MALAYSIAN INSTITUTE
OF ACCOUNTANTS

INSOLVENCY GUIDES

Preamble

The Insolvency Guides (Guides) are issued by the Malaysian Institute of Accountants (MIA) for the reference of insolvency professionals in Malaysia, based upon the recommendation of the MIA-MICPA Joint Insolvency Practice Committee.

The Guides are framed as general practices with the objective of promoting consistency and quality in insolvency practices. However, MIA recognises that there may be instances where specific circumstances encountered by a practitioner may render it inappropriate for a particular Guide to be followed.

The Guides are prepared from the perspective of an Insolvency Practitioner operating under the laws and regulations of and practices in Malaysia. The Guides are not intended as a definitive interpretation of the prevailing laws and regulations and MIA disclaims liability for any loss or penalty suffered, or claims sustained, by any member as a consequence of following the general practices set out in the Guides.

Members performing insolvency services in Malaysia shall adhere to relevant laws and regulations, including the MIA By-Laws (On Professional Ethics, Conduct and Practice). The Guides do not form part of the Institute's By-Laws (On Professional Conduct and Ethics). If there is any discrepancy, conflict or inconsistency between any provision in the Guides and any provision of the laws, regulations or MIA By-Laws, the laws, regulations or MIA By-Laws shall prevail to the extent of the discrepancy, conflict or inconsistency.

The Guides are not prescriptive in nature and are for guidance only. However, in determining whether the member has acted properly in the performance of his respective duties, MIA, through the appropriate committees, may take into consideration the member's application of these practices as contained in the Guides, in addition to the relevant prevailing laws and regulations.

The Guides supersede and replace all prior Insolvency Guidance Notes (where applicable) issued by MIA.

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Definitions

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 these Guides:

"**Act**" means the Companies Act 2016.

"**Books and Records**" means any registers, indices, minute books, accounts, accounting records, books of account, letters, agreements, documents, papers and any other record of information of any kind (however compiled, recorded or stored), including but not limited to books within the meaning of Section 2 of the Act.

"**By-Laws**" means the MIA By-Laws (On Professional Ethic, Conduct and Practice) [Amended as at 8 December 2022] and any subsequent amendments from time to time.

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

"**Debenture**" carries the meaning in Section 2 of the Act and includes debenture stock, bonds, *sukuk*, notes and any other securities of a corporation whether constituting a charge on the assets of the corporation or not.

"Form or Forms" means the forms determined by the Registrar.

"**Guides**" means the Insolvency Guides issued by the Malaysian Institute of Accountants.

"**Inducements**" are as defined or prescribed in Section 250.4 of the By-Laws.

"**Insolvency Appointments**" means any form of appointment of an Insolvency Practitioner(s), including appointment as Receiver(s), Liquidator(s), Nominee(s) and / or Judicial Manager(s).

"**Insolvency Practitioner**" carries the meaning in Section 2 of the Act being a person who is an approved liquidator other than the Official Receiver.

"**Institute**" means the Malaysian Institute of Accountants.

"**Judicial Manager**" means any person who is qualified to be appointed under Part III, Division 8, Subdivision 2 of the Act and who is not the auditor of the company.

"**Liquidator**" means interim Liquidator(s) and / or Liquidator(s) appointed under the provisions of Part IV, Division 1 of the Act.

"Member" means a professional accountant who is registered with the Institute in accordance with the Accountants Act as a chartered accountant, licensed accountant or an associate member. Where a member is in public practice, this definition would include the practice entity and the partners and personnel of the entity.

"**Nominee**" or "**Supervisor**" means any person who is qualified to be appointed under Part III, Division 8, Subdivision 1 of the Act.

"Official Receiver" carries the meaning in Section 2 of the Act being the Director General of Insolvency, Deputy Director General of Insolvency, Directors of Insolvency, Deputy Directors of Insolvency, Senior Assistant Directors of Insolvency, Assistant Directors of Insolvency, Insolvency officers and any other officer appointed under the Bankruptcy Act 1967.

"**Receiver**" means a Receiver or a Receiver and Manager of any part of or all of a company's property and undertakings appointed under the provisions of Part III, Division 7, Subdivision 3 of the Act or by way of any other Court Order.

"**Receiver's Account**" means the accounts of receipts and payments by Receiver to be prepared/lodged pursuant to Section 391(1) of the Act.

"**Registered Office**" means the registered office of a company within the meaning of Section 2 of the Act.

"Registrar" means the Registrar designated under subsection 20A(1) of the Companies Commission of Malaysia Act 2001.

"**Rule or Rules**" means the Companies (Winding-Up) Rules 1972.

"**Section**" means the Section or Sections of the Act, unless otherwise stated.

Note:
Words in the masculine include the feminine and vice versa. No regard for gender is intended by the language in this Guide.

GENERAL (G)

G1: MINIMUM STANDARDS OF PRACTICE FOR INSOLVENCY PRACTITIONERS

Introduction

1. An Insolvency Practitioner (IP) owes duties to the stakeholders, including those who retain or employ him, to the profession of which he is a member, to fellow IPs and, where relevant, to his partners. In carrying out his duties, he should remember at all times the responsibility which has been placed upon him.

2. The IP should demonstrate that he has administered his practice in a manner such as to satisfy a reasonable person's view as to his proper conduct.

3. The IP owes certain duties which arise specifically from his appointment as an IP in accordance with the Companies Act 2016 or Companies Act 1965 (as the case may be) and / or others which arise from his appointment by the Court.

Practice Organisation

4. The organisation of work within the office of each IP will vary and in part reflects the size of his practice as well as the size of the tasks with which he is required to deal. The IP should have policies, procedures and systems in place to ensure good and effective service. Broad outlines of what is expected from the IP are set out in the following paragraphs.

Ethics

5. Before accepting any appointment, the IP should consider the implications of such an appointment, based on the relevant provisions in the Institute's By-Laws (On Professional Conduct and Ethics). Clear evidence of the matters considered and the conclusion reached should be recorded within the IP's papers.

6. The IP should ensure that the fundamental principle of objectivity created by any conflicts of interest is not compromised. The IP should ensure conflict checks are cleared locally and globally (if applicable) and such evidence should be kept within the IP's records.

7. The IP and his staff are to comply with the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 requirements and lodgment of the Data & Compliance Report (where required).

Resources

8. The IP should not accept an appointment unless he is satisfied that he has sufficient resources to perform his duties. He should be able to demonstrate the thinking behind his allocation of resources to each aspect of the cases he administers.

The word “resources” include acquired expertise and ability to arrange external assistance (from other professionals for works which the IP is not qualified to do himself), if necessary.

The IP should only delegate work to staff with the appropriate experience, competencies and qualifications.

The IP must have sufficient staff and / or expertise before accepting any insolvency appointment to ensure that the principle of professional competence and due care is not compromised.

Knowledge and Experience

9. In order to ensure that the principle of professional competence and due care is complied with, an IP should ensure that there are sufficient resources to undertake an engagement and that he and his staff have sufficient experience and knowledge. The IP has the continuing duty to ensure that he and his personnel keep up to date with changes in legislation and good insolvency practice to ensure that a client receives competent professional services based on current developments in practice, legislation and techniques.

   The IP and his staff should have access to all the relevant Acts, supporting Statutory Instruments, case laws, Insolvency Guides and suitable reference books.

Joint Appointments

10. IPs are jointly and severally responsible to third parties for the actions of co-appointees. Where there is a joint appointment with an IP from another firm, the division of duties should be agreed at the commencement of the assignment and should be clearly recorded in an exchange of letters.

11. IPs should periodically keep each other updated on the progress of their respective duties to ensure the assignment is moving in the agreed direction.

Case Control

12. The IP should promote transparency in each case by maintaining adequate records (such as correspondences, status / progress reports and documentation for major decisions) for the methods by which each case is controlled and progressed through both commercial decisions and legal requirements.

13. The IP should maintain adequate records to show that the appropriate assessments and reviews have been carried out to satisfy the legal requirements of reporting to Suruhanjaya Syarikat Malaysia and if applicable, the Court and relevant authorities and also identify assets to be realised and liabilities to be paid.

14. The IP should be able to demonstrate that he has a work organisation which will control and ensure an adequate review of correspondences, other communications and transactions both within his own office and, if appropriate, at the separate location of a case.

Funds

15. The IP should maintain each case as a separate entity with separate accounting, banking, cash control and timely investment procedures, although these may be within the overall office work organisation procedure. No funds or assets of cases should be intermingled with those of the IP or with other cases. Where funds are received which are clearly the property of third parties, care should be taken to ensure that these are separately maintained.

Remuneration

16. The IP should ensure that prior approval has been obtained from the appropriate party(ies) (i.e., Committee of Inspection, creditors, the Court or members, as the case may be) for the payment or part payment of his proper remuneration before he withdraws such funds from any case.

17. Remuneration and expenses incurred by the IP in the course of carrying out his work are to be paid out of the assets of the company.

18. Furthermore, the IP should have sufficient documents and / or details of work done and be prepared to justify the amount of any remuneration sought. Relevant parties should be informed as to any out-of-pocket expenses to be charged by the IP. Such out of pocket expenses must also be substantiated.

Books and Records

19. The IP should ensure that he is able to comply with all the requirements of his office, with particular regard to the maintenance and retention of the Books and Records.

Advice from Other Professionals

20. Where the IP's qualification(s), own knowledge and experience of matters outside the basic duties of an insolvency office holder is insufficient to deal with any professional and commercial aspects of his responsibilities, he should take advice from suitable qualified members of appropriate professions. The IP should retain details of the advice, evidenced in writing.

21. The IP should evaluate whether such reliance is warranted and factors such as reputation and expertise of such parties should be considered.

22. Fees / payments to such parties must be substantiated and should take into consideration factors such as the experience of the professional and value of work undertaken.

Insurance

23. The IP should obtain appropriate insurance cover in respect of the loss of insurable assets or risks relating to the affairs of the insolvency that the IP may reasonably anticipate. If not, he should be able to demonstrate clear reasons why such cover was not obtained.

References

24. IPs should pay due attention / refer to the Institute's By-Laws and Guides as well as other standards which may be applicable to members, including the International Standard on Quality Control 1 / International Standard on Quality Management.

G2: PROFESSIONAL CONDUCT AND ETHICS IN INSOLVENCY PRACTICE

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1. This Guide provides guidance on the professional conduct expected of members in insolvency practice.

2. Although this Guide does not form part of the Institute's By-Laws (On Professional Ethics, Conduct and Practice), it relates to the practice and conduct in insolvency appointments and administrations under the Companies Act 2016 (Act) and other statutory legislation. Nonetheless, the By-Laws require members to exhibit the highest standards of ethics, professionalism and professional conduct that are expected of the profession in view of the professional responsibilities and duties owed to their clients, employers, the authorities and the public.

3. In assuming insolvency roles, the preservation of objectivity needs to be protected and demonstrated by the maintenance of a member's independence from influences which could affect his objectivity. Before a member accepts or carries out those roles, which are detailed in the guidance which follows, the member must not only be satisfied as to the actual objectivity which he can bring to his judgment and decisions, but must also be mindful of how his acceptance and conduct will be perceived by others.

   This Guide makes reference to and should be read together with the By-Laws' concept of the fundamental principles of ethics for professional accountants. Members are advised to constantly update themselves with the provisions of the By-Laws.

Solicitation of Insolvency Appointments

4. While recognising the benefits of competition and the need for promotion, members should exercise discretion in the manner and degree by which they seek an appointment and should be careful to avoid the creation of obligations to or by those who are responsible for an appointment.

5. Members' attention is drawn to the provisions of the Malaysian Anti-Corruption Commission Act 2009 and By-Laws Section 250 in relation to inducements.

6. Members are required to comply with relevant laws and regulations such as those related to bribery and corruption that prohibit the offering and / or accepting of inducements. Where appropriate, members should take actions / safeguards to mitigate any potential threats to the member(s)' compliance with the fundamental principles of the By-Laws.

7. In addition to any statutory consequences which may result, soliciting for an insolvency appointment in a manner amounting to harassment, or otherwise so as to represent a material departure from this Guide, may render a member liable to be referred to the Investigation Committee of the Institute.

8. A member may be requested by a creditor to consent to act with regard to an insolvency appointment in competition with another member who has already commenced insolvency proceedings at the

request of the company or its directors. It is fundamental that creditors have the right to appoint the member of their choice but in those circumstances:

a. There should be no garnering of or soliciting for proxies by members either with or without threats or inducements; and
b. Members should act professionally towards each other and act, and be seen to act, in the creditors' interests rather than their own.

Acceptance of Insolvency Appointments

General

9. Insolvency Practitioners (IPs) are required to comply with the By-laws, including fundamental principles and apply the conceptual framework set out in By-Laws Section 120 to identify, evaluate and address threats.

10. The following paragraphs refer to specific situations in which a member may not properly accept insolvency appointments.

11. In situations other than those dealt with below and where a member of the IP's practice or a current employee of the practice has previously acted in another capacity, a member should only accept office after giving careful consideration to the implications of acceptance in all the circumstances of the case, and satisfying himself that objectivity is unlikely to be compromised, by a prospective conflict of interests or otherwise. If he remains in doubt as to his position, the member should seek advice from the Institute via its Secretariat.

12. The attention of members is drawn to the statutory disqualifications on acting as IPs in Section 373 and / or Section 433 of the Act.

13. The possibility of a conflict of interest should be carefully considered prior to any member consenting to act or accepting an insolvency appointment. Conflicts, actual or potential, should be avoided.

a. Pre-Appointment

Where it is apparent at the time a member is approached to consent to act, that there will be a conflict of interest if consent is given, then the member should not consent to act. When a member is requested to consent to act and his review of the information available is such that he forms an opinion that a conflict of interest may arise during the appointment or administration, consent to act should not be given unless all relevant parties (including the Court where appropriate) are advised of the possibility of a conflict arising, and they do not object to the appointment.

b. Post-Appointment

If, during the course of an appointment or administration, a conflict or apparent conflict arises, the member should, as soon as is practicable, fully disclose details of the matter to the appointor, Committee of Inspection, creditors, the Court or other appropriate body, depending upon the form of administration and the circumstances.

14. A member who is invited to accept an insolvency appointment jointly with another member should be guided by similar principles to those set out in relation to sole appointment. For the purpose of joint appointments, members are advised to refer to the Insolvency Guide (IG) G1: Minimum Standards of Practice for IPs. Where a member is specifically precluded by the guidance herein from accepting an insolvency appointment as an individual, a joint appointment will not render the appointment acceptable.

15. Where there has been a material professional relationship with a client, no member or employee of the practice should accept appointment as Liquidator, Receiver, Nominee and / or Judicial Manager of the client, if the client is insolvent.

    Where the client is solvent, such appointment should only be accepted after careful consideration being given to all the implications of acceptance in the particular case. For example, a member should satisfy oneself that he is, at the time of appointment, not aware of any circumstance that the directors' declaration of solvency of the client will not be substantiated during the appointment.

16. A material professional relationship with a client arises where a practice or a member is carrying out or had during the past two years carried out material professional work, whether of a continuing nature or not, for that client. Material professional work includes the following:

    a. Where a practice or person has carried out, or has been appointed to carry out audit work for a company or individual to which the appointment is being considered; or
    b. Where a practice or person has carried out one or more assignments, whether of a continuing nature or not, of such overall significance or in such circumstances that a member's objectivity in carrying out a subsequent insolvency appointment could be or could reasonably be seen to be prejudiced.

17. In forming views as to whether an existing material professional relationship would result in potential conflict of interest, one needs to look at:

    a. The materiality of such assignments in the context of the client's overall activities;
    b. Possibility that any subsequent IP may need to make enquiries into and take action over such assignments; and
    c. Existing or previous relationships with members or firms with which they are, or have been associated with that may affect or appear to affect objectivity, including relationships whereby a member or firm are held out by name, association or other public statements as being part of a national or international association.

18. A material professional relationship with a client includes any material professional relationship with companies or entities controlled by that client or under common control, where the relationship is material in the context of the company or individual to whom the appointment is being sought or considered.

19. A material professional relationship may also arise where a practice or member has carried out professional work for any director of a company of such nature that a member's fundamental principles per the By-Laws in carrying out a subsequent insolvency appointment in relation to that company could be or reasonably be seen to be prejudiced.

