The Restructuring Review

Seventh Edition

Editor
Christopher Mallon

Law Business Research

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EDITOR'S PREFACE

I am very pleased to present this seventh edition of *The Restructuring Review*. As with the previous editions, our intention is to help general counsel, government agencies and private practice lawyers understand the conditions prevailing in the global restructuring market in 2014 and 2015 and to highlight some of the more significant legal and commercial developments and trends that have been evident in recent years, and that are expected to be significant in the future.

In many jurisdictions the general economic trends are now more positive than they have been for many years. Against this background, the trend of diminished large-scale restructuring activity has continued in many markets. This picture may suggest a global economy in robust health after the long and difficult years of recession but it would be naïve to think that stability has returned for the long term as several warning signs remain.

First, the dramatic growth of high-yield issuances of past years may lead to unknown consequences further down the road. In the United States, 2012 and 2013 were each record years for high-yield issuance, and across the Atlantic this market is finally achieving a similar stage of development. At the time of writing, total European high-yield issuances for 2014 had already surpassed the annual totals for every year before 2013, and Credit Suisse was forecasting a record level of issuances for the year. As has happened in the past, it is inevitable that such large increases in economic activity will include inappropriate or unfortunate deals, the effects of which will need to be unpicked in future years with the help of restructuring professionals. The same will no doubt apply to the surge in M&A activity that has recently been observed in many developed economies.

A further factor to note is the continued employment of unorthodox monetary policy by many central banks. There remains considerable uncertainty as to the broader economic effects when quantitative easing is unwound and when interest rates return nearer to the long-term average; many commentators expect that when the monetary tide retreats many businesses that until now have managed to conceal their weaknesses may be left dangerously exposed.

With the above in mind, and taking into account also the stresses that continue to lie beneath the surface in the eurozone and some worrying signs of instability in the

emerging economies, only the very brave would forecast a prolonged period of calm for the global economy. As such, this work continues to be relevant and important, in particular as a result of the international nature of many corporate restructurings.

I would like to extend my gratitude to the contributors from some of the world's leading law firms who have given such valuable support and cooperation in the preparation of this work, and to our publishers, without whom this Review would not have been possible.

Christopher Mallon
Skadden, Arps, Slate, Meagher & Flom (UK) LLP
London
August 2014

Chapter 17

MALAYSIA

Rabindra S Nathan[1]

I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

i Liquidity and state of the financial markets

The Malaysian economy as a whole expanded by 4.7 per cent in 2013.[2] While growth in 2013 was lower than for 2012 (5.6 per cent), the domestic economy remained robust and demand was resilient, even taking into account the challenging external environment.[3]

Overall, liquidity conditions remained stable throughout 2013. Although news of the tapering down of the US Federal Reserve Bank's asset purchase programme resulted in strong outflows for the second half of 2013, nevertheless, overall both surplus liquidity placed with Bank Negara Malaysia and private sector liquidity all remained high,[4] despite volatile global financial markets.[5]

The diversified Malaysian financial market plays a pivotal role in facilitating and catalysing the growth of Malaysia's economy. At the end of August 2013, financial intermediation continued to support the economic activities with total loans outstanding in the banking sector increasing 9.3 per cent to 1,180.3 billion ringgit while the total financing outstanding of development financial institutions (DFIs) increased 8.5 per cent to 117 billion ringgit, particularly to strategic economic sectors.[6]

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1 Rabindra S Nathan is a partner at Shearn Delamore & Co.

2 Bank Negara Malaysia Annual Report 2013 (the BNM Report).

3 Ibid.

4 Ibid.

5 Ibid.

6 The Economic Report 2013/2014 published by the Official Website of the Ministry of Finance Malaysia.

The capital market remains an important source of financing for companies, with a total of outstanding private bonds amounting to 415.3 billion ringgit and market capitalisation of the equity market increasing to 1,598.8 billion ringgit as at the end of August 2013.[7] In January 2013, *sukuk*[8] and bonds were made available to all investors of Malaysia for the very first time with a new *sukuk* asset class launched on Bursa Malaysia. Malaysia remains the world leader in *sukuk* issuance and as at end-August 2013, Bursa Malaysia continued to be ranked the top exchange for *sukuk* listing, which amounted to US$32.3 billion.

