



# INSOLVENCY

Personal Bankruptcy

Corporate Insolvency

# BANKRUPTCY

- Bankruptcy proceedings against individual is governed by the Insolvency Act 1967 (“IA 1967”).
- IA 1967 came into force on 6.10.2017.
- It was previously governed by the Bankruptcy Act 1967.
- Section 5(1)(a) of IA 1967 - Minimum threshold to make an individual bankrupt :RM50,000.00



# WHAT IS PRE-REQUISITE BEFORE FILING BANKRUPTCY PROCEEDINGS?

- A **court judgment** of any court of a minimum amount of RM50,000.00 (Section 3(1)(i) IA 1967) (including interest and costs).
- Can creditor file bankruptcy proceedings without having a judgment? No.



- After getting judgment, where do creditors file bankruptcy proceedings? Bankruptcy is filed at the High Court according to the **debtor's address** in his/her identification card ("IC"). If debtor's IC shown that his /her address is in Alor Setar, bankruptcy proceedings shall be filed at the Alor Setar High Court.
- Who cannot be made a bankrupt?
  - 1) **Social guarantor** (guarantor for purposes of education and other non-business related)
  - 2) **For other than social guarantor**, creditor has to first **obtain leave** of the bankruptcy court before proceeding with petitioning the said guarantor.
- How long does it take to make an individual bankrupt? 6 months to 1 year, depending on whether the debtor wishes to contest the bankruptcy or otherwise.



# HOW TO CONTEST BANKRUPTCY PROCEEDINGS?

- Debtor has to file **affidavit to oppose** the bankruptcy petition and/or various other applications to derail time.
- Kindly seek proper legal advice on the applications suitable to be filed according to circumstances.
- In the meantime, debtor is encouraged to propose settlement with the creditor to avoid bankruptcy.



# VOLUNTARY ARRANGEMENT

- It is a scheme of arrangement of a debtor's affairs regulated under Section 2A to 2Q IA 1967.
- It allows a debtor to enter into an arrangement with his creditors at any time before he is adjudged a bankrupt.
- Application is made by the debtor to obtain an **interim order for 90 days** to, through a nominee, call for a creditors' meeting to table his/her proposed voluntary arrangement.



# VOLUNTARY ARRANGEMENT

- **Effect of the interim order:**
  - a) **no bankruptcy petition** may be made or proceeded with against the debtor; and
  - b) **no other proceedings**, execution or other legal process may be commenced or continued against the debtor without leave of the court.
- What happens if the debtor failed to comply with the approved voluntary arrangement?  
Bankruptcy order will be granted.



# EFFECT OF BANKRUPTCY ORDER (SECTION 8 IA 1967)

- No creditor shall proceed with or commence any action or **other legal proceeding** in respect of such debt unless with the leave of the court.
- All property of the bankrupt shall become divisible among his creditors.
- The Director General of Insolvency (**DGI**) shall be the receiver, **manager**, administrator and trustee of all properties of the bankrupt.





# DUTIES AND DISABILITIES OF A BANKRUPT (SECTION 38 IA 1967)

- Incompetent to maintain any action without previous sanction of the Director General of Insolvency;
- To render to the DGI once in every six months an account of all moneys and property which have come to his hands for his own use during the preceding six months, and shall pay and make over to the DGI much of the same moneys and property as have not been expended in the necessary expenses of maintenance of himself and his family;
- To inform the DGI if there is any change of his home address;
- Not to travel/leave Malaysia without previous permission of the DGI or of the court.
- Except with the previous permission of the DGI or of the court, not to enter into any business either alone or in partnership, or become a director of any company or take part in the management of any company;
- Except with the previous permission of the DGI or of the court, not to engage in the management or control of any business carried on by or on behalf of family members.



# HOW DO DEBTORS GET AWAY FROM BANKRUPTCY?

- Annulment
- Discharge



# ANNULMENT OF BANKRUPTCY ORDER

- Debtor to file an application to the Court to annul the bankruptcy order under Section 105 IA 1967.
- The Court may annul the bankruptcy order if in the opinion of the court a debtor **ought not to have been adjudged bankrupt**, or where it is proved to the satisfaction of the court that **the debts of the bankrupt are paid in full**.



# ANNULMENT OF BANKRUPTCY ORDER

- **AFFIN BANK BHD v. ABU BAKAR ISMAIL [2020] 3 CLJ 739, Federal Court**
- (1) The relevant date to consider whether the debtor was able to pay his debts was the date of the making of the AORO.
- (2) The solvency does not relate to the debtor's ability to pay his debts subsequent to the making of the AORO. Further, it related to 'commercial solvency' and not 'balance sheet solvency'.