20. A member should take reasonable steps prior to his acceptance of any insolvency appointment to ascertain whether any of the above work has been performed.

21. A material professional relationship may not arise:

    a. Where the relationship is as a result of an appointment by the firm of a member or at the application of a creditor or a third party having an actual or potential financial interest in the company to investigate, monitor or advise on its affairs provided that:
        i. There has not been a direct involvement by a member in the management of the company or business; and
        ii. The firm of a member has its principal client relationship with the creditor or third party but not the company or proprietor of the business, and the company or the proprietor of the business is aware of this.
    b. Where the professional relationship arises from the appointment of a member by a Court to investigate, monitor or advise on the company's affairs and such appointment is not actively sought having due regard to the preceding paragraphs.

Groups, Associated and Family Connected Companies

22. Members should be particularly aware of the difficulties likely to arise from the existence of inter-company transactions or guarantees in groups, associated or family-connected company situations. Acceptance of an insolvency appointment in relation to more than one company in the group or association may raise issues of conflict of interest. Nevertheless it may be impracticable for a series of different IPs to act on such circumstance. A member should not accept multiple appointments in such situations unless he is satisfied that he is able to take steps to minimise problems of conflict and that his fundamental principles of the By-Laws are, and are seen to be maintained.

23. When two or more practices merge, members of the merged practice become subject to common ethical constraints in relation to accepting new insolvency appointments to clients of either of the former practices. However, existing appointments which are rendered in apparent breach of this Guide by such merger need not be determined automatically, provided that a considered review of the situation by the practice discloses no obvious and immediate conflict. Otherwise, a member should endeavour to terminate the appointment as soon as possible.

24. Where a member has, in any former practice, undertaken work upon the affairs of the company in a capacity which is incompatible with an insolvency assignment of his new practice, he should not personally work or be employed on that assignment, save in the case of an employee of such junior status that his duties in the former practice did not involve the exercise of material professional judgment or discretion.

25. A member is encouraged not to accept an insolvency appointment in relation to a company where any personal connection with a director or former director may impair or reasonably appear to impair the member's fundamental principles of the By-Laws. The attention of the member is also drawn to the definitions relating to persons 'connected' with a director in Section 197 of the Act.

26. A member should, in general, decline to accept an insolvency appointment in relation to a company if he has a personal, close and / or distinct business connection with an appointor as it may impair or appear to impair the member's objectivity.

27. However, it is not considered likely that a "close and distinct business connection" would normally exist between an IP and for example, a clearing bank or major financial institution.

Other Potential Conflicts of Interest

Purchase of Assets of a Company or Other Entity

28. A member appointed to any insolvency appointment in relation to a company or other entity shall not himself directly or indirectly acquire any of the assets of the company or other entity. The member's employees and / or representatives for the insolvency appointment shall also refrain from participating in the sale of or acquiring (directly or indirectly) assets of the company or other entities.

29. A member shall also not acquire nor knowingly permit any family members and close relatives of his, his employees and / or representatives, to directly or indirectly acquire any of the assets of the company or other entity, without prior approval of the Court or creditors to whom full facts must be disclosed.

30. An indirect purchase of assets of the company by a member, his employees and / or representatives include purchase via an individual or a company or an entity in which a member, his employees and / or representatives or close relatives of his, his employees and / or representatives has substantial interests and / or exercise significant influence over the management of the company or entity.

31. Where a contract for purchase of asset(s) is already in existence between the company or other entity and an employee, representative or close relative of the member, guidance should be sought from the Institute as to the propriety of accepting such an insolvency appointment.

Conversion of Members' Voluntary Winding Up to Creditors' Voluntary Winding Up

32. Where a member has accepted appointment as Liquidator in a members' voluntary winding up and is obliged to summon a creditors' meeting under Section 447 of the Act because it appears that the company will be unable to pay its debt in full within the period stated in the directors' declaration of solvency, the member's continuance as Liquidator under a members' voluntary winding up will cease.

However:

a. If the company will not be able to pay its debts in full and the member has previously had a material professional relationship with the company, he should not accept nomination under the creditors' winding up.
b. If the company will not be able to pay its debt in full and the member has had no such material professional relationship, he may accept nomination by the creditors and continue as Liquidator with the creditors' approval, subject to giving careful consideration as to the implications, etc.
c. If the member believes that the company will eventually be able to pay its debts in full he may accept nomination by the creditors and continue as Liquidator. However, if it should subsequently appear that this belief was mistaken, the member must offer his resignation, and may not accept re-appointment if he has previously had a material professional relationship with the company.

Insolvent Liquidation following Appointment as Receiver

33. Where a member is, or in the previous two years has been a Receiver of the company or any of its assets, no member of the practice should accept appointment as Liquidator of the company in an insolvent liquidation. This restriction does not apply where the previous appointment was made by the Court.

34. However, before a Court appointed Receiver accepts subsequent appointment as Liquidator, he should give careful consideration as to whether his objectivity could be open to question and if so, the appointment should be refused.

G3: REMUNERATION OF INSOLVENCY OFFICE HOLDERS

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1. The Insolvency Practitioner (IP) is entitled to receive remuneration in respect of work performed in an engagement.

2. The IP is entitled to withdraw funds from the engagement once appropriate approval has been obtained for the payment or part payment of his remuneration.

Liquidation Engagements

Court Winding Up

3. An interim Liquidator other than the Official Receiver shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is determined by the Court.
[Section 479(1) of the Companies Act 2016 (Act)]

4. In a winding up by the Court, a Liquidator other than the Official Receiver shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is determined:

   a. by agreement between the Liquidator and the Committee of Inspection (COI), if any;
   b. failing such agreement or where there is no COI, by way of a creditors' resolution passed by a majority of not less than three-fourths in value and one-half in number of the creditors present and voting at a meeting of creditors convened by the Liquidator; or
   c. failing either of the above, by the Court.

   [Section 479(2) of the Act]

5. If there is no COI, the Liquidator's remuneration shall, unless the Court shall otherwise order, be based on the scale fees and percentages for the time being payable on realisations and distributions set under Table C of the Companies (Winding-Up) Rules 1972 (Rules).
[Rule 142(3)]

   This Rule shall only apply to a Liquidator appointed by the Court. However, approval is still required to be sought in accordance to Section 479(2) of the Act.

Creditors' Voluntary Winding Up

6. The COI, or if there is no such COI, the creditors may fix the remuneration of the Liquidator.
[Section 450(5) of the Act]

7. Notwithstanding the above, in the event of any disagreement with respect to the Liquidator's remuneration, any member or creditor or the Official Receiver or the Liquidator, as the case may be, shall apply to the Court for a review of the Liquidator's remuneration. The Liquidator shall provide sufficient and clear justification on his remuneration.
   [Section 454(2) of the Act]

Members' Voluntary Winding Up

8. The determination of the Liquidator's remuneration is based on the contractual arrangement between the Liquidator and the company to be placed under members' voluntary liquidation. The Liquidator should agree to the terms of the engagement, the basis on which the remuneration is charged and the services covered by such remuneration. Any variation and / or additional fees should be agreed to by members, being the relevant stakeholders.

Receivership Engagements

9. For Court appointed engagements, the remuneration of the Receiver is fixed by the Court and the Receiver has a lien for his costs and remuneration over the assets which are subject to the receivership[1].

10. For privately appointed engagements, the determination of the Receiver's remuneration is based on the contractual arrangement between the parties. The Receiver should agree to the terms of the engagement, the basis on which the remuneration is charged and the services covered by such remuneration.

Corporate Voluntary Arrangement

11. For Corporate Voluntary Arrangement engagements, the determination of the Nominee's and / or Supervisor's remuneration is based on the contractual arrangement between the parties. The Nominee and / or Supervisor should agree to the terms of the engagement, the basis on which the remuneration is charged and the services covered by such remuneration.

Judicial Management

12. For Judicial Management engagements, the salaries or remunerations shall be by way of percentage or otherwise as is determined:

    a. by agreement between the Judicial Manager and the company or creditors, as the case may be;
    b. failing such agreement, by a resolution passed at a meeting of creditors by a majority of not less than seventy-five per centum in value and of the creditors present in person or by proxy and voting at the meeting and whose debts have been admitted to vote; or
    c. failing either of the above, by the Court.

    [Section 407(4) of the Act]

1 Mellor v. Mellor [1992] 1 WLR 517; [1993] BCC 513

General

13. In all cases, the IP should have sufficient documents and / or details of work done and be prepared to justify the amount of any remuneration sought as well as the basis on which the remuneration is sought (e.g., fixed fee, time costs (whether retrospective or prospective), percentage, contingent, etc.).

14. Relevant parties should be informed as to any out-of-pocket expenses to be charged by IPs and be paid out of the assets of the company. Such out-of- pocket expenses must also be substantiated.

G4: THE HANDLING OF FUNDS IN A LIQUIDATION ADMINISTRATION

Introduction

1. This Guide provides guidance for the use of members in connection with formal insolvency appointments and administrations under the Companies Act 2016 (Act) and other statutory legislation.

Handling of Funds

2. All funds of a company in liquidation shall be deposited into a bank account opened in the name of the company.

3. Within ten calendar days of receiving any money, the Liquidator shall deposit the money into the relevant company's liquidation bank account, in accordance with Section 488 of the Act.

4. The Liquidator should ensure that records are maintained to identify the funds (including any interest earned thereon) and other assets of each case / company for which they have responsibility as a Liquidator. Such funds and assets of each company must be maintained separately from those of the Liquidator or his firm. The following principles are to be adhered to:

   a. the Liquidator is not entitled to combine the company's liquidation bank account(s) with any other account or exercise any right to set off the money in the account with any other account, including those of the Liquidator or his firm; and
   b. interest payable on the money in the company's liquidation bank account(s) must be credited to that account(s).

5. Where the same Liquidator has been appointed over a number of companies within a group, the Liquidator should take cognisance that each company is a separate legal entity. Accordingly, a separate bank account(s) should be maintained for each of those companies.

6. Where funds are received by cheque, all payments to the company in liquidation should be in the name of the company and not the Liquidator or his firm. However, if payments to the company are nevertheless made out as payable to the Liquidator or his firm, such cheques may be cleared through an account maintained in the name of the Liquidator or his firm. A company's funds deposited into any account(s) in the name of the Liquidator or his firm should be paid out to the company's liquidation bank account to which they relate as soon as possible.

7. Cash balances in excess of the amount, in which the Committee of Inspection or the Liquidator opines to be sufficient for the needs of the current assignment, are to be invested in securities issued by the Government of Malaysia or placed in interest-bearing accounts with any banks.
   [Section 507 of the Act]

8. Liquidators' attention is drawn to Section 508 of the Act where a Liquidator has in his hands or under his control:

   a. any unclaimed dividend or other moneys which have remained unclaimed for more than six months from the date when the dividend or other moneys became payable; or
   b. after making final distribution, any unclaimed or undistributed moneys arising from the estate of the company,

   the Liquidator shall forthwith pay those moneys to the Official Receiver to be placed to the credit of the Companies Liquidation Account.

9. Members' attention is drawn to the requirements to be in compliance with the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001.

G5: PREPARATION OF STATEMENT OF RECEIPTS AND PAYMENTS BY INSOLVENCY PRACTITIONERS

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- Estimated value of assets (Note 9 of Receiver's Account)

Liquidation – Preparation of the Liquidator's Account

- Account of Receipts and Payments
- Particulars of Rate of Dividends and Dates Declared
- Particular of Dates and Rate per Share of Return of Surplus Assets Payable to Contributories
- Statements of the Position in the Winding Up
- Statutory Declaration Verifying the Liquidator's Account and Statement

Other Matters in Relation to Filling of the Receiver's Account and / or the Liquidator's Account

- Multiple Appointments in Cases of Receivership
- Direct Payments to Third Parties

Appendix 1

Appendix 2

Introduction

1. This Guide deals with the preparation and filing of Statement of Receipts and Payments by Insolvency Practitioners involved in the liquidation and receivership assignments.

General Guidance

2. Every Receiver is required to lodge the receipts and payments on a six monthly basis and within 30 days from his ceasing to act as Receiver with the Registrar.
   [Section 391(1) of the Companies Act 2016 (Act)]

3. Every Liquidator is required to lodge the receipts and payments on a six monthly basis and within 30 days after the Liquidator ceases to act as a Liquidator with the Registrar and the Official Receiver. *[Section 514(1) of the Act]*

4. The prescribed Accounts of Receipts and Payments by the Receiver (the Receiver's Account) for the Receivership and the Liquidator's Account of Receipts and Payments and Statements of the Position in the Winding Up (the Liquidator's Account) for Liquidation are set out in the Registrar's website (https://www.ssm.com.my/Pages/Legal_Framework/Companies-Act-2016.aspx).

5. If more than one Receiver or Liquidator is appointed to act jointly, the Receiver's Account or Liquidator's Account shall be executed jointly by all the Receivers or Liquidators. If more than one Receiver or Liquidator is appointed to act jointly and severally, the prescribed forms may be executed by any one of the Receivers or Liquidators.

6. The Receiver or Liquidator must ensure that the information provided in the prescribed forms are accurate and reflect the true position of the affairs of the company.

7. Section 391(1) of the Act sets out the following:

   Every Receiver of the property of a company or of the property within Malaysia of any other corporation shall:

   a. within 30 days from the expiration of the period of six months from the date of his appointment and of every subsequent period of six months and within 30 days from his ceasing to act as Receiver, lodge with the Registrar a detailed account in the prescribed form showing:
      i. his receipts and payments during each period of six months, or where he ceases to act as Receiver, during the period from the end of the period to which the last preceding account related or from the date of his appointment, as the case may be, up to the date he ceased to act as Receiver;
      ii. the aggregate amount of those receipts and payments during all preceding periods since his appointment; and
      iii. where he has been appointed pursuant to the powers contained in any instrument, the amount owing under that instrument at the time of his appointment, in the case of the first account, and

at the expiration of every six months after his appointment and, where he has ceased to act as Receiver, and his estimate of the total value of all assets of the company or other corporations which are subject to that instrument.

b. before lodging the account, verify by affidavit all accounts and statements referred to in the account.

Penalty: Every Receiver who contravenes this Section commits an offence and in the case of a continuing offence, to a further fine not exceeding five hundred ringgit for each day during which the offence continues after conviction.
[Section 391(6) of the Act]

8. The disclosure of such information is to be made in the Receiver's Account.

9. Every Liquidator shall, within 30 days from the expiration of the period of six months from the date of the Liquidator's appointment and of every subsequent period of six months and in any case within 30 days after the Liquidator ceases to act as a Liquidator, shall immediately after obtaining an order of release (in the case of Court Liquidations), lodge with the Registrar and with the Official Receiver, an account of the Liquidator's receipts and payments and a statement of the position in the winding up and verified by statutory declaration in a manner as may be determined by the Registrar.

   Penalty: Fine not exceeding ten thousand ringgit and in the case of a continuing offence, to a further fine not exceeding five hundred ringgit for each day during which the offence continues after conviction.
   [Section 514(7) of the Act]

10. For members' and creditors' voluntary liquidation, the Liquidator shall lodge with the Registrar and with the Official Receiver a return of the holding of the meeting and of its date, with a copy of the Liquidator's account up to the date of the final meeting, within seven days from the meeting.
    [Section 459(3) of the Act]

Receivership - Preparation of the Receiver's Account

Receipts and Payments (Note 5 of Receiver's Account)

11. The Receiver has to ensure that all receipts and payments for the period reported have been recorded correctly and with appropriate details.

12. For this purpose, it would be good practice for the Receiver to prepare the bank reconciliation for the latest period prior to the preparation of the Receiver's Account and to account for all receipts or payments made between the date of the bank reconciliation and the reporting date of the Receiver's Account.

13. It would be good practice for the Receiver to make an early request to the bank to send the bank statement(s), e.g., within a week of the reporting date, to ensure timely preparation and lodging of the Receiver's Account.

Aggregate Receipts and Payments (Notes 6 and 7 of Receiver's Account)

14. This requires disclosure of the aggregate amounts of receipts and payments during all preceding period by the Receiver since his appointment.