Furthermore, on 30 June 2013, the Financial Services Act 2013 (FSA) and the Islamic Financial Services Act 2013 (IFSA) came into force to further strengthen the financial sector's regulatory and supervisory framework. At the end of the first quarter of 2014, the economy of Malaysia recorded a steady growth of 6.2 per cent.

ii Impact of specific regional or global events

In 2012 and 2013, two key external developments affected the state of the Malaysian economy. First, the eurozone sovereign debt crisis in 2012 presented various challenges and posed a key downside risk to Malaysia's domestic growth prospect. The transmission of the impact of the euro debt is mainly through two major channels: the trade and financial channels. In the trade channel, potential spillover effects are seen on private investment and consumption spending while on the financial side, confidence and domestic spending may be affected. This is due to the close correlation that exists across market and across asset classes that is affected by the uncertainty and volatility in the global financial markets, and the attendant rise in deleveraging activity, particularly among European financial institutions.[9]

For 2013, the Malaysian economic landscape was affected in the main by the indications of a tapering off in the US Federal Reserve Bank's asset purchase programme. This resulted in high net outflows of capital from Malaysia as well as from other emerging market economies. Nevertheless this did not have a disorderly effect on the domestic economy, which coped well and did not suffer any serious sustained repercussions.

iii Market trends in restructuring procedures and techniques employed during this period

Most restructurings in Malaysia are effected on a formal basis. Even in terms of formal processes, restructuring options in Malaysia have to date been limited. A company may be restructured via:

a Schemes of Arrangement under the Companies Act 1965 (Act 125) (the CA 1965);

b Special Administration under the Pengurusan Danaharta Nasional Berhad Act 1998 (the Danaharta Act); or

7 Ibid.

8 *Sukuk* is the Arabic name for financial certificates, but are commonly referred to as the Islamic equivalent of bonds.

9 Bank Negara Malaysia Annual Report 2012.

c Conservatorship under the Malaysia Deposit Insurance Corporation Act 2011 (the MDICA 2011).

Some of the companies facing financial difficulties that did not restructure, or could not be restructured formally may have attempted to undertake workouts with financial institution creditors, but information as to the extent of such workouts is not publicly available. Those debtors that remained that could not be restructured under one or more of the formal or informal methods outlined above, would then be wound up either by way of voluntary winding up by its members or creditors, or by way of compulsory winding up done by the court.

iv Number of formal procedures entered into or exited during this period

Based on the 2013 Annual Report by the Malaysia Department of Insolvency,[10] there were 1,563 cases involving windings up by the court in 2013. This represents a rise of 0.8 per cent from 2012, which recorded a total of 1,550 cases. It is also shown in the statistics that a total of 2,223 petitions were filed for winding up by the court in 2013 and this represents a rise of 0.7 per cent from 2012, which recorded a total of 2,207 petitions. Of the 2,223 petitions filed, only a total of 1,529 petitions were granted the court order. The remaining 697 petitions were either withdrawn or invalid.

In relation to voluntary winding up, the statistics recorded a total of 631 cases in 2013. This represents a fall of 44.9 per cent from 2012, which recorded a total of 1,145 cases.

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

There are several formal statutory insolvency and restructuring procedures available in Malaysia. The key legislation for corporate insolvency in Malaysia is the CA 1965, supplemented by the Companies (Winding up) Rules 1972 (the Winding up Rules).

The other key legislation for restructuring would be the Danaharta Act and the MDICA 2011. The Danaharta Act provides for special administration to assist in the survival of the company as a going concern and a similar framework is also found under the MDICA 2011 for the conservatorship of a company.

i Formal procedures

Winding up

Winding up is governed under Part X of the CA 1965, which provides for two types of winding-up methods for companies.

10 Malaysia Department of Insolvency Annual Report 2013 published by the Official Website of the Malaysia Legal Affairs Division.

