

Companies Bill – Insolvency Provisions
Malaysian Institute of Accountants

4 March 2014 - LEE SHIH

Summary

1. Background
2. Changes to Receivership provisions.
3. Changes to the Winding Up provisions.
4. Striking Off.
5. Schemes of Arrangement.
6. Judicial Management.
7. Corporate Voluntary Arrangement.

Background

- **The CLRC Consultative Document (CD) – CD4 (covering winding up) and CD10 (receivership and the new rescue mechanisms).**
- **CLRC Final Report**
- **Companies Bill 2013**

Receivership

Summary

- Introduction: cl. 373-390.
- Appointment under instrument and by the Court.
- Powers of the receiver and R&M.
- Receivership and appointment of liquidator.
- Priority in payments.

Receivership: Introduction



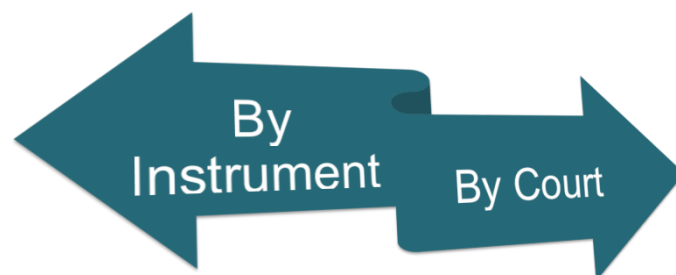
Receivership: Introduction

- For private appointment of receivers, if a mortgagor (borrower) is left in possession of the mortgaged property, borrower could receive income and apply it to his own use – without accounting to the mortgagee (secured lender).
- Initially, an option would have been for the lender to enter into possession personally to collect the rents and profits of the property. But law placed “exceptional severity” against the lender: lender made to account for what it received and what it might have received without its own wilful default.
- Lenders structured mechanism to appoint receivers as agents of the borrowers to collect rents and profits. More sophisticated drafting followed: broad powers to manage and realise secured property and judicial recognition of floating charges.

Receiver and R&M

- **The distinction.**
- **The significance and strategic considerations.**

Receivership - Appointment



Receivership - Appointment

Route 1: Appointment under instrument *[cl. 372]*

- Receiver appointed is the agent of the company (unless expressly provided otherwise)
- Power to appoint includes power to appoint two or more receivers, an additional receiver and a receiver to succeed a receiver whose office has become vacant.
- NB: Will require inclusion of “R&M” references.

Receivership - Appointment

Route 2: Appointment by the Court *[cl. 373]*

Where Court is satisfied that

- Company has failed to pay a debt to debenture holder.
- Company proposes to sell or dispose of the secured property in breach of the terms of the security.
- Necessary to preserve secured property for benefit of holder.

Receivership - Appointment

But this may prevent other types of Court appointments of a R&M allowed under case law

Examples:

- Serious disputes among the shareholder (*Federal Transport Service Co Ltd & Ors v Abdul Malik & Ors* [1973] 1 MLJ 216)
- Serious mismanagement (*Re Bondwood Development Ltd* [1989] HKCFI 320)

Powers of the R&M



Powers of the R&M

- Express statement on powers: receiver or R&M shall have powers expressly or impliedly conferred by the instrument or by Order of Court [cl.380(1)].
- Codification of a list of minimum powers that the receiver or R&M may exercise [cl. 380(2)]
- List of powers set out in the Seventh Schedule.

Powers of the R&M

- Seventh Schedule: Receiver has power to do all things necessary to the attainment of the objectives for which the receiver was appointed.
- Subject to any provision of the Court Order or instrument limiting the receiver's powers in any way, receiver has the **additional** powers listed.

Powers of the R&M

- Examples of some of the Seventh Schedule Powers:
 1. Enter into possession and take control of property
 2. Borrow money on the security of property
 3. To carry on the business of the company.
 4. To inspect at any reasonable time books and documents.
 5. Right to inspect, on behalf of company, books and documents that are in the possession of another.
 6. To execute any document to bring or defend proceedings.

Personal Liability of the R&M



The image shows a magnifying glass held over a document. The word "liability" is prominently displayed in red, underlined text within the lens of the magnifying glass. The background text is blurred but appears to be legal language, including phrases like "taking into account", "such Person", "Date the", "of credit and", "extension of credit", "of the proceeds of such", "definition, (i) 'debt'", "ans liability on a 'cl".