15. Other than where the first Receiver's Account is being lodged, the amounts under Notes 6 and 7 must agree with the amounts previously reported. Any adjustments to the previous totals reported must be highlighted and explained in the period covered by the Receiver's Account.

16. The net difference between the total receipts and total payments as shown in Note 5 should be represented by actual funds available (e.g., balance in current account, fixed deposit, etc.).

17. Where there are funds held in foreign currencies which are not converted to RM after appointment, the receipts and payments of each foreign currency account should be set out separately.

An illustration showing the completion of Notes 5, 6 and 7 in the Receiver's Account is set out in Appendix 1.

Amount Owing under the Instrument (Note 8 of Receiver's Account)

18. It would be good practice to obtain written confirmations from the relevant lenders as to the updated amounts owing under the instruments as at the reporting date of the Receiver's Account.

Estimated Value of Assets (Note 9 of Receiver's Account)

19. The value of the assets should be reviewed each time the Receiver's Account is prepared to ensure it reflects the current estimated realisable value.

20. It is important that the Receiver be objective in his estimates of the value of the assets. It would be preferable to base the value on an independent professional valuation of assets, if available.

21. In the absence of any valuation, the Receiver may use prudent estimates so as not to overstate the value of the assets. The values stated therein should reflect the values to the best knowledge of the Receiver, to be realisable.

22. It may be necessary to consider including a note on whether the estimated value of all assets of the company subject to the instrument(s) had been arrived at after taking into account the cost of realisation and preferential payments as defined in Section 392 of the Act read in conjunction with Section 527 of the Act.

23. In instances where there are assets not currently in the hands of the Receiver e.g., assets held by a bailor, assets to which the titles are being contested, etc., the Receiver may wish to disclose the value of such assets separately, i.e., this value should be excluded from the estimated value of all assets of the company subject to the instrument(s).

Liquidation - Preparation of the Liquidator's Account

24. For the preparation of the Liquidator's Account, "the date of commencement of winding up" shall be:

    a. the date the special resolution was passed for members' voluntary liquidation;
    b. the date where the statutory declaration is lodged with the Registrar for a creditor's voluntary liquidation (where an interim Liquidator has been appointed before the resolution for voluntary winding up is passed at the creditors' meeting); or
    c. the date of the winding up order for a Court liquidation.

Account of Receipts and Payments

25. The Liquidator has to ensure that all receipts and payments for the period reported have been recorded in detail and correctly.

26. For this purpose, it would be good practice for the Liquidator to prepare the bank reconciliation for the latest period prior to the preparation of the Liquidator's Account, to account for all receipts and payments made between the date of the bank reconciliation and the reporting date of the Liquidator's Account.

27. It would be good practice for the Liquidator to request for the bank statement(s), e.g., within a week of the reporting date, to ensure a timely preparation and lodging of the Liquidator's Account.

28. This account requires disclosure of cumulative amounts of receipts and payments received / made by the Liquidator since his appointment.

29. Where there are funds held in foreign currencies which are not converted to Malaysian Ringgit (RM) after appointment, the receipts and payments of each foreign currency account should be set out separately.

    An illustration for filling up the receipts and payments for the Liquidator's Account is set out in Appendix 2.

Particulars of Rates of Dividends and Dates Declared

30. This section requires the disclosure of the rates and dates of dividends declared during the current reporting period and the alphabetical listing of creditors, their claims and whether the dividends have been paid or remained unclaimed as at the reporting date.

Particulars of Dates and Rate per Share of Return of Surplus Assets Payable to Contributories

31. This section requires disclosures in relation to returns to contributories similar to the disclosures for dividends to creditors. Surplus moneys are payable only after all are satisfied in full.

32. Where a Liquidator has in his hands or under his control:

    a. Any unclaimed dividends or other moneys which have remained unclaimed for more than six months from the date when the dividends became payable or other moneys became payable; or
    b. After making the final distribution, any unclaimed or undistributed moneys arising from the estate of the company,

    the Liquidator shall forthwith pay those moneys to the Official Receiver to be placed to the credit of the Companies Liquidation Account.
    [Section 508(1) of the Act]

Statement of the Position in the Winding Up

The amount of the estimated assets and liabilities at the date of the commencement of the winding up

33. The first part of this section sets out the assets of the company, after deducting amounts charged to secured creditors and debenture holders.

34. The second part sets out the liabilities i.e., amounts payable to the various categories of creditors, namely secured creditors, debenture holders and unsecured creditors.

35. The position of assets and liabilities shown is as at the date of commencement of winding up and based on:

    a. The Statement of Affairs as submitted to the Liquidator by the directors and / or officers of the company; or
    b. If there is no Statement of Affairs submitted to the Liquidator, it is based on the information available to the Liquidator as at the time the first Liquidator's Account is filed. In such instance, the Liquidator should set out in the notes, the relevant sources of information and basis in arriving at the estimated position of assets and liabilities.

    This information would be static during the whole period of liquidation.

The total amount of the capital paid-up at the date of commencement of the winding up

36. This section requires the total paid-up capital of the company as at the date of commencement of winding up. Where applicable, it is good practice to provide details of different classes of paid-up capital including capital paid up in cash and paid up otherwise than for cash. This information would be static during the whole period of liquidation.

The general description and estimated value of outstanding assets (if any)

37. This section requires a list and estimated values of all the assets of the company that has yet to be realised or would become available for distribution to the unsecured creditors or contributories, including cash.

38. The value of the assets should be reviewed each time the Liquidator's Account is prepared to ensure it reflects the current estimated realisable value.

39. It is important that the Liquidator be objective in his estimates of the value of the assets. It would be preferable to base the value on an independent professional valuation of assets, if available.

40. In the absence of any valuation, the Liquidator may use prudent estimates so as not to overstate the value of the assets. The values stated therein should reflect the values to the best knowledge of the Liquidator to be realisable.

Total amount of unsecured debts in respect of which proofs have been admitted

41. This section requires disclosure of the total amount of debts due to unsecured creditors whose proofs of debts have been admitted by the Liquidator.

Estimated amount of debts or claims remaining for proof

42. This section requires disclosure of the estimated amount of debts that the Liquidator has not adjudicated and admitted. This can arise from:

    a. Claims submitted but sufficient proof has not been furnished; and
    b. Liabilities disclosed under the Statement of Affairs for which claims have not been submitted.

43. In a company winding up where the directors or officers have not provided the company's Statement of Affairs to the Liquidator, the information required for completion of paragraphs 33 to 35 is therefore not available. Hence, if the Liquidator has taken all reasonable steps to obtain the Statement of Affairs but has not been able to secure the same, he may disclose the fact in this section.

Details of any arrangement whereby assets of the company have been disposed off by the Liquidator for a consideration other than cash

44. Under this section, the Liquidator is required to disclose assets disposed of which did not attract a cash consideration. In such instances, the Liquidator would have to disclose the reason for such a disposal and the value of consideration that the assets were disposed for.

The causes which delay the termination of the winding up

45. This section requires disclosure of the reasons that protract the completion of the winding up.

The period within which the winding up may probably be completed

46. This section requires disclosure of the estimated time that the Liquidator believes is required to complete the assignment. The Liquidator may state the matters on which completion of the liquidation is dependent on, e.g., the conclusion of pending legal cases, claim disputes, tax clearance, etc.

Statutory Declaration Verifying the Liquidator's Account and Statement

47. This statutory declaration would have to be executed by the Liquidator and attested by the Commissioner for Oaths.

Other Matters in Relation to Filing of the Receiver's and / or Liquidator's Account

Multiple Appointments in cases of Receivership

48. In the case of Receivers being appointed by more than one debenture holder over different charged assets of the same company, the Receivers would have to lodge separate Receiver's Account for each appointment.

Direct Payments to Third Parties

49. In the event certain receipts or payments of a company are allowed to be made directly between third parties and do not flow through the hands of the Receiver or Liquidator, it is good practice for the Receiver or Liquidator to record these transactions as receipts and payments of the receivership or liquidation as if it had been made via the hands of the Receiver or Liquidator.

50. Receipts and payments made directly between third parties may also:

    a. Be reported in schedules separate from those receipts and payments made through the hands of the Receiver and Liquidator; or
    b. Be noted in the Receiver's Account and Liquidator's Account as receipts and payments which were not made through the hands of the Receiver or Liquidator.

51. Some examples of such receipts and payments are:

    a. Where part of the purchase price is paid by the purchaser or purchaser's financier directly to the charge to redeem the titles of the assets disposed of by the Receiver or Liquidator.
    b. Where part of the purchase price held by a solicitor, as stakeholder, is released to third parties, e.g., to the Director General of Inland Revenue for Real Property Gains Tax purpose.
    c. where the chargee in a receivership or liquidation makes payments directly in respect of receivership or liquidation costs e.g., insurance premium and quit rent.

Appendix 1

Illustration

The Receiver's Account for the First Period

The statement of receipts and payments during that period is as follows:

Receipts			Payments		
Date	From Whom	Amount	Date	To Whom	Amount
		RM			RM
	Bank A Berhad • Balance from closure of existing bank account	2,000.00		Bank B Berhad • Cheque book	10.00
	Debenture Holder • Advances	8,000.00		C Insurance Bhd • Premium	3,000.00
				D Advertising Bhd • Advertisement charges	800.00
	Total Amount	10,000.00		Total Amount	3,810.00

1. The aggregate amount of receipts during all preceding periods since appointment is Nil.
2. The aggregate amount of payments during all preceding periods since appointment is Nil.

The Receiver's Account for the Second Period

The statement of receipts and payments during that period is as follows:

Receipts			Payments		
Date	From Whom	Amount	Date	To Whom	Amount
		RM		Total Amount	RM
	TNB • Deposits refund	500.00		SSM • Filing charges	200.00
	Debtor Bhd • Debt payment	1,500.00		R&M • Professional fees	2,000.00
				L & Co • Legal fees & expenses	1,500.00
	Total Amount	2,000.00		Total Amount	3,700.00

Appendix 1 (cont'd)

Illustration

1. The aggregate amount of receipts during all preceding periods since appointment is RM10,000.00.
2. The aggregate amount of payments during all preceding periods since appointment is RM3,810.00.

The Receiver's Account for the Third Period

The statement of receipts and payments during that period is as follows:

Receipts			Payments		
Date	From Whom	Amount	Date	To Whom	Amount
		RM			RM
	F Buyer Bhd • Sale of computer	800.00		SSM • Filing charges R&M • Professional fees	300.00 2,000.00
	Total Amount	800.00		Total Amount	2,300.00

1. The aggregate amount of receipts during all preceding periods since appointment is RM12,000.00.
2. The aggregate amount of payments during all preceding periods since appointment is RM7,510.00.

Appendix 2

Illustration

The Liquidator's Account

Receipts				Payments			
Date	Of Whom Received	Nature of Receipts	Amount	Date	To Whom Paid	Nature of Payments	Amount
			RM				RM
		Brought forward	5,000.00			Brought forward	1,000.00
	G Sdn Bhd	Debt payment	4,000.00		H Sdn Bhd	Security charges	2,000.00
		Carried forward	9,000.00			Carried forward	3,000.00

Total receipts		9,000.00
Total payments		3,000.00
	Balance	6,000.00

RECEIVERSHIP (R)

R1: SUGGESTED RECEIVERSHIP CHECKLIST (FOR RECEIVER APPOINTED UNDER A DEBENTURE)

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 through the private appointment of the Receiver(s) or Receiver(s) and Manager(s) (Receiver) by a secured creditor under the terms of a deed of charge or debenture. The new provisions in the Companies Act 2016 (Act) now provide for the appointment of the Receiver by order of the Court. The powers of the Receiver are usually specified in the instrument or the order of Court under which the appointment was made. Subject to the foregoing, the Receiver has the powers set out in the Sixth Schedule of the Act.
[Sections 374-376, Section 383, Section 386 and Sixth Schedule of the Act]

2. The new provisions in the Act provide a clearer position in terms of the status of the Receiver acting in the capacity of an agent of the company. The Receiver is the agent of the company as stated in the Act unless the instrument expressly provides otherwise. The Receiver can continue acting as agent of the company after the company has been wound up and can continue carrying on business provided that the Receiver obtains consent from the Liquidator or the Court as the case may be.

3. Section 386(1)(a) of the Act is a reinstatement of the principle adopted in the case of *(K Balasubramaniam (Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd) v. MBF Finance Bhd & Ors)* where the Federal Court held that "there is no question on any superior ranking. They exist side by side with each exercising his separate powers and duties conferred on them …"

Before Appointment

4. Perform a conflict check on the member's ability to take on the appointment.

5. Review the debenture and ascertain whether:

   a. the debenture was registered with the Suruhanjaya Syarikat Malaysia (SSM) within 30 days of its creation *[Section 352(1) of the Act]* and is adequately stamped to cover the amount advanced;
   b. the charge is a fixed or floating charge, or both and whether there are any prior / subsequent charges taking priority over the relevant charge which would restrict the Receiver's right of possession of the assets;

      (Note: In considering the validity of the charge, attention is drawn to Section 529 of the Act which refers to a floating charge created within six months of commencement of winding up);
   c. any of the conditions precedent for the appointment has been triggered, for example, whether an event of default had occurred, issuance of statutory demand for payment, etc.;
   d. the debenture has been properly executed by the company under seal (where applicable) in a manner authorised by its Constitution *[Section 66 of the Act]*;
   e. the assets fall within the purview of the debenture and over which the Receiver would take possession;

f. the debenture contains a power of attorney and that the same has been registered with the High Court; and

g. the debenture confers on the Receiver the power to execute all agreements, deeds and documents and the power to convey and assign.

Note:

- Subject to the powers conferred in the debenture or order of the Court, the powers of the Receiver are also set out in the Sixth Schedule of the Act.
- Section 386 of the Act provides for powers of a Receiver after the commencement of winding up, namely:
  - ♦ Section 386(1)(a) of the Act – where a Receiver can continue to act as a Receiver; and
  - ♦ Section 386(1)(b) of the Act - permits the Receiver and Manager to continue carrying on the business after the company is wound up provided that the Receiver and Manager obtains consent from the Liquidator or the Court if the Liquidator withholds his consent.
- Section 375(2)(a) of the Act provides that the Receiver acts as an agent of the company and continues to act as an agent upon winding up of the company *[Section 386(2) of the Act].*
- The key roles of the Receiver are:
  a. to raise or borrow money and grant security thereof over the charged property of the company;
  b. to take possession of the charged property and to sell / dispose of the charged property;
  c. to carry on the company's business / trading activities;
  d. to bring or defend any legal action / proceedings in the name and on behalf of the company; and
  e. to do other things incidental to the exercise of the appointment.

  If any of these powers are not set out in the debenture, and in the absence of prohibiting provisions in the debenture, the Receiver can nevertheless exercise these powers which are set out in the Sixth Schedule of the Act.
  [Section 383(2) of the Act]

6. Where necessary, seek legal advice on the proposed appointment, the validity of the charge, the power to appoint the Receiver and the fulfillment of the conditions for doing so.

7. Arrange to meet the debenture holder to obtain information about the company's affairs and to discuss the objectives of the proposed receivership which should cover the following matters:

   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 (to consider insurance cover and security guards, to safeguard the charged assets);
   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. details of major creditors and the likelihood of a Liquidator being appointed; and
g. details of any winding up petition presented against the company.

8. Obtain a deed of indemnity, if necessary, from the debenture holder. An indemnity is generally sought because:

   a. there may be insufficient assets to cover receivership costs;
   b. there may exist doubts as to the validity of the debenture;
   c. there may be questions of personal liability attached to the Receiver (Section 381 and Section 382 of the Act provide for the personal liability of the Receiver, unless otherwise provided by the instrument appointing the Receiver); and
   d. there may be legal actions taken against the Receiver.

9. Document the physical outline for accepting the appointment and the approach for taking control of the company which should include the following:

   a. details of the 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 the Receiver's attendance at the company's premises.

Statutory Requirements on Accepting Appointment

10. Obtain the following documents from the debenture holder:

    a. copy of default notice or letter of demand (if required by the debenture) sent to the company;
    b. letter / deed of appointment as required by the debenture which must be stamped by the Receiver; and
    c. Notice of Appointment of the Receiver, to be filed with SSM within seven days from the appointment date *[Section 377(1) of the Act]*.