Voluntary winding up

A voluntary winding up under the CA 1965 can either be a members' voluntary winding up or a creditors' winding up. It commences at the time of the passing of the resolution for voluntary winding up.[11] A company may be wound up voluntarily in the following circumstances:

a the period (if any) fixed for the duration of the company by memorandum or articles expires; or

b the event, if any occurs, on the occurrence of which the memorandum or articles provide that the company is to be dissolved and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily; or

c the company resolves for the voluntary winding up by special resolution.

A members' voluntary winding up must be preceded with a declaration of solvency, which is a declaration by the majority of the directors of the company to the effect that they have made an enquiry into the affairs of the company and have formed the opinion that the company will be able to pay its debts in full within a period of 12 months after the commencement of the winding up. The same must then be lodged with the Registrar of Companies.[12]

On the contrary, a creditor's winding up[13] is a winding up upon the resolution of the members of the company, which is not accompanied by the making and lodgement of a declaration of solvency. Therefore, the difference between a members' voluntary winding up and a creditors' voluntary winding up is that the latter procedure gives control of the winding up largely to the creditors.

Winding up by the court

Section 218 of the CA 1965 provides 14 circumstances in which the court can wind up a company:

a The company has by a special resolution resolved that it be wound up by the court.

b Default by the company in the filing of statutory report.

c Failure of the company to commence business within a year from its incorporation or suspends its business for a whole year.

d The reduction of members of the company below two.

e The company is unable to pay its debts.

f The directors have acted in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever that appears to be unfair or unjust to other members.

g Upon inspection by an inspector appointed under Part IX of the CA 1965, where he or she is of opinion that the company cannot pay its debts and should be

11 Section 255(6)(b) of the CA 1965.

12 Section 257 of the CA 1965.

13 Section 4(1) of the CA 1965 defines it as a 'a winding up under Division 3 of Part X, other than a members' voluntary winding up'.

wound up, or that it is in the interests of the public or of the shareholders or of the creditors that the company should be wound up.

h The period, if any, fixed for the duration of the company by the memorandum or articles expires or the event, if any, occurs on the occurrence of which the memorandum or articles provide that the company is to be dissolved.

i There are just and equitable grounds to wind up the company.

j The company has held a licence under the Banking and Financial Institutions Act 1989 (Act 372) (the BAFIA 1989) or the Islamic Banking Act 1983 (Act 276) (the IBA 1983) and that licence has been revoked or surrendered.

k The company has carried on Islamic banking business, licensed business, or scheduled business, or it has accepted, received or taken deposits in Malaysia, in contravention of the BAFIA 1989 or the IBA 1983, as the case may be.

l The company has held a licence under the Insurance Act 1996 and that licence has been revoked; and Bank Negara Malaysia has petitioned for its winding up under Subsection 58(4) of the Insurance Act 1996; or an order under Paragraph 59(4)(b) of the Insurance Act 1996 has been made in respect of it.

m The company is being used for an unlawful or prejudicial purpose.

n The company is being used for any purpose prejudicial to national security or public interest.

The winding up of a company by the court is deemed to commence at the time of presentation of the petition for the winding up.[14]

Appointment of receivers and managers

There are two types of receiver in Malaysia, which are court-appointed receivers and privately appointed receivers.

Court-appointed receivers

The High Court derives its power to appoint a receiver from Paragraph 6 of the Schedule to the Courts of Judicature Act 1964. A court-appointed receiver is an officer of the court, and may be so appointed to carry on the business of the company in the ordinary way or to take custody and possession of the assets of the company.

It has the effect of removing the management and conduct of the company from the hands of the directors of the company and placing the same in the receiver and manager. The appointment of a receiver and manager, supercedes the company in the conduct of its business, and deprives it of all power to enter into contracts in relation to that business, or to convey properties in relation to assets covered by the receivership.

The court will grant an application for the appointment of a receiver and manager on the following grounds:

a there is a default in payment under the debenture;

b security of the property subject to the debenture is in jeopardy;[15] and

14 See, *inter alia*, Sections 260 to 263 of the CA 1965.

15 *Matang Holdings Bhd v. Dato Lee San Choon* [1985] 2 MLJ 406.

c there is a threat or danger that the company will dispose of the whole of its undertaking in violation of the rights of the debenture holders.