Personal Liability of the R&M

- CLRC Recommendation - R&M personally liable for debts incurred by him unless there is a specific agreement to the contrary between the contracting parties.
- But in the Bill: personal liability for such debts incurred by him in the course of receivership “*notwithstanding any agreement to the contrary*”, thereby not allowing the parties to contract out of this provision. [cl. 378]
- Conflicts with clause 379(2): “*terms of a contract ... may exclude or limit the personal liability of the receiver ...*”

Receivership and Winding up: *Kimlin*



Receivership and Winding up: *Kimlin*

- *Kimlin* position: Once company is in liquidation, R&M cannot sell charged land without taking proceedings under the NLC for judicial sale. Prevents sale of land by private treaty.
- *Lim Eng Chuan*: If there is an irrevocable Power of Attorney, then the sale of land can be carried out by the borrower's attorney (i.e. Bank or R&M). PA survives winding up.

Receivership and Winding up: *Kimlin*



Receivership and Winding up: *Kimlin*

- At time of the CLRC report in 2008, the recommendations were to get round *Kimlin*:
 1. The R&M could continue to act as an agent of borrower for the purpose of carrying on the business of the company despite liquidation;
 2. The R&M who has obtained consent from the court or the liquidator is deemed as an agent of the company; and
 3. The R&M continued to be the agent over the charged assets continue after the appointment of the liquidator.

Receivership and Winding up: *Kimlin*

Effect of CLRC recommendations:

- R&M could continue as agent to carry on the business of the company and to sell off the charged assets. This agency status would be subject to obtaining consent of the liquidator or, if the liquidator withheld his consent, then consent from the Court.
- By allowing for the continuation in office of the receiver under the supervision of the liquidator or the Court, there would be a more orderly and unified administration of the company's affairs.

Receivership and Winding up: *Kimlin*

- **But there is a problem with the Bill:**

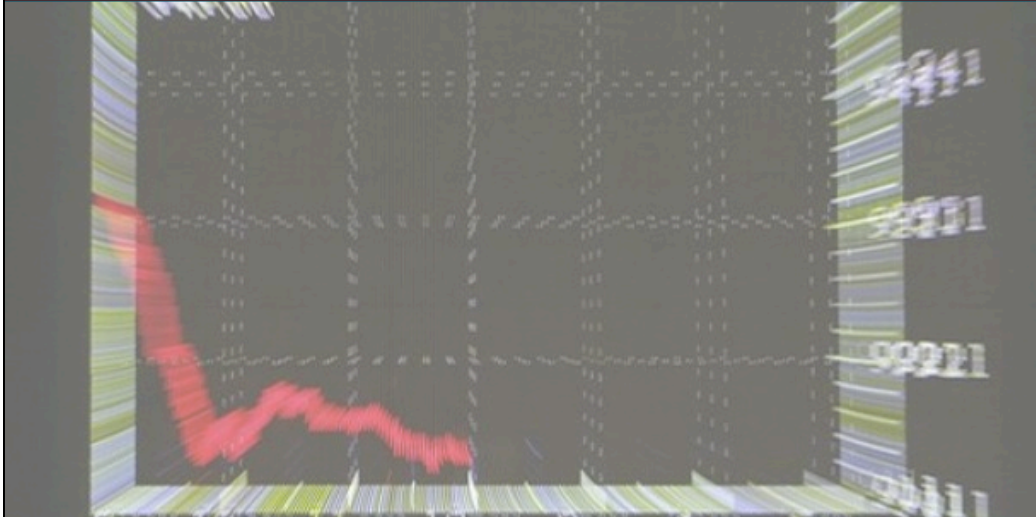
Cl. 383(1) sets out that the “*receiver may continue to act as a receiver and exercise all the powers of a receiver in respect of property of a company that has been put into liquidation, provided that he obtains consent from the liquidator or if the liquidator withholds his consent, the consent of the Court.*”

Cl. 383(2): receiver holding office in respect of such property shall continue to act as an agent of the company.

Questions?



Winding Up



Malaysian Law Firm of the Year 2008, 2009, 2010, 2011 & 2013, Who's Who Legal Awards

| 25

Winding Up

Summary

1. Compulsory Winding Up
2. Twilight Period?
3. Termination of Winding Up
4. Extension of Power to Trade
5. Priorities

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| 26

Compulsory Winding Up

1. “447 Notice” – statutory demand increased to RM5,000 (from present RM500) [cl. 447]
2. Petition shall be filed in Court within 6 months from expiry of the “447 Notice”.

