

## Global Restructuring & Insolvency Guide

### Malaysia

#### Overview and Introduction

Malaysia has a federal system of laws governing insolvency, with a separate legislative scheme for companies (winding-up) and individuals (bankruptcy). The Malaysian insolvency system is similar to and based on the English model.

#### Applicable Legislation

At the time of this writing, the legislation governing bankruptcy consists of the Bankruptcy Act 1967 (the “**Bankruptcy Act**”) and the Bankruptcy Rules 1969, while the legislation governing winding-up consists of the Companies Act 1965 (the “**Companies Act**”), the Companies Regulations 1966 and the Companies (Winding-Up) Rules 1972. However, the new Companies Bill 2015 would substantially reform the current insolvency and corporate restructuring laws found in this guide. The bill was passed by Parliament in April 2016 and is expected to come into force in due course. The Companies Act and its subsidiary legislation are still in force at the time of writing.

#### Personal Bankruptcy

One manner in which a creditor can recover his debts against an individual is to obtain a judgment and execute it against the debtor by commencing bankruptcy proceedings. The primary effect of bankruptcy in Malaysia is to vest all the debtor’s property and assets in the Director-General of Insolvency for liquidation and distribution amongst the debtor’s creditors. Bankruptcy proceedings remain a popular mode of recovery of a debt from an individual. In addition, bankruptcy proceedings can also be invoked by the debtor himself to declare his inability to meet his creditors’ claims.

#### Conditions of Bankruptcy Proceedings

The jurisdiction to adjudicate on bankruptcy matters is vested in the High Court. Before a creditor may commence bankruptcy proceedings against a debtor, it is a precondition that the amount owing by the debtor is MYR 30,000 or more.

Apart from the statutory requirement of a debt of at least MYR 30,000, a debtor must also have committed an act of bankruptcy as prescribed under the Bankruptcy Act. Among the common acts of bankruptcy are the debtor’s failure to comply with a bankruptcy notice, making a fraudulent conveyance to transfer his property, absconding with the intention to defeat or delay his creditors and giving notice of suspension of payment to his creditors.

The act of bankruptcy must have been committed by a debtor. Under the Bankruptcy Act, the debtor is deemed to include any person who at the time when the act of bankruptcy was carried out:

- (a) Was personally present in Malaysia;
- (b) Ordinarily resided or had a place of residence in Malaysia;
- (c) Was carrying on business in Malaysia either personally or by means of an agent; or
- (d) Was a member of a firm or partnership which carried on business in Malaysia.

#### Commencement of Bankruptcy Proceedings

Upon fulfilment of the preconditions and once a monetary judgment has been obtained, the creditor may commence bankruptcy proceedings by issuing a bankruptcy notice founded on such judgment and serve the same on the debtor. Bankruptcy proceedings are said to have commenced on the

issuance of a bankruptcy notice. The bankruptcy notice acts as a demand for the debtor to pay his debts.

## **Bankruptcy Petition**

If the debtor fails to comply with the bankruptcy notice within seven days of its service on the debtor, a petition may be presented, either by a creditor or several creditors, in the High Court in the state where the debtor resides. The petition will then be heard. The creditor is required to attend the hearing.

A debtor may show cause against a creditor's petition by filing a notice with the Registrar of the High Court, specifying the statements in the petition which he intends to deny or dispute and subsequently serving the notice on the petitioning creditor and his solicitor, if known.

## **Receiving Order and Adjudication Order**

Once the debt of the petitioning creditor, act of bankruptcy and service of petition are proved to the satisfaction of the court, it will proceed to make a receiving order.

The court may simultaneously adjudge the debtor a bankrupt through an adjudication order, unless the debtor can show to the satisfaction of the court that he is in a position to offer a composition or make a scheme of arrangement satisfactory to his creditors.

The receiving order will enable the Director-General of Insolvency to take possession, custody or control of the debtor's property, as the receiver of such property. The receiving order in itself does not make the debtor a bankrupt, nor does it deprive the debtor of ownership or proprietary rights over his property. He is deprived of control and possession only.

Once the adjudication order has been made, the property will be vested in the Director-General of Insolvency and becomes divisible among his creditors.