11. Prepare the notice required to be served on the directors and / or senior management of the company:

    a. informing them of the appointment of the Receiver *[Section 388(1) of the Act]*;
    b. requiring the submission of a Statement of Affairs within 14 days from the date of receipt of the said notice of appointment *[Section 388(1) of the Act];* and
    c. informing them of the effect of the appointment of the Receiver, whereby the power of the board of directors and management ceases and that all instructions on the management of the company including ordering and acceptance of supplies; as well as communications with employees, third parties, creditors and suppliers; must not be made without the Receiver's consent and that all outgoing correspondences and documents of the company must be affixed with the statement that the Receiver has been appointed.

Note :

- *Section 389 of the Act – obligations of company and directors to provide information to Receiver*

Administrative Actions upon Appointment

12. Arrange to meet with the directors and senior management of the company. Ensure that the following matters discussed with them are covered and minuted:

    a. service of the Notice of Appointment of Receiver and the requirement to submit the Statement of Affairs within 14 days from the receipt of Notice of Appointment *[Section 388(1) of the Act]*;
    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 380(1) of the Act]*;
    e. understand problems that the company is facing which directors and management are aware; and
    f. timing and nature of communication with employees and third parties.

13. Upon application by the directors, the Court may extend the period for submission of the Statement of Affairs.
    [Section 388(1) of the Act]

14. 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 of Affairs *[Section 388(2)(a) of the Act];*
    b. forward a copy of any such comments or if no comments are made, a notice to that effect, to the company *[Section 388(2)(b) of the Act]*; and
    c. send to the representative of the debenture holder a copy of the statement and related comments, if any *[Section 388(2)(c) of the Act]*.

15. Notify the Director General of Customs and Excise of the appointment of the Receiver within 14 days from the appointment date and request for the submission of their claims, if any.
    [Section 65(C) of the Customs Act 1967]
    [Section 98 of the Sales Tax Act 2018]
    [Section 83 of the Service Tax Act 2018]

16. 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; and

c. financial statements, tax computations, recent management accounts, forecasts and cash flow projections.

17. Consider notifying all third parties which have business dealings with the company on the appointment of the 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;
    e. auditors, solicitors and other professional advisors; and
    f. debtors.

18. Prepare notices 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 prior approval of the Receiver.
    [Section 380 of the Act]

19. Review the adequacy of insurance coverage for the charged assets and ensure that the Receiver's interest is noted on all policies.

20. Notify banks of the appointment of the Receiver and stop unpresented cheques. Only credits to the banking accounts are allowed. Open a bank account or accounts as necessary in the name of the company with the additional designation – "in Receivership" with appropriate arrangements for signatories. Take control of the access to online banking.

21. Determine all prior and subsequent charges registered over the company's assets. In respect of prior charges, obtain the Chargee's 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.

22. If a petition to wind up the company has been presented, consider obtaining legal advice on the next course of action.

23. 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.

24. 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.

25. Take steps to obtain control of all other known assets of the company and ensure their security.

26. Consider the 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.

27. Arrange for control of all (both physical and electronic) incoming and outgoing mail.

28. Open receivership accounting records, for example, an analysed cashbook, petty cash, etc., which should provide adequate details transacted by the Receiver, using the 'cash' basis of recording.

29. Steps must be taken to differentiate between the two periods i.e., before receivership and during receivership. This will include commencing new sequences of numbers for all despatch notes, invoices, orders, etc.

30. Review the Statement of Affairs prepared by the directors and prepare schedules / working papers as appropriate, to provide 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; and
    j. commitments and contingencies of the company.

Reporting to Debenture Holder and Compliance with Other Statutory Requirements

31. Discuss with the debenture holder as to the timing, frequency and details of reporting required. Paragraphs 32 to 36 may be used for guidance purposes.

32. Within two 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 the company, for example, notification to insurance companies and employees, opening of bank accounts, etc;
    b. problems encountered in taking control, if any; and
    c. timing for a second comprehensive report.

33. Within four to six weeks of being appointed, a comprehensive report should be sent to the debenture holder. The report should contain:

    a. a brief summary of the business, its recent history including events leading to the appointment of the Receiver;

b. the Receiver's strategy for the conduct of the receivership and reasons for selecting the strategy;
c. potential problem areas and their likely effect on the realisation or recovery of assets together with the steps proposed to be 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 debenture holder and the forced sale valuations;
f. detailed receipts and payments and comments on anticipated cash flow, together with forecasts containing as much details as possible if the debenture holder is requested to provide financing to the Receiver to enable the Receiver to continue the business;
g. the likely timing and extent of the distribution of proceeds of the realisation to the debenture holder;
h. the timing of future reports and items to be addressed in these reports; and
i. details of the Receiver's remuneration and costs-to-date.

34. Subsequent reports should be sent to the debenture holder at least once a month. They should include:

a. Receiver's receipts and payments account;
b. updated estimates of realisations;
c. problems and potential problems including strategy changes, if necessary; and
d. updated Receiver's remuneration and costs-to-date.

35. 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 as he is an agent of the company and not an agent to the debenture holder.

36. Ensure that the receipts and payments account is prepared by the Receiver every six months, commencing from the appointment date and is filed with SSM within one month after the expiration of each period.
[Section 391 of the Act]

Realisation of Assets

37. Depending on the method of the realisation of the assets under charge, as determined in the receivership strategy, make necessary arrangements to effect the realisation, for example, getting independent valuations, issuing memorandum of sale and putting out advertisement for sale of the business or assets.

Distribution of Proceeds from Realisation of Assets under Fixed Charge

38. Determine the liability owing to the debenture holder under the fixed charge. Where applicable, a letter setting out the redemption sum should also be obtained.

39. Distribute the realisation proceeds under the fixed charge to the debenture holder in accordance with the provisions of the charge document which may, generally, be in the following order:

    a. cost and expenses associated with the realisation of the assets;
    b. remuneration of the Receiver;
    c. liability to secured creditors that rank in priority to the charge held by the debenture holder; [do take note of Section 31 of the Employment Act 1955 (EA 1955)] which accords priority of wages (as set out below) over that of the debenture holder;
    d. amount due to debenture holder under the charge; and
    e. if there is any surplus thereafter, the surplus should be returned to the rightful owner or company.

40. Section 31 of the EA 1955 applies in the case where there is a disposal of a security held over property which is a place of employment and in which event the proceeds of such sale are to be paid to employees in priority to payment to the debenture holders in respect of the following:

    a. unpaid wages, capped at four consecutive months of work; and
    b. benefits in respect of termination and lay-off benefits, annual leave pay, sick leave pay, public holiday pay and maternity allowance for which there is no cap on the amounts *(Perwaja Steel Sdn Bhd (In Liquidation) v. RHB Bank Berhad and 789 Others [2019] 5 AMR 342).*

Distribution of Proceeds from Realisation of Assets under Floating Charge

41. Ensure all liabilities (including but not limited to those under Section *392* 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.

42. Seek legal advice (if required) as to the priority of payments when making any distributions out of the realisation of the assets under floating charge. The claims that generally have priority over the debenture holder are set out in Section *392* of the Act as follows:

    a. costs, expenses and remuneration of the Receiver and any indemnity to which the Receiver is entitled to, out of the assets of the company;
    b. all wages and salary including allowances or reimbursements under a contract of employment not exceeding the amount of RM15,000 in respect of services rendered by the employees within a period of four months before the date of appointment of the Receiver;
    c. remuneration payable for unutilised annual leave accrued before the appointment date; and
    d. all amounts due in respect of the Employee Provident Fund (EPF) contributions payable during the 12 months before the appointment date.

43. Before making any payments to the employees in respect of their preferential claims, outstanding EPF contributions and compulsory deduction of the employees' income tax must be made from the amount payable to each employee.

44. Subject to paragraph 43, in respect of the amounts of contributions to EPF due in the 12 months prior to the appointment date, the Receiver should:

    a. obtain confirmation of liabilities from EPF and agree on the sum; and
    b. settle the agreed liability and obtain confirmation from EPF that no further claims exist.

45. Review order books, purchase journals, creditors files etc. to ensure that all known liabilities (including administrative costs for example, telephone, electricity, rental, etc.) incurred by the Receiver have been paid or provided for.

46. Ensure sufficient funds are withheld to pay the Receiver's remuneration and costs.

47. Determine the balance available to the preferential creditors in relation to the floating charge.

48. Distribute the balance funds available to the debenture holder after payment of or provision for items stated above.

Receivership under Both Fixed and Floating Charges

49. Ensure appropriate apportionment of costs and realisation between fixed and floating charges.

50. Determine the funds available to the debenture holder under the fixed charge.

51. Determine the distribution under floating charge having regard to paragraphs 43 to 50.

Completing the Receivership

52. There are many circumstances which may discharge / terminate a receivership. Generally, if one of the following circumstances occurs, the receivership may cease:

    a. the debenture holder is fully repaid and the Receiver hands over control of the company to the directors who then continue the company's normal operations;
    b. the debenture holder is fully repaid and the Receiver hands over control to another Receiver appointed by a lower ranking secured creditor;
    c. the debenture holder is fully repaid and the Receiver hands over control to the Official Liquidator, if one is appointed;
    d. proceeds of realisation is insufficient to fully pay the debenture holder. In this case, the Receiver would be discharged (and a Liquidator may eventually be appointed); or
    e. the debenture holder has an agreement with the company, for example, arising from a restructuring exercise or rescheduling of the loan and banking facilities. In this case, the Receiver would be discharged and hands over control of the company to the directors.

53. Prepare schedule of assets to be handed over to the directors or Liquidator or other chargee (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.

54. Determine which is the appropriate party to receive the surplus assets and hand over control to that party once all the requirements for the discharge of the receivership have been complied with and notify any other interested parties as to when the surplus assets are to be handed over.

55. Obtain written acknowledgement from the party receiving the assets, accepting responsibility for those assets.

56. If there are no surplus assets available, consider notifying the Liquidator, or other chargee, general creditors and the directors as to the position.

57. Where practicable, assist the directors in keeping all Books and Records properly written up to the date of the Receiver ceasing to act.

58. Hand over the Books and Records to the Liquidator or the directors of the company if no Liquidator has been appointed.

59. Obtain written acknowledgement of receipt from the directors or Liquidator as the case may be, for the Books and Records.

60. On termination of the receivership, consider notifying the general creditors of the fact.

61. Regardless of the situation, the receivership working papers remain the property of the Receiver.

62. Consider sending a notification of the Receiver ceasing to act to all third parties which have business dealings with the company.

63. Prepare a final report to the debenture holder on the conduct of the receivership which should include a proposed final accounting of the receivership.

64. Upon the Receiver ceasing to act, attend to the following statutory requirements:

    a. lodgement of the Notice of Ceasing to Act within 14 days of ceasing to act *[Section 379 of the Act]*; and
    b. lodgement of the final Statement of Receipts and Payments within one month of ceasing to act *[Section 391(1) of the Act]*.

R2: A RECEIVER'S RESPONSIBILITY FOR THE BOOKS AND RECORDS OF THE COMPANY

Introduction

Pre-Appointment Books and Records

- Statutory Records
- Accounting Records and Non-Statutory Records

Post-Appointment Records

- Accounting Records relating to the Period prior to the Appointment of a Liquidator
- Records
- Accounting Records relating to the Period after the Appointment of a Liquidator
- Other Books and Records
- Company's Records
- Receiver's Records

Best Practice

Introduction

1. Disagreements have arisen where Receiver(s) or Receiver(s) and Manager(s) (Receiver) appointed out of Court have been approached by directors or Liquidators of the company on the question of access to and custody of the company's Books and Records. This Guide summarises the Receiver's responsibility in relation to the Books and Records of the company and sets out what is considered to be the best practice in these circumstances.

Pre-Appointment Books and Records

2. The Books and Records which a company maintains prior to the appointment of the Receiver may be classified into three main headings:

   a. statutory Books and Records which the company is required to maintain by the relevant provisions of the Companies Act 2016 (Act), *inter alia*, Sections 50, 57, 59, 60, 144, 341 and 362. These Books and Records, consisting of various registers (e.g., of charges), indices (e.g., of members), minute books (e.g., of directors' meetings) and copies of instruments (e.g., charging instruments) are hereafter referred to "Statutory Records";

   b. accounting Books and Records which the company is required to maintain by statute, e.g., under Section 245 of the Act, which are hereafter referred to as "Accounting Records"; and

   c. all other non-statutory Books and Records, hereafter referred to as "Non-Statutory Records".

Statutory Records

3. All Statutory Records of the company should be kept at its registered office, having regard in particular to Sections 46, 57, 59, 144, 341 and 362 of the Act except for the company's register of debenture holders and its register and index of members which may be kept at places other than its registered office as provided in Section 60 and Section 54 of the Act respectively. The Statutory Records are to be kept in the form and manner prescribed by Section 49 of the Act.

4. The directors' powers and duties to cause entries to be made in the Statutory Records do not cease on the appointment of the Receiver. The Statutory Records should therefore be left in the custody and control of the company secretary / directors so that they are in a position to carry out their duties to maintain the Statutory Records. However, the Receiver should take stock of the Statutory Records and inform the company secretary / directors that the Statutory Records should be surrendered to the Receiver, if required. A letter to such arrangement should be prepared and acknowledged by the holders (company secretary / director) of the Statutory Records. The Receiver should advise the directors clearly of their continuing responsibility to maintain the Statutory Records.

5. On appointment, the company and every director shall make available to the Receiver all books, documents and information relating to the property or undertaking in receivership (including the Statutory Records). The Receiver may choose to take into his possession the Statutory Records which in his opinion should not be left in the custody or control of the directors for various reasons, e.g., for

the purposes of safekeeping or to support the title of the debenture holder. In such circumstances, the Receiver should remind the directors in writing of their statutory responsibilities and allow the Receiver free access to the records so that Receiver can maintain them. The Receiver should prepare a detailed receipt for all the Statutory Records taken into his possession, which should be signed by a director of the company.

6. The Receiver has a right to inspect the Statutory Records upon his appointment, but he should not become involved in maintaining them after his appointment. If the company has a seal, the directors of the company shall make the seal available for use by the Receiver upon request.

7. If there is a need to change the company's registered office to that of the Receiver's or any other address, the directors should be advised to transfer the Statutory Records required under the Act from the company's registered office to the new registered office and the procedures described in paragraph three above should be followed. The Receiver should also advise the directors to give proper notice of the change in the company's registered office in accordance with Section 46 of the Act.

8. On ceasing to act, the company's seals and all Statutory Records taken into the Receiver's possession should be returned to the directors of the company or, if the company is in liquidation, to the Liquidator. If the registered office of the company was changed during the receivership, the Receiver should, upon ceasing to act, advise the directors or Liquidator to change the address again, either to the pre-appointment address or, if the company is in liquidation, to the address of the Liquidator. The Receiver should also advise the directors to give proper notice of the change in accordance with Section 46 of the Act. Where the directors cannot be traced and there is no Liquidator, the step recommended in paragraph 28 should be followed.

Accounting Records and Non-Statutory Records

9. The Accounting Records of the company should be kept at its Registered Office or such other place as provided by Section 245 of the Act and are to be kept in the form and manner prescribed by Section 49 and Section 539(2) of the Act insofar as books of account are concerned.

10. The Accounting Records and the Non-Statutory Records which are necessary for the purposes of the receivership should be taken into the Receiver's possession and / or control and any other records which he considers he will not require, may be left with the directors. The directors should be reminded of their responsibilities to maintain the Accounting Records and to be allowed free access to such records taken into the possession of the Receiver so that they may discharge their statutory duties under Part II, Division 10 and Part III, Division 3, Subdivision 1 of the Act.

11. The Receiver has no duty to bring pre-appointment Accounting Records up to date to the date of his appointment, although for the purposes of the receivership it may be necessary for him to do so.

12. If the Receiver has not taken possession of all the Accounting Records and Non-Statutory Records of the company, it is advisable for future reference and retrieval for the purpose of his administration, for him to prepare a list of all those records not taken into his custody, with a note of their whereabouts.