Twilight Period



Twilight Period

1. Stand-alone provisions without need to refer to bankruptcy laws.
2. Undue preference [cl. 535]: 6 months before the presentation of the Petition if results in winding up (or date of commencement of voluntary winding up).
3. Void disposition [cl. 453]: After presentation of Petition, all dispositions are void except for 'exempt dispositions'.

Twilight Period

- "Exempt disposition" for purposes of otherwise void dispositions:
- However, only covers disposition by a liquidator or interim liquidator.
- CLRC recommendation was to allow for equivalent Australian provisions. Would cover payments out of a bank account made in good faith.

Termination of Winding Up



Termination of Winding Up

- Termination of winding up **[cl. 477]**: Court may order termination of compulsory winding up.
- Factors like the satisfaction of the debts, the agreement by both parties, or other facts as it deems appropriate.
- Easier route to bring to an end the winding up where the debtor company has satisfied the debts owing to the petitioning creditor.
- This is in addition to stay of winding up **[cl. 476]**.

Only Way Now: Stay of Winding Up

- Present mechanism: section 243 [cl.476] is the only way to unwind a winding up (for both compulsory and voluntary winding up).
- See *Megah Teknik* [2010] 4 MLJ 651 (CA) and FC decision.

Extension of Power to Carry on Business

- Presently: Liquidator can carry on business of company for 4 weeks after winding up Order, after which, require Court or COI approval. [s.236(1)(a)]
- Bill: List of Liquidator's powers in Eleventh Schedule.
- Liquidator can now carry on business for 180 days (6 months) after winding up Order, after which, obtain Court or COI approval.

Priorities

- List of priorities now at **cl. 534**.
- **Cl. 534(1)(b)** for wages or salary [equivalent to s. 292(1)(b)]: Amount increased to RM15,000 instead of present RM1,500.
- CLRC had recommended abolition of priority of federal taxes but this has still been maintained.

Striking Off the Register



Striking Off the Register

- Striking off: *[cl. 556-562]*
- CLRC referred extensively to the CCM 2007 guidelines.
- Interested party may apply to Registrar for striking off *[cl. 557]*: director, shareholder/member or liquidator.

Striking Off the Register

- **Stage 1:** Registrar serves 30-day notice asking to show cause to the contrary *[cl. 558(1)]*.
 [Objection]
- **Stage 2:** Publication of 30-day notification to public on intended striking off *[cl. 558(2)]*.
 [Objection]
- **Stage 3:** Publication in Gazette (effective date of dissolution) *[cl. 558(3)]*.

Striking Off the Register

- **Objections** to striking off [cl. 559]:
 1. *Company still carrying on business.*
 2. *Company party to legal proceedings.*
 3. *In receivership or liquidation.*
 4. *The person is a creditor, shareholder or with undischarged claim.*
 5. *There exists a right to pursue a shareholder remedy (e.g. oppression or statutory derivative action) under Division 6*

Questions?



Schemes of Arrangement



Schemes of Arrangement

1. Introduction of the Rationale of SoA & Current Problems.
2. Additional Safeguard.
3. Extension of the Restraining Order.
4. Will Not Extend to Regulators.

Rationale & Current Problems

1. Rationale: Overcome impossibility of obtaining 100% creditors approval to compromise or re-arrange debts.
2. Instead: different classes of creditors. Each class votes in favour with at least 50% in number and at least 75% in value.
3. Restraining order: moratorium against legal proceedings. No maximum time limit.

Rationale & Current Problems

OS for Leave: Call meetings and apply for RO

CCM: Each class. 50% number, 75% in value.

OS Sanction: Court sanctions the Scheme

(1) Additional Safeguard

- **Clause 432** provides that the Court may appoint an approved liquidator to assess the viability of the proposed scheme.
- Provides a safeguard to the creditors to have an independent assessment.
- Presumably fees to be borne by applicant?
How to resolve agreement on fees?

(2) Extension of the Restraining Order

- **Clause 434**: Initial RO for not more than 90 days.
- Court may extend this period for another 270 days.
- This is not exactly in line with the CLRC recommendation. Maximum lifespan of the RO is 1 year but with each extension of 90 days.

(3) RO: Regulators and Other Persons

Clause 434(7): RO will not restrain Registrar or securities market regulator.

Chg Industries Bhd & Ors v Bursa Malaysia Securities Bhd [2007] 6 CLJ (HC): RO against Bursa.

But, unreported decision of *Avangarde Resources Berhad* (see Listing Circular No. L/Q: 4285 of 2007) did not allow the RO.