Privately appointed receivers

A privately appointed receiver is appointed as a consequence of the terms of an agreement between the parties. A common example is a receiver privately appointed by debenture holder to enforce the security under the terms of the debenture.

Once appointed, the receiver takes possession of the assets of the company that are subject to the floating charge that is now crystallised in the debenture. Depending on the terms of the debenture, a receiver may also be a manager (hence known as 'receiver and manager'), and thus is additionally empowered to run the business of the company with the objective of realising the assets on the basis of a going concern.[16]

Schemes of arrangement

Schemes of arrangement may include arrangements such as the sale of the assets of the company to a third party. The High Court is empowered under Section 176 of the CA 1965 to sanction a scheme of arrangement between a company and its creditors on the proposal of parties.

An application may be made by the company or any creditor or member of the company or, in the event of a company being wound up, by the liquidator, for an order that a meeting of the creditors or a class of creditors or of the members of the company or class of members to be summoned in such manner as the court directs.[17]

The scheme of arrangement will be binding on the order of the court on all the creditors or class of creditors or on the members or class of members (as the case may be), and also on the company; also, in the case of a company being wound up, it is binding on the liquidator and contributors to the company if a majority in number representing three-quarters in value of the creditors or a class of creditors or members or class of members present and voting either in person or by proxy at the meeting agrees to the compromise or arrangement.[18]

Special administration

Sections 24 to 26 of the Danaharta Act allows the Danaharta to acquire non-performing loans and the underlying security thereof of a company, which is an 'affected person' by way of an appointment of a 'special administrator' over an 'affected person'.

It must, however, be noted that the Danaharta has wound down its operations since 2005, and all its residual assets have been transferred and are now managed by Prokhas Sdn Bhd. Nevertheless, the appointment of a special administrator by the Danaharta remains a theoretical possibility, as the Danaharta Act is still in force.

There are two ways in which a special administrator may be appointed to a company by the Danaharta. The first is by way of an application by the board of directors

16 *Re Victoria Steamboats* [1897] 1 Ch 158.

17 Section 176(1) of the CA 1965.

18 Section 176(3) of the CA 1965.

or the majority of the members of a company to the Danaharta for the appointment of a special administrator of the affected person.[19] Alternatively, the Danaharta may, on its own motion, recommend the appointment of a special administrator to the Oversight Committee of the Danaharta.[20] The Danaharta may recommend the appointment of a special administrator if it would serve public interest to do so or if it is satisfied that:[21]

a the company is unable or likely to be unable to pay its debts or is unable or likely to be unable to fulfil its obligations to its creditors;

b the survival of the company and the whole or any part of its assets as a going concern may be achieved;

c a more advantageous realisation of the company's assets may be achieved than by winding up; or

d the appointment may achieve a more advantageous realisation or a more expeditious settlement of a duty or liability owed by any person to the Danaharta or any subsidiary of the Danaharta, whether future, present, vested or contingent.

Conservatorship

The appointment of a conservator is governed under the MDICA 2011. The MDICA 2011 was gazetted on and operational from 27 January 2011 to replace the old MDCIA 2005. The MDICA 2011 provides for the continuing existence of the Malaysia Deposit Insurance Corporation (more commonly known by its Malay name Perbadanan Insurans Deposit Malaysia or 'PIDM'). Among the objectives of PIDM is to promote or contribute to the stability of the financial system.

PIDM has an arsenal of powers that it can use to assume control of non-viable financial institutions and to acquire and take control of non-performing loans that are outstanding between the financial institutions, borrowers and security providers. Once PIDM acquires the non-performing loans, it will appoint a conservator over the borrower or the security provider, or both. These obligors are known as 'affected persons' under the MDICA 2011.

PIDM may appoint a conservator to administer a company that is deemed an 'affected person' if the following requirements are satisfied:[22]

a the company is unable or likely to be unable to pay its debts or is unable or likely to be unable to fulfil its obligations to its creditors;

b the survival of the company and the whole or any part of its assets as a going concern may be achieved by the appointment of a conservator;

c the conservatorship may result in a more advantageous realisation of the assets of the company than by winding up; or

d the appointment may achieve a more advantageous realisation or a more expeditious settlement of a duty or liability owed by any person to PIDM or any subsidiary of PIDM, whether present or future, or whether vested or contingent.