13. On the appointment of a Liquidator, the Liquidator is entitled to possession of all Books and Records relating to the management and business of the company which are not necessary to support the title of the debenture holder (*Engel v. South Metropolitan Brewing and Bottling Co. (1892) 1 Ch.442*). Section 483 of the Act in fact provides that a Liquidator appointed in a compulsory winding up shall take custody or control of all property to which the company is or appears to be entitled, and Section 511 of the Act (applicable to every mode of winding up) empowers the Court to require the Receiver to deliver to the Liquidator all books and papers to which the company is *prima facie* entitled. The Receiver is, however, entitled to retain possession of documents necessary to support the debenture holder's title (*Fenton Textile Association v. Lodge (1928) K.B. 1, Re Landmark Corporation Ltd. (In Liq.) and the Companies Act (1968) 88 W.N. (Pt 1) (N.S.W.) 195*). The Receiver should deliver possession of all other Books and Records to the Liquidator, who must produce them to the Receiver when required. In practice, Liquidators invariably allow the Receiver to retain possession of all Books and Records against an undertaking for access and eventual return.

14. The Receiver has no statutory authority to destroy the company's pre-appointment Accounting Records and Non-Statutory Records and in due course, these must be returned to the company's directors or, if the company is in liquidation, to the Liquidator. Where the directors cannot be traced and there is no Liquidator, the step recommended in paragraph 28 should be followed.

Post-Appointment Records

Accounting Records relating to the Period Prior to the Appointment of a Liquidator

15. The Receiver is answerable to the company for the conduct of its affairs. The Receiver is treated as an accounting party to the company and has a duty to keep full and proper accounts of his dealings with its assets (*Smiths Ltd. v. Middleton (1979) 3 A.E.R. 842*). The Receiver may also be considered as an accounting party even after the debenture holder's debt is discharged (but before the termination of the receivership) as he must account for residual assets in his hands as well as for the conduct of the administration (*Smiths Ltd. v. Middleton; Expo International Ltd. v. Chant (1979) 2 N.S.W.L.R. 820; Re Otway Coal Co. Ltd. (1953) V.L.R. 557*).

16. The Receiver should establish and maintain new and proper Accounting Records, i.e., receipts and payments, from the date of his appointment. He is under a duty to render proper records to the company and to produce them so that the directors may comply with their statutory duties (*Smiths Ltd. v. Middleton)*. The Receiver specifically, should have particular regard to the provisions of Section 245(9) and Section 539(1) of the Act.

17. The Receiver is under an obligation to lodge detailed accounts of his receipts and payments as required by Section 391 of the Act.

Records

18. The Receiver has no statutory authority to destroy such records and, on ceasing to act, must hand these over to the company's directors or, if the company is in liquidation, to the Liquidator. Where the directors cannot be traced and there is no Liquidator, the step recommended in paragraph 28 should be followed.

Accounting Records relating to the Period after the Appointment of a Liquidator

19. The Receiver, upon commencement of a winding up, may continue to act as the Receiver and exercise all the powers of the Receiver in respect of property or assets secured under the debenture appointing the Receiver and may carry on business provided the Receiver obtains consent from the Liquidator, if not, the Court (*K Balasubramaniam (Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd) v. MBF Finance Bhd & Ors*). However, the Receiver clearly should continue to maintain records of his dealings as provided under Section 391 of the Act, i.e., the receipts and payments.

Other Books and Records

20. The remaining Books and Records relating to a receivership may be subdivided between "Company's Records" and "Receiver's Records".

Company's Records

21. Company's Records will include, as a minimum, all those records which exist as a result of carrying on the company's business or dealing with the company's assets, including those held by the Receiver in his capacity as an agent of the company. Only documents generated or received pursuant to the Receiver's duty to manage the company's business or dispose of its assets belong to the company *(Gomba Holdings U.K. Ltd v. Minories Finance Ltd: 1988).*

22. These records fall in the same category as the Non-Statutory Records mentioned in the paragraph 2(c) above and should be treated in the same way, being returned on ceasing to act, to the company's directors or if the company is in liquidation, to the Liquidator (see paragraphs 13 and 14 above). Where the directors cannot be traced and there is no Liquidator, the step recommended in paragraph 28 should be followed.

Receiver's Records

23. Receiver's Records are those Books and Records relating to the Receiver in his personal capacity, which are prepared for the purpose of enabling him to discharge his professional duties. Such records will include information on the progress of the administration and the filing of returns required of the Receiver under the Act.

24. Documents containing advice to and information for the debenture holder and "notes, calculations and memoranda" prepared to enable the Receiver to discharge his professional duty to the debenture holder belong to the Receiver if he chooses to claim them. They do not belong to the company *(Gomba Holdings U.K. Ltd v. Minories Finance Ltd: 1988).*

25. Receiver's Records are personal to the Receiver and should be retained at his discretion. The Act provides for company Books and Records to be kept for seven years. Receiver's may not be bound by Section 245 of the Act. Section 82 of the Income Tax Act, 1967 requires that accounts or records are to be kept for seven years. To be prudent it is advisable to keep Records for seven years.

Best Practice

26. It is considered best practice that all the Books and Records mentioned above, with the exception of the Receiver's Records (see paragraphs 23 to 25) should be made available on request to the company, acting by its directors or, if the company is in liquidation, by its Liquidators, unless the Receiver is of the opinion that disclosure at that time would be contrary to the interests of the debenture holder, e.g., because of ongoing negotiations for the sale of assets *(Gomba Holdings v. Homan: 1986).* Subject to the interests of the debenture holder, it would seem that the directors are entitled to such Books and Records as are needed for them to exercise their residual powers and perform their duties.

27. The disclosure of the Receiver's Records is a matter for his personal discretion although in any legal action brought against him, it could be that if such records are not disclosed, they could be held to be discoverable.

28. Where there is no liquidation and directors cannot be traced, the Receiver will need to consider if it is necessary to submit an application under Section 384 of the Act for directions of the Court on the disposal of the company's Books and Records.

29. The Receiver has no statutory power to destroy the company's Books and Records, even after the expiry of the statutory period for which the company would have been required to keep them. If there is no Liquidator and the directors cannot be traced, the Receiver should retain the Books and Records after ceasing to act and should not destroy them without the authority of the directors or the Liquidator. As per paragraph 28, the Receiver considers making an application to the Court under Section 384 of the Act for the Books and Records to be dealt with in strict compliance with the order of the Court.

R3: THE RECEIVER'S RESPONSIBILITY TO PREFERENTIAL CREDITORS

Introduction

1. This Guide summarises what is considered to be the best practices to be adopted by the Receiver(s) or Receiver(s) and Manager(s) (Receiver) over the assets of companies where any of those assets are subject to a floating charge such that the Receiver has legal obligations to creditors whose debts are preferential. The purpose is to:

   a. ensure that members are familiar with the relevant statutory provisions;
   b. set out best practice with regard to the application of the statutory provisions; and
   c. set out best practice with regard to the provision of information to creditors whose debts are preferential and to respond to enquiries by such creditors.

2. This Guide has been produced in recognition of the likelihood that preferential creditors may be concerned about the categorisation of charged assets as between fixed and floating charges and the manner in which costs incurred during a receivership are charged against different categories of these charged assets.

The Statutory Provisions

3. The rights of creditors whose debts are preferential in a receivership are derived from Section 392 of the Companies Act 2016 (Act) (preferential creditors). Where the Receiver is appointed by or on behalf of the holders of any debentures of a company secured by a charge which is a floating charge at the date of the appointment of the Receiver and the company is not at the time in the course of being wound up, its preferential debts shall be paid out of the assets coming into the hands of the Receiver in priority to any claims for principal or interest in respect of the debenture. Where the Receiver is appointed under both fixed and floating charges, this requirement does not extend to assets coming into the hands of the Receiver pursuant to the fixed charge.

4. Members should note that the statutory provisions give a right to preferential creditors to be paid those debts in priority to the claims of floating charge holders, and the corollary of this right is the obligation of the Receiver to pay them. Failure by the Receiver to pay preferential debts out of available assets is a breach of statutory duty.

5. Section 31 of the Employment Act, 1955 applies in the case where there is a disposal of a security held over property which is a place of employment and in which event the proceeds of such sale are to be paid to employees in priority to payment to the debenture holders in respect of the following:

   a. unpaid wages, capped at four consecutive months of work; and
   b. benefits in respect of termination and lay-off benefits, annual leave pay, sick leave pay, public holiday pay and maternity allowance for which there is no cap on the amounts *(Perwaja Steel Sdn Bhd (In Liquidation) v. RHB Bank Berhad and 789 Others [2019] 5 AMR 342).*

6. There are no statutory provisions requiring preferential creditors in a receivership to prove those debts in any formal manner and no statutory obligation is imposed on the Receiver to advertise for claims.

Categorisation of Assets and Allocation of Proceeds

7. In order to ascertain what assets are subject to the statutory rights of preferential creditors, it is necessary to distinguish, on proper interpretation of the charging document(s), which assets are subject to the fixed charge and which are subject to the floating charge. In this statement, this process is referred to as 'categorisation'.

8. The overriding principle, as laid down by the Court, is that it is not of itself sufficient for the charging document to state that an asset is subject to a fixed charge for it to be subjected to such a charge. There have been cases where the Court has struck down charges that purported to be fixed and held that they were floating.

9. It is the duty of the Receiver to effect the categorisation and legal advice should be sought in case of doubt. As to the doubt on the correct categorisation, it may be possible to consult preferential creditors and reach agreement with them and the debenture holder. However, if this is not possible and the Receiver, together with his legal advisors, cannot determine the correct categorisation, it is advisable to apply to the Court for directions.

10. Upon appointment of Receiver, floating charge will be crystalised into fixed charge. However, members should not lump the recovery from floating charge and fixed charge together as preferential creditors enjoy priority of payments from the floating charge.

11. Section 392 of the Act requires that the preferential debts shall be paid out of the floating charge assets coming into the hands of the Receiver. The effect of this Section is that the Receiver is under liability to the preferential creditors if, having had available assets in hand, he fails to apply them in payment of the preferential debts. Where any action which he proposes to take could result in a diminution in the amount available to meet preferential debts, the Receiver should give serious consideration to the risks of such legal action being taken against him.

12. When assets are sold as part of a going concern (or otherwise in parcels comprising both fixed and floating charge assets), the apportionment of the total consideration suggested by the purchaser (for example for the purchaser's own financial reasons) may not properly reflect the financial interests of the different classes of creditors in the individual assets or categories of assets. In these circumstances, the Receiver should ensure that he is able to properly discharge his obligations to account to holders of fixed charges on the one hand and preferential creditors interested in assets subject to floating charges on the other.

Apportionment of Costs

13. The amount available to meet preferential debts are the funds realised from the disposal of assets subject to a floating charge net of the costs of realisation. It is dependent, therefore, not only on the correct categorisation of the charged assets but also on the appropriate allocation of costs incurred in effecting realisations.

14. These costs will normally fall into one of three categories:

    a. liabilities incurred by the company and costs incurred by the Receiver and recoverable by him out of the company's assets under his statutory indemnity (other than those referred to below);
    b. the costs of the Receiver in discharging his statutory duties; and
    c. the remuneration and disbursements of the Receiver.

15. Liabilities incurred by the company and the Receiver's reasonable costs are sometimes readily identifiable as applicable to either the fixed charge or floating charge assets, but in other cases may not be easily allocated between the two categories of assets. Where costs are clearly identifiable as having been incurred in the realisation or collecting of one or the other two categories, they should be recorded as such in the Receiver's records so that they can be deducted from the realisation proceeds in ascertaining the amount available for each class of creditors.

16. It is in the nature of receiverships, and particularly receiverships where trading continues, that there will be continuation of employment of the company's directors and staff, ongoing occupation of its premises, purchase of supplies for manufacturing and other purposes and much of the other expenditure normally associated with a company's operations. In these circumstances, it may be difficult to arrive at an appropriate allocation of costs. Many of the trading activities in a receivership will enhance the realisations of assets in both of the categories identified above. They may, of necessity, be incurred before full categorisation has been completed. These factors do not affect the duty of the Receiver to allocate costs appropriately but that allocation will involve the exercise of professional judgment undertaken with full appreciation that it must be made with an independent mind and integrity.

17. The key principles for the Receiver in his consideration of the allocation of costs (including any trading losses) are:

    a. the statutory rights of preferential creditors as set out in the Act and the decisions of the Court in cases under that Act and predecessor legislation; and
    b. the provisions of the charge document(s).

18. In order to enable the Receiver to allocate costs on an appropriate basis, contemporaneous records of the dominant reasons for incurring costs should be maintained. These will also assist him in providing explanations as to how he arrived at what he considers to be an appropriate allocation and provide evidence should that allocation be challenged by any of the parties involved.

19. In allocating costs, the Receiver should have regard to:

    a. the objectives for which costs were incurred, ascertain that certain types of costs may properly be allocated to the fixed charge assets in one case and to the floating charge assets in another case. such costs may enhance realisations in both categories. For example, payment of rent on a leasehold property may be to preserve the value of the lease or to enable manufacturing to continue and completion of work in progress;
    b. the benefits actually accrued for those financially vested in one or other category of asset in terms of protection of those assets or their value and any augmentation of that value;
    c. whether the benefits to those interested in assets subject to a fixed charge have been enhanced by actions which prove to be detrimental to those with vested interest in floating charge assets (for example where trading losses are incurred to protect or enhance the value of property or book debts subject to a fixed charge); and
    d. whether the realisation of the undertaking and assets by means of a going concern sale has resulted in a reduction in the quantum of debts which are preferential due to the transfer of employment contracts.

20. The Receiver will incur costs in complying with his statutory duties. The extent of those duties depends upon the nature of his appointment.

21. The allocation of the Receiver's remuneration and disbursements should be undertaken adopting the same principles as those applicable to costs and he should ensure that he maintains contemporaneous records which will enable him to make an appropriate division of his remuneration and disbursements between the different categories of assets.

Determination of Preferential Debts

22. As stated in paragraph six of this IG, it is the Receiver's obligation to pay preferential debts out of assets available for that purpose and no proof of debt or advertisement for preferential creditors is required.

23. Following initial notification to potential preferential creditors of his appointment and before beginning the process of determining preferential debts, the Receiver should assess whether there are likely to be sufficient floating charge realisations to make a distribution. Where no payment can be made, it is not necessary to agree on preferential claims. However, in such circumstances, the Receiver should write to preferential creditors explaining why he is unable to make payment to them.

24. Where there will be distribution to preferential creditors, the Receiver should assist those creditors, where possible, by providing adequate information to enable them to calculate their claims. The Receiver may prepare a list of preferential creditors of the company, indicating the company's amount

owing to them. Where applicable, confirmations in writing from the preferential creditors must be obtained. All differences must be reconciled and documented. In the case of all preferential creditors other than employees, the Receiver is entitled to assume they have full knowledge of their legal entitlements under the Act and should invite them to submit their claims. The Receiver should then check those claims and accept or reject them as appropriate.

25. In determining the preferential claims of employees, the Receiver should not regard an individual employee as having full knowledge of his rights and entitlements. Accordingly, the Receiver should obtain information from either the company's records or from the employee before calculating the claim. The employee should be provided with details of the calculation of his claim and any further explanation that he may reasonably require.

Payment of Preferential Debts

26. As soon as practicable after funds become available and the amount of the preferential debts has been ascertained, the Receiver should take steps to pay them.

Disclosure to Creditors with Preferential Debts

27. When funds realised from assets subject to floating charge are inadequate to pay the preferential debts in full, Receiver should (unless he has already written to them as suggested in paragraph 23) send those creditors a statement setting out the following:

    a. the assets which have, in accordance with the charge document, been categorised as subject
    b. to the floating charge; and
    c. the costs charged against the proceeds of the realisation of those assets.

28. Any further information which a preferential creditor reasonably requires should be provided promptly.

Other Matters

29. Difficulties may arise in determining the rights of preferential creditors to have debts paid preferentially in priority to a prior floating charge holder when the Receiver has been appointed under a second or subsequent charge. The law in this area is complex and members should seek legal advice (and if necessary apply to the Court for directions) when appointed under such a charge.

LIQUIDATION (L)

L1: Members' Voluntary Winding Up

L2: Procedures for Creditor's Voluntary Winding Up

L3: A Liquidator's Assessment and Review into the Affairs of the Insolvent Company

L4: Summoning and Holding Meetings of Creditors under Court Winding Up

L1: MEMBERS' VOLUNTARY WINDING UP

Introduction

Pre-commencement Considerations

- Professional Independence
- Eligibility to Act
- Review of Company's Balance Sheet
- Advising the Company's Directors of the Effects of the Winding Up

Initiation of Members' Voluntary Winding Up

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Introduction

1. A members' voluntary winding up can only be initiated when a company is solvent and with the consent and approval of its shareholders.