Clause 434(8): RO will not restrain any proceeding against any other person other than the company-applicant.

Questions?

Judicial Management

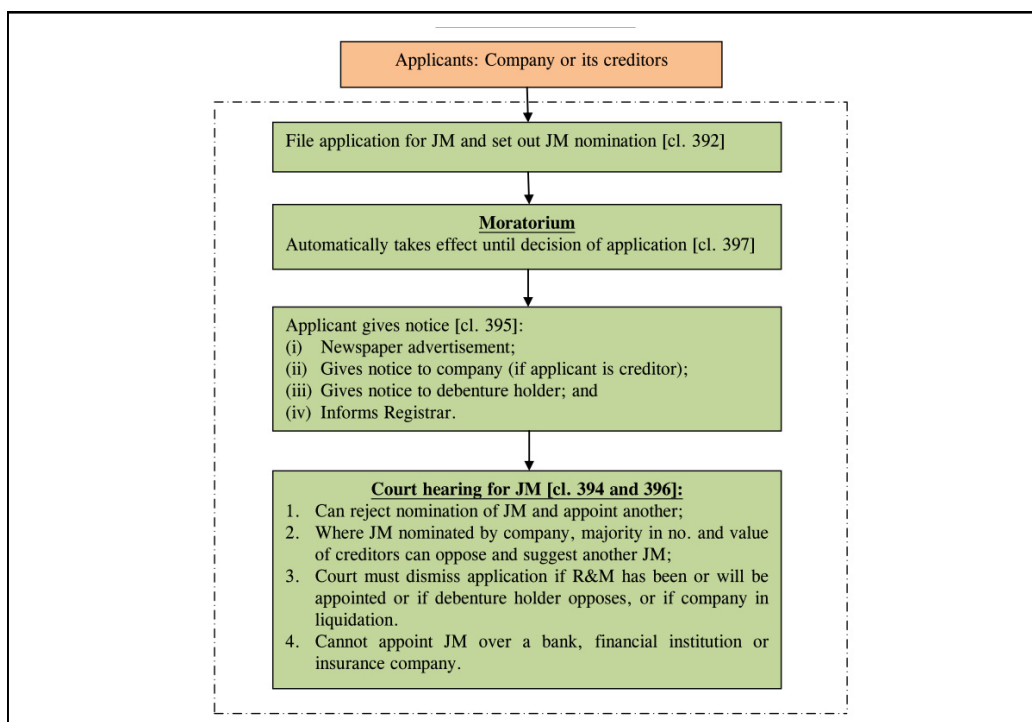


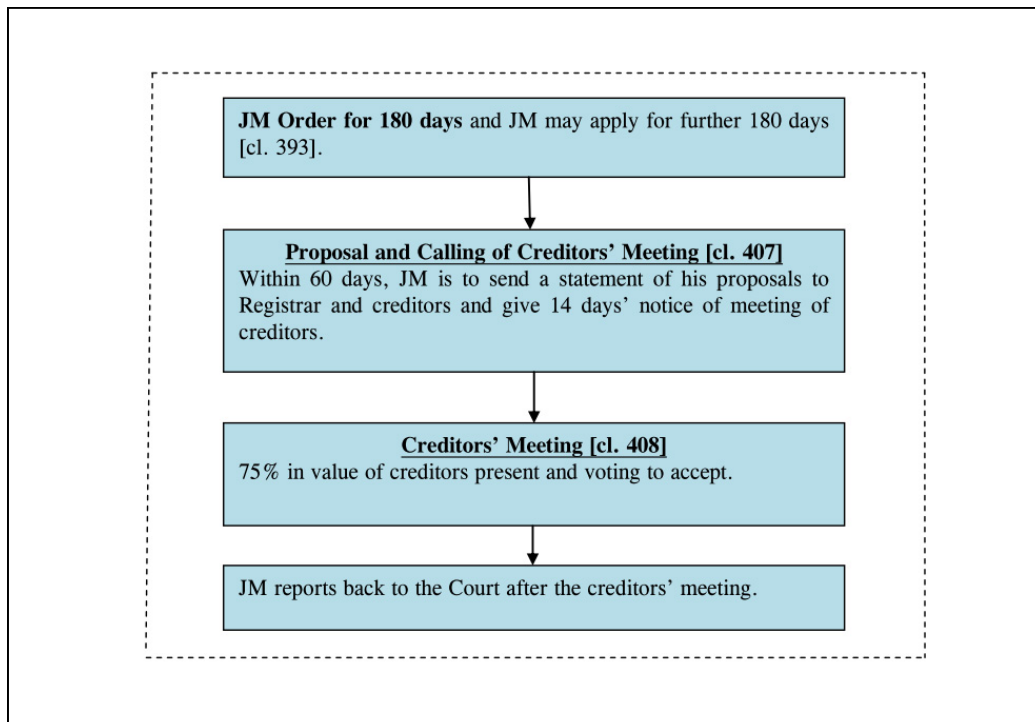
Judicial Management

- Key features of this new mechanism [cl. 391-417 and Eighth Schedule]
 1. Company or creditors to obtain Court Order to place the management of a company in the hands of a qualified person (an approved liquidator).
 2. A moratorium order to stay legal proceedings.
 3. Debenture holder has absolute veto over the judicial management scheme.
 4. 75% in value of creditors to approve.

Test for Appointing a Judicial Manager

- Company or its directors, or a creditor or creditors, together or separately, apply to the Court, Court will make JM Order if and only if **[cl. 392]**:
 1. Company is or will be unable to pay its debts; AND
 2. Making of order will achieve 1 or more of:
 - (i) Survival of the company
 - (ii) Approval of a scheme of compromise or arrangement;
 - (iii) More advantageous realisation of assets than winding up





Powers of the Judicial Manager

- Eighth Schedule of Bill lists out the powers of the judicial manager. Examples:
 1. Power to take possession of the property of the company.
 2. Power to sell or otherwise dispose of the property.
 3. Power to borrow money and grant security.
 4. Power to appoint solicitor or accountant or other professionally qualified person to assist.
 5. Power to bring or defend any action or other legal proceedings in name and on behalf of company.

JM's Powers and Impact on Secured Lenders

- JM may dispose of company property regardless of security rights (even that of a floating charge) [cl. 402]
- If JM appointed, no subsequent appointment of R&M [cl.398(1)(a) and (4)(b)]
- JM can grant security [Eighth Schedule]. Could grant a further floating charge taking priority over an existing one.

Questions?

Corporate Voluntary Arrangement



| 57

Corporate Voluntary Arrangement

- Key features of the CVA [*cl. 418-429 and Ninth and Tenth Schedule*]
 1. Directors appoint an approved person (approved liquidator) and he gives positive opinion on the proposed CVA.
 2. Papers filed in Court and 28-day moratorium.