## **Effects of Bankruptcy**

Where an adjudication order is made, the Director-General of Insolvency takes control of the bankrupt's personal affairs, property, and the administration of his estate, subject to equities and encumbrances thereon. The bankrupt's personal liberty is then controlled by the Director-General of Insolvency and he is subject to the latter's directions.

## **Corporate Restructuring and Insolvency**

### **Reorganisations, Restructurings and Work-Outs**

Before the process of insolvency, there are several methods of company reorganisations, restructurings and work-outs. Generally, company restructuring and reorganisations are governed by the Companies Act 1965. An application to the court may be made under sections 176 and 178 of the Companies Act for the approval of a scheme of arrangement for companies undergoing reorganisation and restructuring.

### **Insolvency (Winding-Up)**

In the winding-up process of a company, the company's business is closed, its assets sold off, the creditors paid, the balance distributed to its members and eventually the company ceases to exist. In Malaysia, a company may be wound up voluntarily or compulsorily by an order of court.

### **Court-Based Insolvency**

The most common ground in support of a winding-up by the court is the inability of a company to pay its debts.

A company shall be deemed to be unable to pay its debts if:

- (a) A creditor of the company has served a statutory notice on the company for a debt exceeding MYR 500 at its registered office, requiring the company to pay the sum so due, and the company thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor within three weeks;
- (b) Execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- (c) It is proved to the satisfaction of the court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the court shall take into account the contingent and prospective liabilities of the company.

### **Pre-Court Procedures**

The simplest method of establishing a company's inability to pay its debt is through the issuance of a statutory notice to the company, demanding that the debt be paid within three weeks. The demand must relate to a specified liquidated sum that cannot be seriously disputed by the debtor. Failure by the debtor company to pay the sum demanded within three weeks raises a rebuttable presumption that the company cannot pay its debt, entitling the creditor to proceed with a petition to wind up the debtor company.

### **Court Procedures**

A compulsory winding-up is initiated by presenting a petition to be heard by the judge in open court. The petitioner must be a person to whom the debtor owes money and/or is listed under the Companies Act.

After presenting the petition to the court, the petition will be advertised. The petition must be advertised once in the *Gazette* and at least twice in any two local newspapers in Malaysia. The petition must be served on the debtor company as well as on the Registrar of Companies.

### **Hearing**

At the hearing, the petitioner and the company are required to attend the proceedings. Every other person who intends to appear on the hearing of a petition shall serve on the petitioner or his solicitor a notice of his intention to appear. This includes persons who may oppose or support the winding-up petition. The judge will proceed to decide whether to allow or dismiss the petition after hearing submissions in support or opposition, if any.

Once the court makes a winding-up order, the company is deemed to have been wound up at the time the petition is presented. Once the winding-up order is made, the only way to stop the winding-up process is by obtaining a stay of the winding-up or by appealing against the decision to grant the order.

The sealed winding-up order must be served on the wound-up company's secretary, and lodged with the Registrar of Companies. The sealed winding-up order is also advertised in two local newspapers and is published in the *Federal Government Gazette*.

### **Recovering Debts after a Winding-up Order**

When filing the petition the petitioner shall nominate in writing an approved liquidator, who is entitled to be appointed as liquidator if an order for the winding-up of the company is made by the court. If no approved liquidator is nominated by the petitioner, the court shall, on making the winding-up order, appoint an approved liquidator or the Official Receiver as the liquidator as it deems fit.

The liquidator then takes into his custody and control all properties and choses in action to which the company is entitled. After the entry of a winding-up order, only the liquidator has the power to dispose of, or authorise the alienation of, the company's property.

When a winding-up order is made, the directors of the company remain in office but their powers are removed. While the company is in the process of being wound up a person cannot perform or

exercise, and must not purport to perform or exercise, a function or power as an officer (other than a liquidator) of the company, except with the approval of the liquidator or the court.

## **Distribution of Payments**

The priority of payment in an insolvency proceeding (winding-up) is as follows:

- Secured creditors, to the extent of the value of their collateral;
- Claims by certain third parties in respect of which the company is insured and in respect of which an amount is or has been received by the company;
- Preferential creditors, including certain claims in respect of employment by the company, the costs incurred by the petitioner and the liquidator's costs and expenses;
- Unsecured creditors; and
- Deferred creditors.

