



MALAYSIAN INSTITUTE  
OF ACCOUNTANTS  
ACCOUNTANTS: MANAGERS OF VALUE



IGN R1

# INSOLVENCY GUIDANCE NOTE

Suggested Receivership Checklist (for Receiver Appointed under a Debenture)

November 2009

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## FOREWORD

This foreword has been approved by the Council of the Malaysian Institute of Accountants for publication. The Guidance Notes represent what constitutes good practice in stated areas of insolvency.

The Guidance Notes are issued with the view to harmonising the approach of members to questions of insolvency practice. However, the Institute recognises that there may be instances where the circumstances encountered by a practitioner render it inappropriate for the guidance given in a particular Note to be followed.

The Guidance Notes are prepared from the perspective of an insolvency practitioner operating under the laws of and practices in Malaysia. Nevertheless, the Notes are not intended as a definite interpretation of the law, and the Institute disclaims liability for any loss or penalty suffered, or claims sustained, by any member as a consequence of his following the procedures set out in the Guidance Notes.

The Guidance Notes do not form part of the Institute's By-Laws (On Professional Conduct and Ethics) [Revised 1 January 2007].

It is believed that the issuance of the notes will help to improve the quality of insolvency practices. They are not prescriptive in nature. The notes are for guidance only. However, in determining the acts of members in the performance of their respective duties, the Council may take into consideration the recommended practices as contain in these IGNs.

## EFFECTIVE DATE

These IGNs are effective for members to observe from the date of issuance and these are set out in each of the IGN proper.

## Introduction

1. The term 'Receivership' indicates a form of insolvency administration. Although there are various types of Receivership, the most common form of initiating a Receivership in Malaysia is the private appointment of a Receiver by a secured creditor under the terms of a deed of charge or debenture. The powers of the Receiver under this form of administration are usually specified in a contractual agreement between the secured creditor and the company. As the contractual objective is the ultimate repayment to that secured creditor, the Receivership will usually include the power to sell as well as to administer the company's business. The person appointed with such powers is termed as a 'Receiver and manager' whereas one appointed merely to take possession and to protect the property over which he was appointed is a 'Receiver'.

The foregoing Receivership programme is applicable in the appointment of a Receiver and manager which is the more popular form of appointment in Malaysia. As each Receivership is a unique administration, the programme should be viewed as a guide only.

It should also be noted that if land charged under the National Land Code is amongst the property over which the Receiver and manager or Receiver has been appointed, he must consider seeking legal advice before dealing with the land, in view of the Federal Court decision in 'Kimlin Housing Development Sdn Bhd vs Bank Bumiputra Malaysia Berhad and 3 others', the Court decisions in 'Carah Enterprise Sdn Bhd vs Melatrans and Perdana Merchant Bankers' and 'K. Balasubramaniam vs MBf Finance Berhad, Ler Cheng Chye & Lum Tuck Cheong'.

This Suggested Checklist cannot be and does not set out to be a definitive guide on all administrative matters.

## Definitions

2. Except where otherwise stated or indicated by the context in which they appear, the following terms have the respective meanings shown for the purposes of this Guidance Note:

**"Act"** means The Companies Act, 1965.

**"Books and Records"** means any registers, indices, minute books, books of account, documents, papers and any other record of information of any kind, including books within the meaning of Section 4 of the Act.

**"Court"** means the Courts in Malaysia.

**"Guidance Note"** means the Insolvency Guidance Note ("IGN") as approved by the Council of the Malaysian Institute of Accountants

**"Member"** means a person who is registered in accordance with the Accountants Act 1967 as a public accountant, registered accountant or licensed accountant. Where a Member is in public

practice, this definition would include the practice entity and the partners and personnel of the entity.

**“MIA”** means The Malaysian Institute of Accountants.

**“Receiver”** means a Receiver or a Receiver and Manager of any part or all of a company's property and undertakings appointed under any instrument, but not including a Receiver or a Receiver and Manager appointed by the Court.