   The 'solvency' test is the key determinant differentiating a members' voluntary winding up from a creditors' voluntary winding up.

2. The provisions encompassing the members' voluntary winding up under the Companies Act 2016 (Act) are contained in Part IV of the Act under the following divisions and Sections:

Division	Sections	Provision
1	431-438	Preliminary on winding up
3	439-448	Voluntary winding up
4	452-463	Every mode of winding up

3. The Rules which are applicable for creditors' voluntary winding up and Court winding up may be used as reference for similar situations in members' voluntary winding up where the Act is silent.

Pre-Commencement Considerations

4. Certain matters should be considered or attended to prior to the proposed appointment of a Liquidator, so that the members' voluntary winding up may proceed with minimum complications, thereby minimising the costs of winding up. For instance, the client should be advised to clear any charges prior to the commencement of the liquidation, otherwise the Liquidator of a company will need to attend to the discharge of charges during the course of liquidation. Generally, it would be expedient to attend to necessary matters before the winding up process, which begins upon the passing of the resolution to wind up.

Professional Independence

5. Before accepting the appointment, IG G1 requires the Insolvency Practitioner to consider the implications of such an appointment, in light of the By-Laws.

   A member in public practice should be, and be seen to be, free of any interest which might detract from objectivity in each professional assignment he undertakes.

   No partner or employee of a firm should accept appointment as Liquidator of a company where they have had a continuing professional relationship with the company including the Receiver of any assets of the company for the previous two years if the company is insolvent. Where the company is solvent, such appointment could be accepted but only after careful consideration has been given to the implication of acceptance in that particular case.

6. The member should also conduct a company search at Suruhanjaya Syarikat Malaysia and check details of the directors and secretaries to determine if there exists any potential conflicts of interest (see requirements of IG G2).

Eligibility to Act

7. In addition to the restrictions provided under the Act and By-Laws, a member in public practice shall not knowingly consent to be appointed, and shall not knowingly act, as Liquidator of a company in a members' voluntary winding up if:

   a. he is indebted to the company or to a corporation that is deemed to be related to the company by virtue of Section 7 in an amount exceeding twenty-five thousand ringgit;
   [Section 433(1)(b) of the Act)]
   b. he is a partner, employer or employee of an officer of the company;
   [Section 433(1)(d) of the Act]
   c. he is a partner or employee of an employee of an officer of the company;
   [Section 433(1)(e) of the Act]
   d. he assigns his estate for the benefit of his creditors or makes an arrangement with his creditors pursuant to any laws relating to bankruptcy;
   [Section 433(1)(f) of the Act]
   e. he becomes a bankrupt; or
   [Section 433(1)(g) of the Act]
   f. he is convicted of an offence involving fraud and dishonesty punishable on conviction by imprisonment for three months or more.
   [Section 433(1)(h) of the Act]

8. Any person other than the exceptions mentioned in paragraph 7 above can act as a Liquidator for the purpose of a members' voluntary winding up.

   However, the person shall not be appointed as Liquidator of a company unless he has, prior to the appointment, consented in writing to act as such Liquidator.
   [Sections 433(1)(a)-(c) and Section 433(4) of the Act]

Review of Company's Balance Sheet

9. The directors should review the financial position of the company and take steps to realise as many assets as practicable and reduce the liabilities *pari passu* before the resolution to wind up the company is passed. Such actions include the settlement / reduction of inter-company loan accounts and payment of creditors, and the distribution of dividends from retained profits to the shareholders.

10. The Liquidator should review the tax position of the company regarding status of tax returns and payments and consider the likely tax implications of the proposed liquidation. Consideration should also be given to reduce activities that have tax implications which may prolong the winding up.

Advising the Company's Directors of the Effects of the Winding Up

11. The company's directors should be made fully conversant with the effects of a winding up prior to their decision to proceed to pass the special resolution for winding up. Emphasis should be placed on the following:

    a. All the powers of the directors shall cease unless the Liquidator or the company in a general meeting, with the consent of the Liquidator, approves the continuance thereof;
    b. The company shall, from the commencement of the winding up, cease to carry on its business, except so far as may be necessary for the beneficial winding up thereof; and
    c. Any transfer of shares, except for transfers made with the sanction of the Liquidator and any alterations in the status of members, made after the commencement of the winding up, shall be void.

    [Sections 442(1)-(3) and Section 445(2) of the Act]

Initiation of Members' Voluntary Winding Up

The initiation of the members' voluntary winding up may entail the following sequence of steps:

Declaration of Solvency

12. All or a majority of the directors at a meeting of directors may make a written declaration in a *Declaration of Solvency form* (the Declaration) to the effect that they have made an inquiry into the affairs of the company and that at a meeting of directors, formed the opinion in the Declaration that the company will be able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding up.
    [Sections 443(1)(a)-(b) of the Act]

13. There must be attached to the Declaration, a Statement of Affairs of the company, made up to the latest practicable date before making the declaration, showing the assets of the company and the total amount expected to be realised therefrom, the liabilities of the company, estimated expenses of the winding up and estimated surplus, after paying its debts in full.
    [Sections 443(3)(a)-(c) of the Act]

14. The directors should not take into account contingent assets when forming an opinion that the company will be able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding up. Conversely, the directors should take appropriate steps to ascertain the full extent of actual or contingent claims, if any, against the company, including claims that may arise from the directors or employees as a result of the proposed winding up.

15. A declaration so made shall have no effect unless it is:

    a. made at the meeting of the directors;
    b. made within five weeks immediately preceding the passing of the resolution for members' voluntary winding up; and
    c. lodged with the Registrar before the date on which notices are sent convening the general meeting at which the winding up resolution is proposed.
    [Sections 443(4)(a)-(c) of the Act]

16. Both the Declaration and the Statement of Affairs must be lodged with the Registrar, usually by the company secretary, prior to the date of despatch of the said notice for the general meeting.

17. A director who makes the declaration of solvency without reasonable ground that the company will be able to pay its debts in full within the period stated in the Declaration can be prosecuted and if found guilty, the penalty is imprisonment for a term not exceeding five years or a fine not exceeding three million ringgit or to both and in the case of a continuing offence, a further fine not exceeding five hundred ringgit for each day during which the offence continues after conviction.
    [Section 443(5) of the Act]

18. If the company is wound up under a resolution for voluntary winding up passed within a period of five weeks after the making of the declaration, but its debts are not paid or provided for in full within the period stated in the Declaration, the directors are presumed until the contrary is shown to have had no reasonable grounds in making the declaration.
    [Section 443(6) of the Act]

19. The company and every officer who contravene Section 443(4)(c) of the Act commit an offence and shall, on conviction, be liable to a fine not exceeding two hundred fifty thousand ringgit and in case of a continuing offence, to a further fine not exceeding one thousand ringgit for each day during which the offence continues after conviction.
    [Section 443(7) of the Act]

Calling of Shareholders' Meeting

20. Within five weeks of the making of the Declaration, a general meeting is required to be convened to pass a special resolution to wind up the company and empower the Liquidator to distribute part or the whole of the company's assets in specie or in kind and an ordinary resolution for appointment of one or more Liquidators.
    [Section 445(1) of the Act]

21. A special resolution requires 21 days' notice and a 75% majority unless approved by majority holding of not less than 95% in nominal value of shares or voting rights.
    [Section 292(1) and Section 316(5) of the Act]

22. A company may be wound-up voluntarily:

    a. when the period, if any, fixed by the constitution for the duration of the company expires; or

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

    c. if the company so resolves by special resolution.
    [Section 439(1) of the Act]

23. Due to the introduction of the single member, single director company concept, Section 147(6) of the Companies Act 1965 is not adopted under the Act. For a private company which is a wholly-owned subsidiary of a public company, such company can pass a written resolution.

Filing of Resolution with the Registrar

24. Within seven days after the passing of the special resolution, the company shall lodge a printed copy of the *Notice of* Resolution with the Registrar.
    [Section 439(2)(a) of the Act][1]

Advertisement

25. A notice of the resolution to wind up the company and appointment of Liquidator(s) should also be advertised in a newspaper circulating generally throughout Malaysia in the national language and in the English language within ten days of the passing of the resolution.
    [Section 439(2)(b) of the Act]

26. The company and every officer who contravene Section 439(2) of the Act commit an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit and, in the case of a continuing offence, to a further fine not exceeding five hundred ringgit for each day during which the offence continues after conviction.
    [Section 439(3) of the Act]

Commencement of Winding Up

Date of Commencement

27. A members' voluntary winding up shall commence at the time of the passing of the resolution for voluntary winding up.
    [Section 441(1) of the Act]

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1 Note: Section 454(1) of the Act
A Liquidator shall be entitled to receive salary or remuneration as prescribed in the Companies (Winding-Up) Rules 1972 (Rules), however, the rule is only applicable to Court winding up. Since there is no guiding provision in the Act on this matter, it remains a *lacuna* in the law.

Effect of Commencement

28. The events mentioned in paragraph 11 on the cessation of powers of the directors, the company's business and shares transfer shall take immediate effect as at the date of EGM / winding up.
[Section 442(3) of the Act]

29. The corporate state and corporate powers of the company continue until it is dissolved. However, the annual tax filing should continue.
[Section 442(2) of the Act]

Powers and Duties of a Liquidator [Eleventh Schedule of the Act]

30. The Liquidator, in a members' voluntary winding up, will settle all debts in full.

31. The Liquidator, with the approval of a special resolution of the company, may exercise any of the powers given to a Liquidator under the Twelfth Schedule in winding up by the Court.
[Eleventh Schedule and Twelfth Schedule of the Act (if applicable)]

32. The acts of a Liquidator shall be valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification. *Bona fide* transactions for value and without notice of such defect or irregularity between the Liquidator and other parties are valid.
[Section 455 of the Act]

33. Where several Liquidators are appointed, the powers shall be exercised by one or more of them as may be determined at the time of their appointment or in default thereof by any number of not less than two.
[Eleventh Schedule of the Act]

34. If the Liquidator is at any time of the opinion that the company will not be able to pay or to provide for the payment of its debts in full within the period stated in the Declaration, he should forthwith summon a meeting of the creditors to present a statement of assets and liabilities of the company and for the creditors to appoint some other person to be Liquidator. The winding up shall thereafter proceed as a creditors' voluntary winding up.
[Section 447 of the Act]

Immediate Steps After Commencement of Winding Up

35. The immediate steps to be taken by the Liquidator after commencement of winding up are as stated below.

Notification that the Company is in Liquidation

36. The company shall have the words “in Members’ Voluntary Liquidation” added after the name of the company where it first appears on every invoice, order for goods or business letter issued by or on behalf of the company or the Liquidator.
[Section 516(1) of the Act]

Notice of Appointment and Address of Liquidator

37. Lodge a Notice of Appointment and Address of Liquidator (Voluntary Winding Up) being the notice of appointment and situation of office with the Registrar and the Official Receiver within 14 days of his appointment.
[Section 513(1) of the Act]

Books and Records

38. Take control of the company’s seal, share register, minute book and all Books and Records particularly, documents of title and other documents of value. A list of Books and Records in existence should be compiled. Advise the directors that they must not dispose off any of the company’s Books and Records until otherwise advised by the Liquidator.

39. The Liquidator shall retain the books and papers for five years from the date of dissolution of the company or earlier, as the company, at the final meeting, by resolution directs. The Liquidator may destroy them thereafter.
[Sections 518(1)-(3) of the Act]

Taking Possession of Assets

40. Obtain a list of assets from the directors or compile one from enquiries and observation to determine what the assets are.

41. Take steps to account for and secure prompt control of all known assets of the company and ensure their security. Conduct stock takes and / or valuation of assets to provide a basis for negotiations to sell the assets and also to establish those that did exist at the date of appointment for control purposes.

42. Where a creditor has issued execution against the moveable property or land of the company or has attached any debt due to the company, serve the “Notice of Appointment of Liquidator” on the creditor, its’ solicitors and Court’s bailiff, if relevant.

43. Any creditor or bailiff shall not be entitled to retain the benefit of the execution or attachment unless he has completed the execution or attachment before the date of commencement of winding up or before the date of the receipt of the notice for the proposed voluntary winding up.
[Section 533 and Section 534 of the Act]

44. Under the following subsections of Section 533(2) of the Act:

    a. an execution against goods is completed by seizure and sale;
    b. an attachment of a debt is completed by receipt of the debt; and
    c. an execution against land is completed by sale, or by the appointment of a receiver.

Insurance

45. Notify the company's insurers, if any, of the Liquidator's appointment and ensure that all assets are properly and adequately insured and the Liquidator's interest is noted on the policies.

Bank

46. Notify the company's bank(s) of the Liquidator's appointment, providing a certified copy of the resolution and giving specific instructions that all payments or withdrawals from the company's bank account(s) will be immediately frozen whilst the bank shall continue to accept deposits and incoming remittances. Request the bank to include the words "in Members' Voluntary Liquidation" (or similar wordings) after the name of the company and to release any company documents held by them to the Liquidator. Initial verbal advice should be confirmed in writing.

47. If required, to open a Liquidator's bank account in the company's name (which should include the words "in Members' Voluntary Liquidation" or similar wordings after the company's name) and effect the transfer of any credit balance from the company's existing bank account(s) to be closed. All moneys received shall be banked into the company's bank account(s) under the Liquidator's control and any sum exceeding ten thousand ringgit shall be banked in as soon as possible and should not be later than ten days.
    [Section 488(2) of the Act]

48. Ensure that the bank balance is regularly reviewed and surplus funds placed pursuant to Section 507 of the Act.

Professional Advisors

49. Notify the company's solicitors, auditors and other professional advisors of the Liquidator's appointment. Appropriate status reports should also be requested from these professional advisors.

Creditors and Proving of Debts

50. In every winding up, all debts payable on a contingency and all claims against the company present or future shall be admissible to proof against the company in Form 55: *Proof of Debt – General Form* pursuant to Rule 81 of the Companies (Winding-Up) Rules 1972 (Rules).
    [Section 523(1) of the Act]

51. Notify creditors of the Liquidator's appointment and send notice to creditors to lodge their claims with proof of debt in Form 55: *Proof of Debt – General Form* by giving them at least 21 days' notice and place a copy of the notice in a daily newspaper. No gazetting of the notice is required for members' voluntary winding up.
[Rule 91]

52. The Liquidator may admit or reject any claim made in accordance with Rule 92. The Liquidator must endeavour to establish those who are justly, legally and properly creditors of the company. He should not admit any claims which appear to be doubtful and must require sufficient evidence to dispel that doubt.

Directors' Powers

53. Write to all directors advising them that their powers have now ceased unless the Liquidator or, the company, in a general meeting, with the consent of the Liquidator, approves the continuance of any power to be exercised by the directors.
[Section 445(2) of the Act]

Notice to Debtors

54. Send notice to debtors advising them of their indebtedness to the company and request payment of the account.

Notice to Government Authorities, EPF and SOCSO

55. Send notices to government authorities, for example, to the relevant government authority in respect of income tax, sales and service tax, EPF and SOCSO to determine amounts owing to them.

56. Section 97 of the Sales Tax Act 2018 and Section 65B of the Customs Act, 1967 require the Liquidator to notify the Director General of Customs and Excise within 14 days of his appointment and shall before disposing of any of the assets of the company set aside such sum out of the assets as appears to the Director General to be sufficient to provide for any such taxes which are or will thereafter become payable in respect of the company. Similar provision exists in the Service Tax Act 2018.

Review of Company's Affairs

57. Review the affairs of the company. Prepare the schedules needed to provide the information for this review and record the decisions taken. The schedules should, as appropriate in each case, cover:

    a. details of all Books and Records of the company;
    b. cash and bank balances;
    c. insurance cover;
    d. documents of title;
    e. tenancies and leases;
    f. physical assets;
    g. hire-purchase contracts;
    h. debtors (including record of all collections and actions taken);
    i. creditors;
    j. quoted and unquoted investments;
    k. details of registered charges or cross guarantees given in respect of advances to the company or related companies;
    l. details of personal guarantees given by directors in respect of advances to the company; and
    m. details of registered business names, copyrights, trademarks and patents.