## **Out-of-Court Mechanisms**

### **Voluntary Winding-Up**

A voluntary, non-judicial winding-up may be done in two ways, i.e. members' voluntary winding-up or creditors' voluntary winding-up. In a member's voluntary winding-up, a declaration of solvency must be made by the directors of the company. The declaration is made to the effect that the directors of the company have formed the opinion that the company will be able to pay its debts in full within 12 months after commencement of winding-up. A special resolution for winding-up is required and winding-up is taken to have commenced upon the passing of this resolution. If a declaration of solvency is not made, the winding-up proceeds as a creditors' voluntary winding-up.

In a creditors' voluntary winding-up, the directors of the company will make a statutory declaration that the company cannot, by reason of its liabilities, continue its business. The directors will therefore appoint a provisional liquidator. The creditors are then summoned to a meeting with the members within one month of making the declaration. At the meeting of the creditors, a special resolution for voluntary winding-up is passed and a qualified person is nominated to be the liquidator.

### **Effects of Winding-Up**

The main implication of winding-up is that the company would cease to carry out its business, except so far as, in the opinion of the liquidator, is required to ensure a beneficial winding-up. However, the corporate personality of the company remains and ownership of the company is not transferred to the liquidator. The liquidator merely functions to carry on the company's business for the purposes of winding-up.

In a compulsory winding-up, the liquidator assumes the duties/powers of its board. However, in a voluntary winding-up, the directors may retain their powers, subject to the liquidator's consent.

## **Dissolution of a Company**

In a compulsory winding-up, after completing his duties, the liquidator may apply with the court for an order that he be released and the company dissolved. The company is dissolved from the date of the order of dissolution.

In a voluntary winding-up, the liquidator must generate an account showing how the winding-up was conducted. A final meeting of the members and creditors is called for the purpose of presenting this account. Within seven days of holding the final meeting, the liquidator must lodge a return to the Registrar of Companies and the Official Receiver. Three months after the lodging of the return, the company will be dissolved.

## **Additional Observations**

### **Antecedent Transactions**

Any transfer, mortgage, delivery, payment, execution or other act that, had it been done by an individual and would in his bankruptcy under the law of bankruptcy be void or voidable, shall be void or voidable in the same manner in the course of the winding-up of a company. Similarly, any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

In the case of sale and purchase transactions between the corporate debtor and a director or company connected to a director, within a period of two years before the commencement of winding-up, the liquidator can recover from that person or company 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. The liquidator of a company may also claim the amount overpaid by the company in such circumstances. In essence, related third parties who have short-changed the company may be made accountable.

Where a creditor has issued execution proceedings against the goods or land of a company or has attached any debt due to the company and the company is subsequently wound up, the creditor will not be entitled to retain the benefit of the execution or attachment as against the liquidator of the company, unless the creditor has completed the execution or attachment before the onset of insolvency.

The Companies Act also provides that any floating charge over a company's undertaking or property created within six months of the onset of insolvency is invalid, unless it can be shown that the company was solvent immediately after granting the charge.

### **Transactions during Insolvency**

Any disposition of the company's property after the commencement of winding-up is void unless the court orders otherwise, in which case the creditor would have to return the property and prove its claim in the liquidation as an ordinary unsecured creditor. The court may, however, validate the transaction subject to the principle of *pari passu* distribution. In other words, a court will not validate transfers of assets if the effect is to give an undue preference to some creditors or to allow some creditors to be paid in full at the expense of the rest.

Any attachment, sequestration, distress or execution put in force against the estate or effects of a company being wound up by court, after the onset of insolvency, is void.

## **Conclusion**

Winding-up proceedings are a useful, tactical way for the recovery of monies owed in circumstances where there is a clearly documented (ideally with admission) and undisputed debt, or where the debtor is a going concern with continuing trading interests, as a petition to wind up a company entails notification to financial institutions and customers by way of advertisement that the company is in an insolvent state.

Like winding-up proceedings for companies, bankruptcy proceedings remain a popular mode to seek enforcement of a judgment debt against individuals. In practical terms, however, bankruptcy proceedings in the case of individual debtors are not recommended as an effective means for debt collection unless the individual has substantial personal means. This is because the liquidation process in the hands of the Director-General of Insolvency takes many years, and it is uncommon for any actual distribution of dividends to occur. The bankrupt is usually able to secure a discharge of the bankruptcy order after five years.

## **Malaysia**

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