19 Section 23 of the Danaharta Act.

20 Section 24 of the Danaharta Act.

21 Section 25 of the Danaharta Act.

22 Section 161(1) of the MDICA 2011.

ii The taking and enforcement of security

A secured creditor can realise its security to recoup the debts owing to it by the creditor without having to wait in line along with the other unsecured creditors. The costs and expenses of the winding up including the taxed costs of a petitioner and the remuneration of the liquidator and other preferential debts must be paid in priority to all other unsecured debts.

Secured creditors

A secured creditor holds a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to it from the debtor but may not include a plaintiff in any action who has attached the property of the debtor before judgment.[23] A secured creditor may rely on its security, and need not prove its debt to do so. It may prove the balance of its debt after deducting the amount realised.

Preferential creditors

A preferential creditor's unsecured debts must be paid in priority of other unsecured claims. A list of preferential creditors is provided under Section 292 of the CA 1965.

Unsecured creditors

Unsecured creditors obtain *pari passu* distribution out of the unencumbered assets of the liquidated company after the secured creditors have enforced their security and the preferential creditors have exhausted their claims: 'debts of the same class shall rank equally between themselves, and shall be paid in full, unless the property of the company is insufficient to meet them, in which case they shall abate in equal proportions between themselves.'[24] However, the commencement of insolvency proceedings and restructuring procedures may affect the taking and enforcement of the securities by the creditors.

Winding-up proceedings

In a situation where winding-up proceedings are commenced against a corporate debtor, but a winding-up order has yet to be made, the company can apply for other legal proceedings to be stayed pending the disposal of the winding-up proceedings.[25] Once a winding-up order is made, all actions against the company cannot be proceeded with unless by leave of court.[26]

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23 *Lian Keow Sdn Bhd (in liq) v. Overseas Credit Finance (M) Sdn Bhd* [1988] 2 MLJ 449, adopting the definition under Section 2 of the Bankruptcy Act 1967.

24 *Malaysian Trustees Bhd v. Transmile Group Bhd & Ors* [2012] 3 MLJ 679.

25 Section 222 of the CA 1965.

26 Section 226(3) of the CA 1965.

Appointment of receivers and managers

Upon the appointment of a receiver and manager, floating charges crystallise and convert into fixed charges, and the company is not able to deal with the assets subject to the charge without the consent of the receiver and manager.[27]

Schemes of arrangement

The court can restrain further proceedings in any action or proceeding against the company upon the application in a summary way of the company or of any member or creditor of the company except by leave of the court and subject to such terms as the court imposes.[28] The restraining order may be granted for a period of not more than 90 days or such longer period as the court may, for good reason, allow if the necessary conditions are satisfied.[29]

Special administration and conservatorship

A moratorium of 12 months takes effect immediately on the onset of special administration and upon the appointment of a conservator. During the moratorium period, *inter alia*, the following apply:

a No steps may be taken to create, perfect or enforce any security over any asset of the company; to enforce any judgment or award or order over the affected person or any asset of the company; to repossess any asset in the possession, custody or control of the company; or to set off any debt owing to the company.

b No action, suit, proceeding, execution or legal process may be commenced or continued with, and no distress levied, against the company or its asset.

iii Duties of directors of companies in financial difficulties

Generally, directors' duties in Malaysia are a mixture of statutory, common law and equitable duties. The statutory duties are to be found in the CA 1965, under Part V.

In 2007, amendments were made to the CA 1965 on various areas, *inter alia*, directors' duties. The principal change was the introduction for the first time in Malaysia of a 'business judgment' defence. Following these amendments, the present position is that a director of a company shall at all times exercise his or her power for a proper purpose and in good faith in the best interest of the company.[30] He or she must also exercise reasonable care, skill and diligence with the knowledge, which may reasonably be expected of a director having the same responsibilities and any additional knowledge, skill and experience which the director in fact has.[31] A director must also exercise the

27 *Perbadanan Pembangunan Bandar v. Syabas Holdings Sdhn Bhd* [1990] 2 MLJ 116, 119; *Tan Ah Teck (t/a Plumcon Plumbing & Construction Co) v. Coffral Malaysia Sdn Bhd* [1992] 1 MLJ 553, 559.