# DISCHARGE OF BANKRUPT BY ORDER OF COURT

- It is governed under Section 33 of IA 1967.
- A bankrupt may at any time after being adjudged bankrupt apply to the court for an order of discharge.
- On the hearing of the application the court shall take into consideration a report of the DGI as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy, and may either grant or refuse an absolute order of discharge, or suspend the operation order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property.



# DISCHARGE OF BANKRUPT BY CERTIFICATE OF DIRECTOR GENERAL OF INSOLVENCY

- It is governed under Section 33A of IA 1967
- The DGI shall not issue a certificate discharging a bankrupt from bankruptcy unless a period of 5 years has lapsed since date of bankruptcy order.
- It is however still subject to challenge by creditors.



# AUTOMATIC DISCHARGE

- It is governed under Section 33C of IA 1967.
- A bankrupt shall be discharged from bankruptcy on the expiration of **3years from the date of the submission of the statement of affairs:-**
  - (a) if the bankrupt has achieved amount of target contribution of his provable debt that is determined by the Director General of Insolvency; and
  - (b) if the bankrupt has complied with the requirement to render an account of moneys and property to the DGI.
- It is however still subject to challenge by creditors.



# WHAT IS THE DIFFERENCE BETWEEN ANNULMENT AND DISCHARGE?





# WINDING UP

- The most common grounds to wind up a debtor's company is inability to pay debts.
- Section 465(1)(e) Companies Act 2016 (“CA 2016”) provides:  
*“(1) The Court may order the winding up if-  
(e) the company is unable to pay its debts;”*
- Section 466(1)(a) CA 2016 provides:  
*“(1) A company shall be deemed to be unable to pay its debts if-  
(a) the company is indebted in a sum exceeding the amount as may be prescribed by the Minister and a creditor by assignment or otherwise has served a notice of demand, by himself or his agent, requiring the company to pay the sum due by leaving the notice at the registered office of the company, and the company has for 21 days after the service of the demand neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor;”*



# WHAT IS THE MINIMUM THRESHOLD TO ISSUE A STATUTORY DEMAND UNDER SECTION 465(1)(E) & 466 CA 2016 ?

**RM10,000.00**

Source: SSM Media Statement dated 10.4.2020

In view of the Movement Control Order (“**MCO**”), the Companies Commission of Malaysia (“**SSM**”) has increased the definition of a company’s “inability to pay” from RM10,000 to **RM50,000** until December 31. The period to answer the statutory notice by a company has also been lengthened to six months, compared to the previous 21 days.



# WHAT ARE DOCUMENTS REQUIRED BEFORE CREDITOR ISSUES STATUTORY DEMAND UNDER SECTION 465(1)(E) & 466 CA 2016?

- A clear record of documentation showing proof of debtor's indebtedness to the creditor.
- Creditor does not need to have a Court judgment prior to issuance of the of the statutory demand.



# WHAT SHOULD A COMPANY DO WHEN RECEIVING A STATUTORY DEMAND UNDER SECTION 465(1)(E) & 466 CA 2016 ?

- Respond to the demand.
- Put up a dispute.
- Get legal advice.
- Consider option to propose settlement if the company does not have bona fide dispute to the demand.



# WHAT SHOULD A COMPANY DO IF IT IS STILL SERVED WITH WINDING UP PETITION?

- The company **MUST** get legal advice as there is stringent time restriction to contest the winding up petition.
- At this stage, it is fatal if the petition is not responded.
- Rule 30 of the Companies (Winding Up) Rules 1972
  - (1) Affidavits in opposition to a petition **SHALL** be filed and served on the petitioner at least 7 days before the winding up hearing
  - (2) Any affidavit in reply by the petitioner **SHALL** be filed within 3 days from the date having served with the affidavit to oppose.



# FORTUNA INJUNCTION

- Application to restrain presentation of winding-up petition on statutory demand issued under ss. 465 and 466 of Companies Act 2016.
- What elements do applicants need to satisfy the Court for Fortuna injunction?
  - a) the intended petition has no chance of success, as a matter of law as well as a matter of fact
  - b) the petition might produce irreparable damage to the company (this only applies if there is a disputed debt on substantial grounds)
- When does a company file application for fortuna injunction? Within 21 days from receiving the statutory demand.