**“Section”** means the section or sections under the Act unless otherwise stated.

**“SSM”** means the Companies Commission of Malaysia which includes the Registrar of Companies designated under Section 7(1) of Act.

## Before Appointment

3. Perform a conflict check on ability to take on the appointment.
4. Review the debenture and ascertain the following:
  - a. Whether the debenture is registered with SSM within 30 days of its creation [Section 108(1) ] and is properly stamped to cover the amount advanced;
  - b. whether the charge is a fixed or floating charge, or both and whether there are any prior charges taking precedence over the relevant charge which inhibits the Receiver’s possession of assets;  
  
*(Note: In considering the validity of the charge, attention is drawn to Section 294 which refers to a floating charge created within 6 months of commencement of winding up.)*
  - c. whether the debenture stipulates that the Receiver shall be the Agent of the company and confers the following powers to the Receiver:
    - i. to raise or borrow money and grant security thereof over the property of the company.
    - ii. to take possession of the secured property and to sell/ dispose of the property.
    - iii. to carry on the company’s business/trading activities.
    - iv. to bring or defend any legal action/proceedings in the name and on behalf of the company.
    - v. to do other things incidental to the exercise of the appointment.

If any of this does not exist, the Receiver should make necessary arrangements with the debenture holders;

- d. whether the debenture has been properly executed by the company under seal in a manner authorised by its Articles of Association;
  - e. whether the assets falling within the purview of the debenture and over which the Receiver would take possession;
  - f. whether the debenture contains a power of attorney clause and that the same has been registered with the High Court; and
  - g. whether the debenture confers on the Receiver the power to execute all agreements, deed and documents and the power to convey and assign: and
5. Where necessary, discuss with legal advisers the proposed appointment and obtain independent written confirmation as to the validity of the charge, the power to appoint Receiver and the fulfillment of the conditions for doing so.
  6. Arrange to meet the debenture holders to obtain information about the company's affairs and to discuss the objectives of the proposed Receivership which should cover the following issues:
    - a. Whether the company is trading.
    - b. The availability of funds for future trading (if considered beneficial or appropriate).
    - c. Nature and location of assets charged.
    - d. Reasons for current problems. Review management information available on past trading and financial position.
    - e. Details of present directors and management and opinion as to their competency.
    - f. Major creditors and the likelihood of liquidator being appointed.
    - g. Details of any winding up petition against the company.
  7. Obtain the deed of indemnity, if necessary. Deed of indemnity is generally obtained because:
    - a. there may be insufficient assets to cover Receivership costs.
    - b. there may exist doubts as to validity of debenture.
    - c. there may be question of personal liability attaching to a Receiver.
    - d. there may be legal actions against the Receiver.
  8. Document the physical outline for accepting the appointment and approach for taking control of the company which must include the following:
    - a. Details of locations of the company's operations and security at each location; and

- b. Ensure adequate staffs are available and that their duties are explained to them prior to attendance at the premises.

## Statutory Requirements on Accepting Appointment

9. Obtain the following documents from debenture holders:
  - a. copy of letter of demand (if required by debenture) sent to the company.
  - b. letter/deed of Appointment as required by the debenture which must be stamped by the Receiver.
  - c. Notice of Appointment of a Receiver, to be filed SSM within seven days on appointment. [Section 186(l) - Form59]
10. Prepare the notice required to be served on the directors and/or senior management of the company:
  - a. informing them on the appointment of Receiver [Section 188(l)(a)];
  - b. requiring the submission of a Statement of Affairs within 14 days of date of delivery of the said notice of appointment in (a). [Section 188(1) (b) - Form 61]; and
  - c. effect of the appointment of Receiver including that the power of management of the Board of Directors and management ceases, all instructions on the management of the company including ordering and acceptance of supplies, communications with employees, third parties, creditors and suppliers must not be made without the Receiver's consent and all outgoing correspondences and documents of the company must be affixed with the statement that Receiver has been appointed.