28 Section 176(10) of the CA 1965.

29 Section 176(10A) of the CA 1965.

30 Section 132(1) of the CA 1965.

31 Section 132(1A) of the CA 1965.

same and the equivalent duties under the common law and equity when making a business judgment.[32]

In addition, statutory duties are imposed on directors when the company is being wound up. The CA 1965 mandates that the directors will be criminally liable if, *inter alia*, the following occur during the course of the winding up:[33]

a failure to deliver all moveable and immoveable property, books and papers in his or her custody to the liquidator;

b destruction, mutilation, alteration or falsification of any books, papers or securities, or the making of or being privy to the making of any false or fraudulent entries into any register or book of account or document belonging to the company with the intent to defraud or deceive any person;

c proper books of account not being kept by the company during the two years immediately preceding the commencement of the winding up;

d engagement in any fraudulent trading; and

e any misfeasance by past or present officers of the company, including liquidators, or any person who has taken part in the formation or promotion of the company.

Judicial pronouncements in other jurisdictions such as Australia or New Zealand recognising a duty that arises in circumstances of insolvency and near insolvency owed to creditors to take their interests into account have not been fully considered or developed in Malaysia.

iv Clawback actions

Section 293 of the CA 1965 made specific reference to the Bankruptcy Act 1967 (the BA 1967)[34] in the application of the clawback doctrine. It renders void any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company that is unable to pay its debts as they become due to its own funds, in favour of a creditor. This has the effect of giving that creditor a preference, priority or advantage over other creditors, if the transaction occurs within the preceding three months or:

a in the case of a winding up by the court, the date of the presentation of the petition (whichever is earlier); or

b in the event that a resolution has been passed by the company for voluntary winding up before the presentation of the petition, the date upon which the resolution to wind up the company voluntarily is passed (whichever is earlier).

In the case of a voluntary winding up, it is the date upon which the winding up is deemed to have commenced by the CA 1965.

32 Section 132(1B) of the CA 1965; Section 132(6) of the CA 1965 defines business judgement as any decision on whether to take action in respect of a matter relevant to the business of the company.

33 Sections 300 to 306 of the CA 1965.

34 Section 53 of the BA 1967.

This does not, however, affect the rights of a person who had made the transaction *bona fide* without notice of the commencement of the winding up.[35]

III RECENT LEGAL DEVELOPMENTS

i The Companies Bill 2013

On 2 July 2013, the Companies Commission of Malaysia (CCM) published a draft of the proposed Companies Bill 2013 (the 2013 Bill) that sets out the new legal framework to replace the existing CA 1965. The 2013 Bill aims to implement changes in many different areas in line with international standard.

One of the most significant changes introduced by the 2013 Bill concerns the area on corporate rescue mechanisms. As explained above, a company facing financial difficulties has limited options available under the CA 1965. It could resort to winding up, enter into receivership or undertake a scheme of arrangement with its creditors.

As such, the 2013 Bill introduces two alternative mechanisms for companies on the brink of insolvency in order to avoid being wound up, as follows.

Judicial management

This is governed under Part III, Division 8, Subdivision 1 of the 2013 Bill. The judicial management is a form of court supervised rescue mechanism of an insolvent company. Upon the application of the company or its creditors in a situation where the company is or will be unable to pay its debts and there is a reasonable probability of rehabilitating the company, the High Court may order that a company be placed under the judicial management of a judicial manager.[36]

Under judicial management, a moratorium for a period of 180 days will take effect and the management of the company would be placed in the hands of a judicial manager. The moratorium period takes effect immediately from the date of the making of the judicial management order and may, on the application of the judicial manager be extended for another 180 days subject to such terms as the court may impose.[37]