# FORTUNA INJUNCTION

- \*\* When there is a judgment debt, the claim for the debt could not be said to be disputed, let alone *bona fide* disputed.
- \*\* What if there is an appeal against the judgment debt? Get a stay order of the said judgment. Why a stay is of relevance is the effect it has on the question of whether the judgment debt is *bona fide* disputed. The stay operates to suspend a judgment of the court and deprives it from being one that is not *bona fide* disputed. With a stay in place, argument that there is no *bona fide* dispute over a debt demanded in a winding-up notice given the judgment debt would potentially be unsustainable.



# CORPORATE RESCUE MECHANISM





# CORPORATE VOLUNTARY ARRANGEMENT (CVA)

- It is regulated under Sections 395 – 402, 7<sup>th</sup> Schedule & 8<sup>th</sup> Schedule of CA 2016.
- Only for private company and company that has not created charge over its property or any of its undertaking.
- Directors shall submit terms of the proposed CVA to a nominee.
- Nominee shall give his opinion whether or not the proposed CVA has reasonable prospect of being approved or implemented.
- Moratorium for **28 days** (with an option to extend it to another period not more than 60 days subject to consent by nominee, shareholders of the company and 75% of value of creditors ) commences automatically from the time relevant documents including terms of the proposed CVA is filed by the company to the Court.
- During the moratorium, the nominee shall call creditors' meetings during the moratorium to approve the proposed CVA. The required majority is **75% of the total value of creditors who are present and had voted at the meeting**.
- Once approved, the CVA shall take effect and be binding on all creditors.



# CORPORATE VOLUNTARY ARRANGEMENT (CVA)

- Effects of moratorium :-
  - a) no petition to wind up the company
  - b) no meeting of the company may be called except with consent of nominee and leave of the Court
  - c) no resolution may be passed or winding up order be made
  - d) no application for judicial management order be made
  - e) no judicial manager of the company may be appointed
  - f) no execution proceedings or other legal process may be commenced or continued against the company
  - g) no steps may be taken to transfer shares of the company or alter status members of the company



# JUDICIAL MANAGEMENT (JM)

- It is regulated under Sections 403 – 430 & 9<sup>th</sup> Schedule CA 2016.
- Applies to unlisted companies.
- Application to the Court by the company or its directors or its creditors for a JM order if it is considered that:-
  - a) the company is or will be unable to pay its debts; and
  - b) there is a reasonable probability of rehabilitating the company or that the creditors' interests would be better served than by resorting to a winding up.
- Judicial Manager will be appointed to manage affairs and business of the company. All powers and duties of a director shall be exercised and performed by the Judicial Manager. Who is the Judicial Manager? An insolvency practitioner, not auditor of the company.
- Duration of the JM order – **6 months** (extendable to another 6 months subject to terms of the Court)
- Pending the application for JM and during period JM order is in force–
  - a) no resolution can be passed or an order made to wind up the company.
  - b) no charge/security can be enforced over a property.
  - c) no legal action can be commenced or continued with against the company.
  - d) no steps shall be taken to transfer share of the company or alter status of member of the company
- Restructuring Proposal by JM is put to creditors and shall be approved upon getting **75% of the total value of creditors whose claims have been accepted by the Judicial Manager, present and voted at the meeting.**



# SCHEME OF ARRANGEMENTS

- It is regulated under Sections 366 – 371CA 2016.
- Available to both private and public listed companies.
- Company applies to Court for leave to hold meetings of creditors (“Court-Convened Meeting (“**CCM**”)”).
- Proposal for a settlement arrangement with all creditors shall be tabled during the CCM.
- The proposal must obtain **75%** approval in value of the company’s creditors.
- The company can apply for restraining order (“**RO**”) to restrain further proceedings against the Company. The RO, if granted, is for a period of not more than **3 months** and may be extended not more than 9 months if the Court is satisfied that there is a proposal for a scheme of arrangement between the company and its creditors and so the RO is necessary to enable the company and its creditors to formalise the scheme of arrangement



# EFFECT OF WINDING UP ORDER

- No action shall be commenced against the company except by leave of the Court (Section 471(1) CA 2016)
- Liquidator shall forthwith take into his custody all properties belonged to the company (Section 483(1) CA 2016)



# TERMINATION OF WINDING UP ORDER

- Application to terminate the winding up order can be made pursuant to Sections 493 and 494 CA 2016.
- Who can apply? Liquidator, or any creditor, or any contributory.
- When can application be made? Anytime after the winding up order was made.
- What are considerations taken into account by the Court:-
  - a) satisfaction of debts
  - b) any agreement by the liquidators, creditors, contributories and other interested parties; or
  - c) other facts the Court considers appropriate.

