator of the estates of the bankrupts and companies in liquidation, the DGI is duty bound to realize all the assets and pay off the dividend to the creditors who have filed their proof. Nevertheless, the DGI still has a social responsibility in giving the bankrupts, especially those who have unwillingly been adjudged bankrupt merely because of the attitude of some borrowers who become the default debtors, a chance to start life anew and for the companies to revive back their business. This solemn intention of the DGI will provide justice to all the parties concerned in insolvency matters.

Lastly, I would also like to make a suggestion that all the ASEAN members present here to stand united and have one regulatory body to meet and discuss the laws and practice of insolvency matters in each country such as the International Association of Insolvency Regulators (IAIR) which members consist of the western
countries such as United Kingdom, Canada and United States of America as well as Malaysia, Singapore and Thailand from the South East Asia region.