Corporate voluntary arrangement

This is governed under Part III, Division 8, Subdivision 2 of the 2013 Bill. The corporate voluntary management is a mechanism that facilitates the rescue and rehabilitation process of the companies. Based on the proposal of the directors of a company other than a company which is under judicial management or is being wound up, the High Court may sanction a composition in satisfaction of its debts or a scheme of arrangement of its affairs between a company and its creditors.[38]

Similarly to a scheme of arrangement, a corporate voluntary arrangement allows the director of a company to propose such to its company and creditors. There will also

35 Section 53 of the BA 1967 read with Section 293 of the CA 1965.

36 Section 391 of the 2013 Bill.

37 Section 393 of the 2013 Bill.

38 Section 419(1) of the 2013 Bill.

be a moratorium period of 28 to 60 days that will take effect. The implementation of the arrangement will be placed in the hands of a nominee[39] who will act either as a trustee or otherwise for the purpose of supervising its implementation.[40]

It must, however, be noted that this alternative corporate rescue mechanism is still pending reform as at the time of writing. Hence, current insolvency proceedings will only be affected pursuant to the 2013 Bill should it be implemented.

ii The Financial Services Act 2013 and The Islamic Financial Services Act 2013

The FSA 2013 and IFSA 2013, which came into force on 30 June 2013, are seen as efforts to modernise the laws that govern the conduct and supervision of financial institution in Malaysia. Both these legislations consolidated and replaced several separate laws: the BAFIA 1989, the IBA 1983, the Takaful Act 1984, the Payment Systems Act 2003 and the Exchange Control Act 1953 in order to encompass the financial sector under a single legislative framework. The FSA has provisions empowering Bank Negara Malaysia, the central bank, to assume control of a licensed financial institution, or alternatively to appoint a receiver and manager over the institution. In addition, there are provisions that restrict the right of any person to present a winding up petition against a licensed institution, without the consent of Bank Negara Malaysia.

iii The Malaysia Deposit Insurance Corporation Act 2011

As explained above, the MDICA 2011 was implemented to replace the old MDICA 2005. It provides for the continuing existence of PIDM, one of the objectives of which is to promote or contribute to the stability of the financial system.[41] PIDM operates a deposit insurance scheme for depositors of 'member institutions'.[42]

In furtherance of its objectives, the PIDM is vested with the power to assume control of a 'member institution'. For companies other than 'member institutions', PIDM can appoint a conservator over any company that falls within the definition of an 'affected person' under the MDICA 2011. A conservator can formulate a restructuring plan for the affected person.

iv Corporate Debt Restructuring Committee 2009

The Corporate Debt Restructuring Committee (CDRC) was established by the Bank Negara Malaysia in July 2009 as a pre-emptive measure against any large increase in non-performing loans in the banking system and to provide for a corporate rescue framework.

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39 Under Section 418, a 'nominee' is any person who is qualified to be appointed as an approved liquidator and the powers and duties conferred to a nominee by this subdivision shall include the powers and duties specified in the Tenth Schedule.

40 Section 419(3) of the 2013 Bill.

41 Section 4 of MDICA 2011.

42 Under Section 2 of the MDICA 2011, member institutions mean 'means a financial institution or a corporation that is deemed prescribed as a member institution under this Act and the membership of which has not been cancelled under Section 38 or terminated under Section 39.

The CDRC only accepts applicants that meet certain eligibility criteria, such as having more than 30 million ringgit-worth of debt, having at least two financial creditors and not being in receivership or liquidation. The CDRC facilitates negotiations and mediation between creditor banks and the debtor to arrive at a viable debt restructuring arrangement.

v Recent judgments

The scope and extent of administration and realisation of the estate of an insolvent company by a receiver and manager was clarified in the recent case of *Lim Eng Chuan Sdn Bhd v. United Malayan Banking Corp & Anor*.[43] The Federal Court held that the receiver and manager had the power to sell lands by entering into the sale and purchase agreement as attorney under an irrevocable power of attorney expressly granted by the debenture. This is, however, subject to the scrupulous compliance with the form of authentication of the said power of attorney. In such a situation, the power of attorney would survive the winding up order.

IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

i Value and significance of transactions

At the beginning of 2013, a Malaysian multinational conglomerate, one of the world's largest plantation players with a diversified business portfolio, was given approval to carry out a US$1.5 billion-equivalent multi-currency *sukuk* issuance programme. This *sukuk* programme is the first of its kind by an Asian corporation under the shariah principle of Ijarah and was internationally rated.[44]

Another significant milestone is the new brand identity 'Malaysia: the World's Islamic Finance Marketplace' in the development of the Islamic finance industry. This was introduced by the Prime Minister in August 2013 with an invitation to the global financial community to collaborate with and mutually benefit from Malaysia's Islamic finance market place, which has a complete overarching regulatory, supervisory, shariah and legal framework.

ii Restructuring techniques

The restructuring techniques currently available in Malaysia as at the time of writing would be by way of:

a schemes of arrangement under the CA 1965;
b special administration under the Danaharta Act; and
c conservatorship under the MDICA 2011.

43 [2013] 3 MLJ 161.

44 Footnote 5, *supra*.

As discussed earlier, two new restructuring methods had been introduced by the 2013 Bill to companies in aid of their corporate rescue process. They are the judicial management and corporate voluntary arrangement respectively.

iii Any distressed industries, market trends and the reasons for these

Sales of distressed non-performing loans are permitted in Malaysia under guidelines issued by Bank Negara Malaysia. Licensed financial institutions may dispose of non-performing loans to eligible third parties, including foreign banks that have incorporated Malaysian banking subsidiaries, or special purpose vehicles set up by such banks. Malaysian-licensed banks are also at liberty to acquire such non-performing loans from other Malaysian banks. Domestic and foreign investors may set up special purpose vehicles to acquire such assets but there are a host of regulatory approvals and requirements that have to be obtained or fulfilled.

At the time of writing, the industries that are being most severely affected, among others, are shipping, construction, manufacturing, steel and biodiesel.

V INTERNATIONAL

Malaysia has not adopted the UNCITRAL Model Law on Cross-Border Insolvency. However, the conflict of laws of Malaysia recognises that *lex incorporationis*, that is the law of the place of incorporation, shall govern matters relating to insolvency of a company. Further, judgments rendered by a court in a country within the Reciprocal Enforcement of Judgment Act 1958 are recognised once they are registered in Malaysia.

VI FUTURE DEVELOPMENTS

The Malaysian parliament is currently considering the implementation of the Companies Bill 2013 which was introduced on 2 July 2013. The 2013 Bill is intended to modernise the existing company legislation of Malaysia in line with international standards. Should it be implemented, it is believed that numerous positive changes to Malaysia's corporate legal framework such as the corporate insolvency laws would take place.

Appendix 1

ABOUT THE AUTHORS

RABINDRA S NATHAN

Shearn Delamore & Co

Rabindra Nathan was called to the New Zealand Bar in December 1986 and the Malaysian Bar in October 1987. A graduate of the University of Canterbury, Christchurch, New Zealand (1985) and Sidney Sussex College, Cambridge (1988), he became a partner of Shearn Delamore & Co in January 1997. Winner of several prizes and scholarships, his area of practice is litigation and his specialities are principally corporate and commercial litigation, banking, insolvency and international commercial arbitration. He has many reported cases to his name, in the High Court, Court of Appeal and Federal Court in Malaysia. He has done consultancy work for the Asian Development Bank and the Organisation for Economic Co-operation and Development.

He is a founding member of, and also currently a Council Member of, the Insolvency Practitioners' Association of Malaysia. In 2011, he was admitted by invitation to become the only Malaysian member of the International Insolvency Institute, New York. He has written a number of papers and articles on company law, corporate governance, insolvency and arbitration, including, 'Controlling the Puppeteers: Reform of Parent-Subsidiary Law in New Zealand' in (1986) 3 *Canterbury Law Review* 1, 15, which is cited in John Farrar, *Company Law* (4th Edn) (2002), chapter 33 and 'Whether an Appearance amounts to a "Step in the Proceedings" under Section 6 of the Arbitration Act 1952' (2002) *International Arbitration Law Review*.

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