Where the Company is Still Trading, Limitation of the Twelfth Schedule of the Act

58. The majority of companies under a members' voluntary winding ups are of companies which have ceased trading. They may be dormant or they may still own assets which the Liquidator must realise.

59. In the minority of cases where the company is still trading, at the date of the winding up, it will be necessary to consider the matters listed under this heading:

    a. 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. Change the locks of the company's premises.
    b. Obtain details of all credit and agency cards issued to directors and employees and consider immediate cancellation.
    c. Ensure that all employees are informed of the appointment of the Liquidator. Where a Union is involved, meet with the Union Officials.
    d. Prepare schedules to cover the following items:
        i. employees;
        ii. contracts in progress (with documentation to show the consequences of either completing or abandoning the contracts);
        iii. stocks and work-in-progress (including estimates to cover the consequences of either disposal in existing condition or upon completion); and
        iv. third party properties;

e. Trading may only be carried on to achieve beneficial realisation of assets. It should be regarded as short term only and as a positive step towards maximising the value at which assets can be realised.

   Consider the extent to which continued trading will, after meeting all the costs incurred, result in a more beneficial realisation of assets than immediate cessation.
   [Section 442(1) of the Act]

f. Identify problems and make decisions about future trading and the further steps needed to safeguard the assets and minimise liabilities. Deal with all matters arising which are likely to include the following:

   i. instructions to directors and managers making clear the extent of any continued authority and the terms of their future employment;
   ii. finance and banking arrangements consequent upon trading;
   iii. arrangements to write up the books;
   iv. insurance cover required consequent upon trading;
   v. tenants and landlords;
   vi. arrangements with customers for the abandonment or continuation of contracts and orders in progress. Consider if any contracts can be disclaimed;
   vii. instructions to suppliers of goods and services regarding deliveries and terms of payment;
   viii. instructions to persons holding property belonging to the company;
   ix. instructions to debtors on payment of amounts due and instituting a system of collection and control of debts;
   x. conforming with any licences and regulations necessary for operations that are to continue; and
   xi. Termination of employees' contracts.

Other Procedures

60. Other procedures that may be necessary include the following:

   a. Change registered office to that of Liquidator's office, if necessary;
   b. Arrange for re-direction of mail as necessary;
   c. Arrange for cancellation of telephone, electricity and other services, if necessary;
   d. Carry out periodic reviews of the winding up and note the results;
   e. Settle list of contributories, if necessary;
   f. Ensure that shareholders are kept informed of the progress of the winding up;
   g. Consider at intervals during the winding up whether there are sufficient surplus funds available to warrant an interim distribution to shareholders according to their rights and interest. Nevertheless, the Liquidator may deem it necessary to secure an indemnity from the company's shareholders prior to making any such distributions; and
   h. Lodge Income Tax returns, if any taxable income is derived during the liquidation.

Liquidator's Account

61. Every Liquidator shall keep proper books in which he shall cause to be made entries or minutes of proceedings at meetings and of such other matters as are prescribed, and any creditor or contributory may, subject to the control of the Court, personally or by his agent inspect them.
[Section 509 of the Act]

62. If the winding up process exceeds six months from the commencement date, within one month after the expiration of six months from the date of the appointment and within one month of the end of each subsequent six months and within one month after he ceases to act as Liquidator, the Liquidator is required to file with the Registrar and the Official Receiver, the Liquidator's Account of Receipts and Payments and Statement of the Position in the Winding Up, affirmed by statutory declaration.
[Section 514(1) of the Act]

Annual Meetings of Members

63. If the winding up continues for more than one year, the Liquidator should summon general meetings of the company within three months after at the end of the first year from the commencement of the winding up and of each succeeding year.
[Section 458(1) of the Act]

64. The Liquidator shall present an account of his acts and dealings and of the conduct of the winding up for the preceding year. Although the Act is silent on the period of the notice, the Liquidator shall give not less than seven days' notice of the meeting to the shareholders.
[Rule 114]

65. If a vacancy occurs by death, resignation or removal of one of the joint Liquidators, the meeting may be convened by the continuing Liquidators or any contributory.
[Section 446 of the Act]

Closing Duties

66. Before calling for the final meeting, the duties to perform would include the following:

    a. Review all files thoroughly to ensure that all matters have been completed, that all assets have been realised and all liabilities settled;
    b. Obtain formal clearance from the Inland Revenue Board, Royal Malaysian Customs Department and other government authorities, if necessary, in respect of income tax, sales tax and other taxes;
    c. Pay Liquidator's fees which may be agreed at the general meeting of members;
    d. After obtaining clearance as in paragraph (b) above, the Liquidator is to resolve to distribute any remaining assets in accordance with Section 452 of the Act. Distribute remaining assets amongst the members according to their rights as laid down in the Company's constitution; and
    e. Where a Liquidator has in his hands or under his control, any unclaimed dividend or other moneys that have remained unclaimed for more than six months or after taking final distribution, or any unclaimed or undistributed moneys arising from the property of the company, he shall forthwith pay those moneys to the Official Receiver to be placed to the credit of the Companies Liquidation Account and close the Liquidator's bank account. The prescribed certificate issued by the Official Receiver for receipt of the unclaimed moneys shall be an effectual discharge to the Liquidator.
    [Section 508(1) of the Act]

Final Meeting

67. When the Liquidator has fully paid off the company's debts, wound-up the company's affairs, distribute the surplus, if any, to the members and upon completion of the accounts of the winding up, he should summon a general meeting of the shareholders for the purpose of laying the Liquidator's final account and giving any explanation.
    [Section 459(1) of the Act]

68. The final meeting shall be called by advertisement published in a widely circulated newspaper in Malaysia in the national language and in the English language at least 30 days before the meeting.
    [Section 459(2) of the Act]

69. The Liquidator shall obtain ordinary resolutions for disposing of the Books and Records of the company and of the Liquidator, otherwise such Books and Records shall be retained for five years from the date of dissolution of the company.
    [Sections 518(2)-(3) of the Act]

70. The quorum for the final meeting shall be two members and if no quorum is present, the Liquidator shall prepare a report in Return by Liquidator relating to Final Meeting stating that the meeting was duly summoned and no quorum was present thereat.

71. The Liquidator shall file with the Registrar and the Official Receiver a return relating to the final meeting together with the Liquidator's final account within seven days after the final meeting.
[Section 459(3) of the Act]

72. Upon the completion of the final meeting, the Liquidator ceases to act.

73. The Liquidator shall file with the Registrar and the Official Receiver the Liquidator's accounts of receipts and payments within 30 days after he ceases to act.
[Section 514(1) of the Act]

74. On the expiration of three months after the lodgement of Return by Liquidator relating to Final Meeting, the company shall be dissolved.
[Section 459(5) of the Act]

L2: PROCEDURES FOR CREDITOR'S VOLUNTARY WINDING UP

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Introduction

1. The only permissible mode of winding up an insolvent company voluntarily is by way of a creditors' voluntary winding up and the prerequisites and procedures for winding up an insolvent company voluntarily are set out in Section 440 and Section 449 of the Companies Act 2016 (Act), by the directors holding of a meeting of shareholders to pass a special resolution to wind up voluntarily, followed by a meeting of creditors of the company.

2. The meeting of creditors should be convened to be held immediately after the shareholders' meeting, on the same day or the next, and both meetings should be held within a period of 30 days from the date of the statutory declaration made pursuant to Section 440 of the Act.

3. This Guide concentrates on the requirements of Section 440 and Section 449 of the Act, and the practice to be adopted in respect of meetings of the company and its creditors. The creditors' meeting referred to is the meeting of creditors convened pursuant to Section 449 of the Act, as declared in the statutory declaration made pursuant to Section 440 of the Act to have been summoned, for the purposes of effectuating a creditors' voluntary winding up.

   This Guide does not purport to cover the practice to be adopted in respect of all other creditors' meetings under the Act or the Companies (Winding-Up) Rules 1972 (Rules).

Pre-Commencement Consideration

4. An interim Liquidator is typically appointed by the company before a creditors' voluntary winding up. In this regard, certain matters should be considered or attended to prior to the proposed appointment of the interim Liquidator, so that the creditors' voluntary winding up may proceed with minimum complications.

Professional Independence

5. Before accepting the appointment, IG G1 requires the Insolvency Practitioner (IP) to consider the implications of such an appointment, in light of the By-Laws.

   A member in public practice should be, and be seen to be, free of any interest which might detract from objectivity in each professional assignment he undertakes.

   No partner or employee of a firm should accept appointment as Liquidator of a company where they have had a continuing professional relationship with the company including the Receiver of any assets of the company for the previous two years if the company is insolvent.

6. The member should also conduct a company search at Suruhanjaya Syarikat Malaysia and check details of directors and secretaries to determine if there exists any potential conflicts of interest (see requirements of IG G2).

Eligibility to Act

7. In addition to the restrictions provided under the Act and By-Laws, a member in public practice shall not knowingly consent to be appointed, and shall not knowingly act as Liquidator of a company in a creditor's voluntary winding up:

   a. if he is not an approved Liquidator *[Section 433(1)(a) of the Act]*;
   b. if he is indebted to the company or to a corporation that is deemed to be related to the company by virtue of Section 7 of the Act in an amount exceeding twenty-five thousand ringgit *[Section 433(1)(b) of the Act]*;
   c. if he is an officer of the company *[Section 433(1)(c) of the Act]*;
   d. if he is a partner, employer or employee of an officer of the company *[Section 433(1)(d) of the Act]*;
   e. if he is a partner or employee of an employee of an officer of the company *[Section 433(1)(e) of the Act]*;
   f. if he assigns his estate for the benefit of his creditors or has made an arrangement with his creditors under any law relating to bankruptcy *[Section 433(1)(f) of the Act]*;
   g. if he becomes bankrupt or *[Section 433(1)(g) of the Act]*;
   h. if he is convicted of an offence involving fraud and dishonesty punishable on conviction by imprisonment for three months or more *[Section 433(1)(h) of the Act]*.

8. An exception is given to any person who is not an approved Liquidator or is an officer of the company mentioned in paragraph 7 to act as a Liquidator for the purpose of a creditors' voluntary winding up if, a majority of creditors in number and value agree so pursuant to Section 433(2)(b) of the Act.

   However, the person shall not be appointed as Liquidator of a company unless he has, prior to the appointment, consented in writing to act as a Liquidator.
   [Section 433(2)(b) and Section 433(4) of the Act]

Instructions for Advisory Services

9. Instructions to act in advisory capacity should be properly defined and be accepted only where there are good grounds for believing that a creditor's voluntary winding up is possible. Although creditors' voluntary winding up is a permissible mode of winding up an insolvent company voluntarily, the creditors themselves cannot effect a voluntary winding up. Their rights to be exercised in the creditors' meeting come into existence only when the insolvent company takes steps to wind up voluntarily by having convened a meeting to pass a special resolution to that effect. In the absence of this action by the shareholders, creditors' voluntary winding up cannot take place.

   The advising member should ascertain from the client whether the shareholders will pass the special resolution to wind up voluntarily. Where a petition has been presented to the Court to wind up the company on the ground that it is unable to pay its debts or on any other grounds, the client should be advised not to take any step to wind up the company voluntarily.

10. The directors should be advised of their responsibility to lodge the statutory declaration pursuant to Section 440 of the Act with the Registrar and the Official Receiver and to appoint an approved Liquidator (approved under Section 433 of the Act) to be the interim Liquidator and convene meetings of shareholders and creditors. The advising member must therefore satisfy himself that the directors are aware of their responsibilities.

11. If the advising member receives instructions which would require him to act in a manner contrary to this Guide, he should only accept those instructions after careful consideration of the implications of accepting and / or discharging those instructions. Where the directors act contrary to the guidance contained in this Guide or to the provisions of the Act, the advising member may be exposed to the extent that he may be called upon to show that the directors' actions were undertaken either without his knowledge or against his advice.

12. A member who is unable or may not want to accept an appointment as an interim Liquidator of a company on the basis that he or his firm has held a continuing professional relationship with the company during the preceding two years may nevertheless act as an advising member.

Compliance with Section 440 of the Act

13. In order to comply with Section 440 of the Act, the client should be advised to ensure that the accounting records are up to date and to prepare the Statement of Affairs reflecting the deficiency in order to substantiate the said statutory declaration to be made by the directors in the prescribed Statutory Declaration of Inability of Company to Continue Business, and that Meetings of the Company and its Creditors have been Summoned (Statutory Declaration).

14. The Statement of Affairs to be prepared by the directors should be in the prescribed form, which is the statement required under Section 449(5) of the Act to be laid before the meeting to be convened pursuant to Section 449 of the Act, by the directors. The client should be guided through the requirements of the said Statement of Affairs together with all of the attendant schedules, where relevant.

15. The Statutory Declaration should be made only after carefully considering the company's ability to convene the meetings of shareholders and creditors which are to be held within 30 days from the date of the declaration.

16. The time and place of the meetings (to be stated in the Statutory Declaration) should be convenient to the majority in value of the creditors.

17. Subject to paragraph 15, there is no objection to an advising member arranging for the meeting to be held at his own office provided it is a convenient place. He may also be able to charge the company for the use of the facilities.

18. It should be highlighted to the directors that the company is required to hold the creditors meeting on the same day or the next day following the day on which the shareholders meeting to pass the resolution to voluntarily wind up the company is held. It is for the advising member to advise the client of the preferable date after taking into consideration all the circumstances of a particular case.

19. After taking into consideration paragraphs 13 to 16, the client should be advised to pass or procure resolutions to convene the meeting of members followed by the meeting of creditors, to make or procure to be made the statutory declaration in the prescribed Statutory Declaration, to appoint an interim Liquidator pursuant to Section 440(1) of the Act, and also to nominate a director to attend the meeting of creditors.

20. If the advising member is not an approved Liquidator, he should assist by suggesting the name of an approved Liquidator to be appointed pursuant to Section 440(1) of the Act.

21. If the advising member is an approved Liquidator, he may also accept appointment as the interim Liquidator.

22. After passing of the resolutions as per paragraph 19, the directors should be advised to make and lodge the Statutory Declaration with the Registrar and with the Official Receiver and also to give notice of appointment to the interim Liquidator to forthwith take office.

23. Notice of the appointment of an interim Liquidator and a copy of the said declaration should be advertised within 14 days of the appointment of the interim Liquidator in one widely circulated newspaper in Malaysia in the national language and in the English language.

24. The advising member should highlight to the client that, pursuant to Section 441 of the Act, the date of commencement of winding up shall be:

    a. where an interim Liquidator has been appointed before the resolution for voluntary winding up was passed, at the time when the declaration referred to in Section 440(1) of the Act was lodged with the Registrar and Official Receiver; and
    b. in any other case, at the time of passing of the resolution for voluntary winding up.

25. The company should be advised to cease to carry on its business from the commencement of the winding up, unless otherwise opined by the Liquidator, subject to Paragraph 1, Part II of the Twelfth Schedule of the Act. The company should also be aware that under Section 516 of the Act, upon commencement of winding up, the words “in Creditors’ Voluntary Liquidation” must be added after the name of the company on every document in which the name of the company appears including invoices, orders for goods, business letters issued by or on behalf of the company or a Liquidator of the company or even a Receiver or Manager of the property of the company.

Notices of Meeting

26. The date, time and venue of the meetings to be stated in the notices to shareholders and creditors should be the same as that stated in the Statutory Declaration.

    The notices to shareholders and creditors shall be sent by post simultaneously, and preferably on the same day the Statutory Declaration is lodged with the Registrar and Official Receiver. Notices should also be served on the interim Liquidator and others who are required by law to attend the meeting.

Meeting of Shareholders

27. The directors and the company secretary should be fully conversant with the practice to be adopted in respect of shareholders' meeting as the usual rules regulating calling and conduct of company meetings apply in relation to matters such as notice, proxy, voting and procedure. In any event, the advising member should advise the client that:

    a. A minimum of 21 days' notice in writing is to be given to the shareholders to pass a Special Resolution for winding up of the company;
    b. If shorter notice is given, it should be predetermined with certainty that 95% in value of shareholders present in person or by proxy will consent to the shorter notice; and
    c. The proxy form (taking into consideration, where applicable, the company's Constitution) is enclosed with the notice.