## Administrative Actions upon Appointment

11. Arrange to meet with directors and senior management of the company. Ensure that the following matters are covered and minuted:
  - a. Serving of notice of appointment of Receiver and the requirement to submit the Statement of Affairs within 14 days from the notice of appointment (Section 188 (1)(b))
  - b. restriction of directors' powers.
  - c. control of incoming and outgoing mails.

- d. notation of appointment of Receiver on all letters, invoices, orders and other company documents. [Section 187(1) ]
  - e. particular problems of which director are aware.
  - f. timing and nature of communication with employees and third parties.
12. Upon written application by the directors, the Receiver may extend the period for submission of the Statement of Affairs. Such a request must be processed as soon as received. [Section 188(l)(b)]
13. Upon receipt of the Statement of Affairs, the Receiver must within one month of receipt:
- a. lodge a copy with SSM together with any comments he sees fit to make in relation to the statement. [Section 188(1)(c)(i)]
  - b. forward a copy of any such comments or if no comments are made, a notice to that effect to the company. [Section 188(1)(c)(ii)]
  - c. send to trustees of debenture holders, if any, a copy of the statement and related comments. If there are no trustees, the statement and the related documents should be sent to the debenture holders. [Section 188(1)(c)(iii)]
14. Notify the Director-General of Customs & Excise on the appointment of Receiver within 14 days from date of appointment and request for the submission of their claims, if any. [Section 65(C) of Customs Act 1967, Section 70 of Sales Tax Act 1972 & Section 52 of Service Tax Act 1975].
15. Obtain the following information to have a general understanding of the company:
- a. details of all assets (together with their respective locations) and liabilities, including all unfulfilled commitments of the company.
  - b. Books and Records of the company, its accounting system and internal controls.
  - c. financial statements, tax computations, recent management accounts, forecasts and cash flow projections.
16. Consider notifying all third parties which have business dealings with the company on the appointment of Receiver, including the following:
- a. employees of the company and trade union, if any
  - b. company's bankers
  - c. insurance companies
  - d. all known creditors/suppliers, if necessary

- e. auditors, solicitors and other professional advisers
  - f. debtors
17. Prepare Notice to all staff that every invoice, letter, order and document bearing the company's name should indicate that the Receiver has been appointed. Advise staff that no purchase orders should be made without the approval of the Receiver. [Section 187(l) ]
  18. Review the adequacy of insurance coverage for the charged assets and ensure that the Receiver's interest is noted on all policies.
  19. Arrange to freeze all bank accounts and stop unpresented cheques. Open a bank account or accounts as necessary in the name of "XYZ Sdn Bhd - In Receivership" with appropriate arrangements for signatories.
  20. Determine all prior and subsequent charges registered over the company's assets. In respect of prior charges, obtain the chargees' consent/agreement to allow the Receiver to deal with the charged assets in order that the charged assets could be realised expeditiously and cost effectively.
  21. If a petition to wind up the company has been presented, consider obtaining legal advice on the next course of action.
  22. Take control of all keys to the company's premises, stores, safes, filing cabinets and vehicles and prepare a schedule of all persons to whom keys are re-issued.
  23. Take control of all Books and Records, particularly documents of title and other documents of value. Ensure that the company's seal and statutory books are held in safe custody.
  24. Take steps to obtain control of all other known assets of the company and ensure their security.
  25. Consider need to review all inward deliveries of goods and all outward deliveries of goods, other than for cash sales until the decisions on future trading have been ascertained.
  26. Arrange for control of all incoming and outgoing mail.
  27. Open Receivership accounting records e.g. an analyzed cash-book, petty cash, etc., which should provide adequate details transacted by Receiver, using the 'cash' basis of recording.
  28. Steps must be taken to differentiate between the two periods i.e. before Receivership and in Receivership. This will include commencing new sequences of numbers for all dispatch notes, invoices, orders etc.
  29. Review the Statement of Affairs as at the date of appointment prepared by the company (Refer to paragraph 15 above) and prepare schedules/working papers as appropriate to provide the information for the review and record the decisions taken. The schedules should cover:

- a. insurance
- b. security
- c. Books and Records
- d. employees
- e. cash in hand and at bank
- f. receivables
- g. property, plant and equipment
- h. investments
- i. creditors, differentiating preferential, secured and unsecured creditors
- j. commitments and contingencies of the company

## Reporting to Debenture Holder and Compliance with other Statutory Requirements

- 30. Discuss with debenture holder as to the timing, frequency and details of reporting required. Paragraphs 35 to 39 may be used for guidance purposes.
- 31. Within 2 weeks of being appointed, forward an initial report to the debenture holder. The report should cover the following:
  - a. actions that have been completed to take control of company, e.g. notification to insurance companies and employees, opening of bank accounts, etc.
  - b. problems encountered in taking control, if any.
  - c. timing for second comprehensive report.
- 32. Within four to six weeks of being appointed, a comprehensive report should be ready to be sent to the debenture holder. The report should contain:
  - a. brief summary of the business, its recent history including events leading to the appointment of the Receiver;
  - b. Receiver's strategy for the conduct of the Receivership and reasons for selecting the strategy;
  - c. potential problem areas and their likely effect on distributions together with the steps taken to deal with them;

- d. major decisions taken by the Receiver, if any;
  - e. a Statement of Assets and Liabilities highlighting the asset coverage for the secured creditor and the forced sale valuations;
  - f. a detailed profit and loss account and comments on anticipated cash flow, together with forecasts containing as much details as possible if the debenture holder is requested to provide finance to the Receiver;
  - g. the likely timing and extent of the distribution to the secured creditor;
  - h. the timing of future reports and contents of these reports; and
  - i. details of the Receiver's remuneration and costs-to-date.
33. Subsequent reports should be sent to the debenture holders at least once a month. They should include:
- a. Receiver's receipts and payment accounts.
  - b. updated estimates of realisations.
  - c. problems and potential problems including strategy changes, if necessary.
  - d. updated Receiver's remuneration and costs-to-date.
34. Maintain regular communication with the debenture holder to advise on progress of the Receivership.
- However, the Receiver should not seek or take instructions from the debenture holder to the extent that he portrays himself as agent to the debenture holder as the Receiver is the agent of the company.
35. Ensure that the Account of Receipts & Payments by Receiver is prepared every six months, commencing from the date of his appointment and is filed with SSM within one month after the expiration of each period. [Section 190(l) -Form 63]

## Realisation of Assets

36. Depending on the method of realising the assets under charge, as determined in the Receivership Strategy, make necessary arrangements to effect the realisation, e.g. independent valuations, memorandum of sale, advertisement for sale of business/ assets.

## Receivership under Fixed Charge

37. Determine the liability to the debenture holder under the fixed charge. Where applicable, a letter of redemption sum should also be obtained.
38. Distribute the proceeds from the assets under fixed charge to the debenture holder in accordance with the provisions of the charge document which normally may be in the following order:
  - a. cost and expenses associated with the realisation of the assets.
  - b. remuneration of Receiver.
  - c. liability to secured creditors that rank in priority to the charge held by the debenture holder. Take note of the provision under Section 31 of the Employment Act 1955 which accorded priority of wages as defined therein over that of a secured creditor.
  - d. amount due to debenture holder under the charge.

## Receivership under Floating Charge

39. Ensure all liabilities (including but not limited to those under Section 191 read together with Section 292 of the Act.) that rank in priority to the debenture holder's charge are met in full prior to any distribution to the debenture holder.
40. Seek legal advice (if required) as to the priority of payments when making any distributions out of floating charge realisations. The claims that generally have priority over the debenture holder are set out in Section 191 (read together with Section 292) as follows:
  - i. all wages and salary including allowances or reimbursements under a contract of employment not exceeding the amount of RM1,500 in respect of services rendered by the employees within a period of four months before the date of appointment of Receiver;
  - ii. remuneration payable for unutilised annual leave accrued before the date of appointment of Receiver; and
  - iii. all amounts due in respect of EPF contributions payable during the 12 months before the date of appointment of Receiver.