 3. Meeting of members and creditors called within the 28 days.

| 58

Corporate Voluntary Arrangement

Stage 1: Nominee for CVA

1. Directors of company submit to nominee, a qualified insolvency practitioner, the proposed CVA and statement of affairs *[cl. 420(2)]*.
2. Nominee issues statement with his view on whether the proposed CVA has reasonable prospect of being approved and implemented *[cl. 422]*.

| 59

Corporate Voluntary Arrangement

Stage 2: Filing and Moratorium

1. Directors to file with the Court the necessary documents e.g. the proposed CVA, consent from the nominee and the nominee's statement *[cl. 421]*.
2. Moratorium automatically applies for 28 days. Can be extended for not more than 60 days. *[cl. 420 and Ninth Schedule]*.

| 60

Corporate Voluntary Arrangement

Stage 3: Calling of Meetings

Within 28 days:

1. Meeting of members to obtain more than **50%** approval.
2. Meetings of creditors to obtain **75%** in value of creditors' approval.
3. If more time needed, require 75% creditors' approval and consent of nominee to extend moratorium for not more than 60 days.

| 61

Corporate Voluntary Arrangement

Stage 4: CVA Takes Effect

- Once approved by required majority, CVA takes effect and is binding on all creditors.
- At conclusion of the meetings, Chairman of meetings to report the result of the meetings to the Court and give notice to the Registrar.
- CVA may appoint a **supervisor** to implement the proposal.

| 62

Challenges to CVA

Challenges of Decisions [cl.426]

(i) Who can challenge?

1. Person entitled to vote at meeting (member or creditor)
2. Person who would have been entitled to vote if he had notice
3. The nominee
4. Liquidator or the judicial manager (if applicable)

| 63

Challenges to CVA

(ii) Challenge on what grounds? One or both of:

1. CVA “unfairly prejudices the interests of a creditor, member or contributory;
2. Some material irregularity at or in relation to the meetings.

| 64

Challenges to CVA

(iii) Time limit for challenge:

1. 28 days from the first day of making report to the Court (under **Stage 4**); or
2. Generally, if person not given notice of meeting, 28 days from day he became aware of that meeting.

QUESTIONS



THANK YOU

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