The Receiver should also take note of Section 292 (3) and 292 (5) as regards the claims of other preferential creditors and Section 21(4)(c) of the Workmen's Compensation Act 1952 as regards the amounts due in respect of workmen's compensation.

41. Before making any payments to the employees in respect of their preferential claims, EPF, and compulsory deduction of employees' income tax must be deducted from the amount payable to each employee.
42. Subject to paragraph 44, in respect of the amounts of contributions to EPF due in the 12 months prior to the date of appointment of Receiver,
  - a. obtain confirmation of liabilities from EPF and agree on the sum; and
  - a. settle the agreed liability and obtain confirmation from the relevant body that no further claims exist.
43. Review order books, purchase journal, creditors files etc. to ensure that all known liabilities (including administrative costs e.g. telephone, electricity, rental etc.) incurred by the Receiver have been paid or provided for.
44. Ensure sufficient funds are withheld to pay Receiver's remuneration and costs.
45. Determine the balance available to the preferential creditors in relation to the floating charge.
46. Distribute the balance funds available to the debenture holder after payment of or provision for items stated above.

## Receivership under both Fixed and Floating Charge

47. Ensure appropriate apportionment of costs and realisation between fixed and floating charge.
48. Determine the funds available to the debenture holder under fixed charges.
49. Determine the distribution under floating charge having regard to paragraphs 43 to 50.

## Completing the Receivership

50. There are many circumstances which may complete a Receivership. Generally, if one of the following circumstances occurs, a Receivership may cease:
  - a. The debenture holder may be paid out and the Receiver hands back control of the company to the directors who then continue the company's normal operations.
  - b. The debenture holder is paid out and the Receiver hands over control to another Receiver appointed by a lower ranking secured creditor.
  - c. The debenture holder is paid and the Receiver hands over control to an Official Liquidator, if one is appointed.

- d. Realisation is insufficient to pay out the appointor. In this case, the Receiver would be discharged (and a liquidator may eventually be appointed).
51. Prepare schedule of assets to be handed over to the directors or liquidator or other chargeholder (whichever is appropriate), if there are surplus assets available after the debt of the debenture holder has been paid in full including the Receiver's remuneration and costs.
  52. Determine which is the appropriate party to receive the surplus assets and pass control to that party once all the requirements in ceasing to act has been complied with and notify any other interested parties as to when the assets are to be passed over.
  53. Obtain a written receipt from the party receiving the assets accepting responsibility for those assets.
  54. If there are no surplus assets available consider notifying the liquidator, other chargeholder, general creditors and the directors as to the position.
  55. Where practicable, assist the directors in keeping all Books and Records properly written up to the date of ceasing to act.
  56. Hand over the Books and Records to the liquidator or the directors of the company if no liquidator has been appointed.
  57. Obtain written acknowledgement from the directors of the company or liquidator as the case may be, for the Books and Records.
  58. On upliftment of Receivership, consider notifying the general creditors of the fact.
  59. Regardless of the situation, the Receivership working papers remain the property of the Receiver.
  60. Consider sending a notification of Receiver ceasing to act to all third parties which have business dealings with the company, if necessary.
  61. Prepare Final Report to the appointor on the conduct of the Receivership which will include a proposed final accounting for the Receivership.
  62. Upon the Receiver ceasing to act, attend to the following statutory requirements:
    - a. Lodge Notice of Ceasing to Act within seven days of ceasing to act. [Section 186(2) - Form 60]
    - b. Lodge final Statement of Receipts and Payments within one month of ceasing to act. Section 190(1) - Form 63]

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