28. Shareholders should be advised to nominate a Liquidator for consideration of the creditors at the creditors' meeting as set out in paragraphs 62 and 63.

29. The shareholders should also be advised to nominate up to five of their own number to act in the Committee of Inspection (COI), should one be formed at the creditors' meeting. However, the appointment of the person(s) nominated is subject to the creditors' consent.

Meeting of Creditors

30. The company is required to cause a meeting of the creditors to be held either on the same day or the day following the shareholders' meeting. The said meeting should be held at a venue and time convenient to majority in value of the creditors.

31. The notices of the said meeting should be sent by post simultaneously with the notices of the shareholders' meeting. Although the statutory requirement is to give a minimum of seven clear days' notice, in effect 21 days' notice is given because the notices to creditors should be sent simultaneously with the notices to the shareholders. If, 95% of the shareholders have consented to shorter notice of the shareholders' meeting, the legal requirement of a minimum of seven clear days' notice to creditors

may be given. The notice of meeting should also be advertised at least seven days before the date of the meeting in a newspaper circulated generally throughout Malaysia in the national language and in the English language.

32. A cover letter should be sent to each creditor stating briefly the purpose of the meeting and the following should be enclosed:

    a. Notice of meeting of creditors;
    b. Detailed list of names of creditors and the amounts of their claims; and
    c. Instrument of appointment of proxy or representative.

    There is no prescribed form for notice of meeting of creditors pursuant to Section 449 of the Act and, as such, any suitable form may be used.

    The notice of meeting of creditors should clearly state the objective and purpose of the meeting and at the foot of the notice of meeting, it should state that the statement of claim and proxy forms should be lodged with the person convening the meeting not later than 12:00 noon of the calendar day before the meeting. The proxy form should be lodged at the registered office.
    [Rule 139(2)]

33. The advising member should advise the client to take all reasonable steps to ensure that the list of creditors provided by the directors is complete. Thus, for example, he should advise the company to identify and send notices to creditors such as hire purchase companies, lessors, bankers, public utility companies, Inland Revenue Board, Royal Malaysian Customs Department, EPF Department, SOCSO Department, the Registrar, solicitors acting on behalf of creditors, land office, employees and workers.

34. Additionally, the client should be advised that the directors of the company must prepare a Statement of Affairs showing in respect of assets, the method and manner in which the valuation of the assets was arrived at, together with a list of the creditors and the amount of their claims to be laid before the meeting of creditors. The client should be advised that one of the directors of the company be appointed to attend the meeting.

35. The advising member should also take cognisance of Rule 117 relating to the costs of calling the meeting.

Statement and Forms to be Sent with the Notice of Meeting of Creditors

36. The directors should prepare a detailed list of creditors and the amount owing and the advising member should take steps to ensure that:

    a. The list provides details of the names of all known creditors and the amounts due to them;
    b. The names should be arranged in alphabetical order for ease of reference; and
    c. Sufficient copies are available to be sent with the notices to creditors.

37. The advising member should also ensure that sufficient proxy forms in accordance with Form 73: *General Proxy* and Form 74: *Special Proxy* of the Rules respectively are available to be sent with the notices to creditors. The proxy forms should be lodged at the registered office.

Proxies / Appointment of Representatives

38. The forms of proxy or appointment of representatives accompanying the notice should state the name of the company and the date of the meeting before despatch in order to reduce the possibility of errors by creditors in completing the forms. No name of the interim Liquidator or any other person shall be inserted or printed in the forms before it is sent.

39. Proxies to be used at the meeting are valid only if they are lodged by the time stated in the notice, convening the meeting at the place specified in the notice.

40. Proxies which are lodged out of time should be treated as invalid. Proxies which are incorrectly completed in a material way should in general be rejected. There is a requirement for proxy forms to be filled by a witness in his own handwriting and to certify at the foot of the proxy form where the creditor is blind or incapable of writing. Proxies which are unsigned or which do not explain the authority under which they are signed will therefore be invalid. However, proxies should not be rejected simply because of a minor error in their completion provided:

    a. The form of proxy sent with the notice of the meeting (or a substantially similar form) has been used; and
    b. The identity of the creditor and the proxy holder, the nature of the proxy holder's authority and any instructions given to the proxy holder are clear.

41. The chairman or the interim Liquidator appointed as general or special proxy is valid.

42. A general proxy should be given by a creditor to a person who is in his regular employment and the standing of the person to the creditor should be stated, otherwise it will be invalid. A minor appointed as a proxy will be invalid.

43. Where a person is appointed as representative for a corporation he should produce to the chairman of the meeting a certificate under Section 333(5) of the Act. If there is an authority letter to be a representative of a corporation, the filing of a proxy is not necessary.

44. When advising the chairman of the meeting on the validity of proxies, the advising member should bear in mind, that he has a personal interest if he intends to seek nomination as Liquidator. Where circumstances so demand, he should suggest that the chairman takes advice on the validity of proxies from an independent source, for example the company's solicitors.

45. There is no requirement for proxies which are considered invalid to be returned to the creditors who have lodged them.

46. Any person entitled to attend the meeting may inspect the proxies and statement of claims, either immediately before or during the meeting. Proxies and statement of claims consist of those which have been validly lodged including those rejected for voting purposes. In this context, the words "immediately before" should be taken to mean during the 30 minutes immediately preceding the meeting.

Submission of Claims

47. It is recommended to insist on statement of claim by creditors notwithstanding that the accounting records of the company contain entries, which *prima facie* establish the indebtedness of the company to the creditors.

48. Creditors attending the meeting may submit statement of claim at any time before voting, even during the course of the meeting itself. The amount for which the chairman of the meeting should be advised to admit for voting purposes, should normally be the lower of:

    a. The amount stated in the statement of claim; or
    b. The amount considered by the company to be due to the creditor.

    However, if the amount stated in the statement of claim is indisputable such as in a situation where the book entry in the company's book is manifestly in error, the chairman should be advised to accept the amount in the statement of claim.

    Statement of claim from secured creditors shall be admitted for voting purposes for only the balance amount after deducting the value of the security. The amount for which the statement of claim is admitted for voting purposes should be endorsed on it. Statement of claim received before the meeting should be made available for inspection, with the proxies, by any person entitled to attend the meeting.

Attendance at the Creditors' Meeting

49. One of the directors of the company appointed by the directors and the secretary of the company should attend the meeting. In addition, the advising member should consider whether any other director or employee of the company will be able to provide information which is relevant to the meeting and if so, he should advise that the relevant notice to attend be served.

50. The interim Liquidator should attend the meeting of creditors, and give any explanations, if required, on his statement of receipts and payments from date of his appointment to date of meeting.

51. Creditors and their authorised representatives are entitled to attend. In addition, a person who holds himself out as representing a creditor should, in the absence of evidence of the contrary, be allowed admittance to the meeting. If any person claims to be the representative of a body corporate, proof of his identity and of the resolution authorising him to act may be required where any doubt is raised.

52. The chairman of the meeting should be advised that he must decide whether to allow any third parties, such as shareholders, the press or the police, to attend, after taking into account the views of the creditors present.

Information to be Provided to the Creditors' Meeting

53. The advising member should advise the client that the director appointed to attend the creditors meeting, along with the company secretary, shall disclose in the meeting the company's Statement of Affairs showing in respect of assets the method and manner in which the valuation of the assets was arrived at together with a list of the creditors and the amount of their claims, and the circumstances leading up to the proposed winding up.

54. The advising member should ensure that a copy of the directors' sworn Statement of Affairs is laid before the meeting of creditors.

55. Information to be given to the meeting should include:

    a. Details of any prior involvement with the company or its directors by the advising member or, if a different person, the proposed Liquidator;
    b. A report on the previously held shareholders' meeting, stating the date the notice of the meeting was issued, the date and time that the meeting was held and if it was held at short notice, the reasons thereof and the fact the required consents were received. The resolutions passed at the meeting should be reported and if the Liquidator has not yet consented to act, that fact should be stated. If the shareholders' meeting was adjourned without a resolution for voluntary winding up being passed, there should be reported:
        i. the date and time to which the meeting had been adjourned;
        ii. the fact that any resolutions passed at the Section 449 of the Act meeting will come into effect, if and when the winding up resolution is passed;
    c. The date on which the directors gave instructions for the meeting of creditors to be convened and the date on which the notices were despatched;
    d. A brief report on the company's relevant trading history which should include:
        i. names of current board members and company secretary;
        ii. names of major shareholders together with details of their shareholdings;
        iii. the directors' reasons for the failure of the company;
        iv. the names and professional qualifications of any valuer whose valuations have been relied upon for the purpose of the Statement of Affairs, together with the basis or bases of valuation; and
        v. such other information as the advising member considers necessary in the circumstances to give the creditors a proper appreciation of the company's affairs;

e. If the company is in receivership, the meeting should be provided with a report on the conduct of the receivership to date, including a summary of the Receiver's receipts and payments. Where any member is an IP and is a Receiver of a company whose shareholders pass a resolution for voluntary winding up, that member should assist the advising member by providing this information, and also provide such information to any other IP who may be acting in the capacity of advising member; and

f. An explanation of the contents of the Statement of Affairs.

Conduct of the Creditors' Meeting

56. Creditors and their representatives attending the meeting are required to sign an attendance list. This list should be made available for inspection to anyone attending the meeting. In addition, any creditor or creditor's representative wishing to speak, ask questions, or make a nomination, should be asked to identify himself and the creditor he represents.

57. The creditors may appoint one of their members to be the chairman, failing which the director appointed to attend the meeting shall preside.

58. The chairman should be advised that he has to make a ruling that the meeting is held at a time and place convenient to the majority in value of the creditors and that his decision shall be final. If the chairman decides that the meeting has not been held at a time and place convenient to that majority, the meeting shall lapse and another meeting shall be summoned by the company as soon as possible.

59. If the meeting of the company is adjourned and the resolution for winding up is passed at an adjourned meeting, any resolution passed at the meeting of the creditors shall have effect as if it has been passed immediately after the passing of the resolution for winding up. Subject to Section 449(10) of the Act, where a resolution is passed at an adjourned meeting of any creditors, the resolution shall for all purposes be treated as having been passed on the date on which was in fact passed and not on any earlier date.

60. Creditors and their representatives should be given the opportunity to ask questions. Whilst every effort should be made to give a reasonable answer to such questions within the context of the meeting, the chairman may be advised to refuse a question to be raised if, for example:

    a. The questioner refuses to give the name of the creditor he represents and his own name or that of his firm;

    b. The questioner does not claim to be or to represent a creditor; or

    c. The information sought could be construed as defamatory if subsequently proved incorrect.

61. The chairman should be advised to state the grounds on which he refuses to allow a question. Creditors are entitled to information on the causes of the company's failure but it is not appropriate for a detailed investigation of the company's affairs to be discussed at a meeting of creditors.

62. The shareholders and the creditors may at their respective meetings nominate a person to be a Liquidator for the purpose of winding up the affairs and distributing the assets of the company. The chairman should ascertain whether the person nominated by the company / shareholders meets the qualifications as set out in Section 433 of the Act.

63. If at the creditors' meeting, the creditors nominated another person other than that person nominated by the shareholders as Liquidator, the person nominated by the creditors shall be Liquidator. If no person is nominated by the creditors, the person nominated by the company shall be Liquidator. A Liquidator is not deemed to have been duly appointed unless the resolution for his appointment is passed by majority in number and in value.

    In the event where a different person is nominated, any director, member or creditor may within seven days after the date of the creditors' nomination apply to the Court for an order directing that the person nominated as Liquidator by the company be Liquidator or jointly with the person nominated by the creditors.

    Where an application is made to the Court upon dispute between the shareholders and the creditors on the appointment of Liquidator, it will be for the Court if it sees fit to direct that the person appointed by the shareholders should act as the Liquidator or jointly with the person appointed by the creditors. If the Court makes no order, then the person nominated by the creditors shall take precedence over the nomination by the shareholders.

64. The chairman should be advised that if a person nominated to be appointed as a Liquidator is not an approved Liquidator, a vote should be taken first to determine whether the majority in value and number present and voting of the creditors approve the appointment of a person as Liquidator who is not an approved Liquidator. A Liquidator appointed under creditors' voluntary winding up is not required to be an approved Liquidator under Section 433(2)(b) of the Act.

65. The procedure to be followed when voting for the appointment of a Liquidator should be explained to the meeting. It should be conducted by stating the names of all those nominated and by the issue of voting papers on which those wishing to vote will be required to show their name, the name of the creditor they are representing, the amount of the creditor's claim and the name of the nominated person for whom they wish to vote.

66. Nominations for the appointment of a Liquidator should be requested before any vote is taken. The holder of a proxy, requiring him to vote for the appointment of a particular Liquidator, is required to nominate that person, and it is therefore possible that the chairman or any other holder of such proxies may need to make more than one nomination.

67. The chairman must accept all nominations and put them to the meeting. All persons nominated to act as Liquidators must have given their consent to act in writing and such consent must be provided to the chairman as evidence.

68. When all votes have been counted, the chairman should announce the result to the meeting, giving details of the total value and number of votes cast in favour of each nomination. He should also give

details of votes which have been rejected, either in whole or in part, and should also state which nomination those creditors supported.

69. A majority in number and value is required for a Liquidator to be appointed by the creditors at the meeting. If the poll is not conclusive (i.e., no majority in number and value), there will be no nomination of the Liquidator by the creditors and the Liquidator(s) nominated by the company shall be the Liquidator(s).

70. The appointed Liquidator may, or upon request, summon a separate meeting to appoint the COI. If it wishes to do so, the meeting should be advised of any shareholders' nominations to the committee and of the voting procedure which will be followed. It is accepted that, where the constitution of the committee is not contentious, a resolution may be passed on a show of hands and may also appoint a committee *en bloc*. If there are more than five nominations for appointment to the COI, it is recommended that the creditors should be issued with voting papers on which they should enter their own name, the name of the creditor they represent and the amount of his claim. Each creditor should be allowed to vote for up to five members of the COI and in doing so a creditor may vote for his own. Each nominee shall require a majority in number and value of creditors to become a member of the COI. If such a committee is appointed the company may, either at the meeting at which the resolution for voluntary winding up is passed or at any time subsequently in general meeting, appoint such number of persons but not more than five as it thinks fit to act as members of the COI. The creditors, if they think fit, can resolve that all or any of the persons so appointed by the company ought not to be members of the COI and, if the creditors so resolve, the persons mentioned in the resolution shall not be qualified to act as members of the COI, unless the Court otherwise directs. On any application to the Court, the Court may if it thinks fit, appoint other persons to act as such members in place of the persons mentioned in the resolution.

71. When declaring the result, the chairman should follow the same procedures as those outlined in paragraphs 63 to 68 above.

72. Voting papers should be made available for inspection by any creditor or creditor's representative whose claim has been admitted for voting purposes at any time during the meeting or during the business hours on the business day following the meeting.

73. The admission or rejection of claims for voting purposes is the responsibility of the chairman. In most instances it is expected that, prior to the meeting, the chairman will mark on each statement of claim the amount for which it is admitted. The advising member may assist the chairman to decide the amounts for which claims should be admitted, in accordance with the guidance given in paragraph 48 above; but if he intends to seek appointment as Liquidator he should bear in mind that his own personal interest might create a conflict, in which case the chairman should be advised independently. If the chairman is in doubt whether a claim should be admitted or rejected, he shall marked it as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained.

Minutes of Meeting

74. The minutes of meeting of shareholders and creditors should be prepared immediately after the close of meetings setting out details of the decisions reached and the chairman of the respective meeting should be asked to sign and date the respective minutes. The minutes should then be kept with the liquidation papers.

Compliance with Section 439 of the Act

75. The directors should be advised to lodge the printed copy of the resolution for voluntary winding up (i.e., Notice of Resolution) with the Registrar within seven days from the date of resolution and to give notice of the resolution in one widely circulated newspaper in Malaysia in the national language and in the English language within ten days from the date of the resolution.

Provision of Information to Liquidator

76. In instances where the advising member has not been appointed to be the Liquidator of the company, he must provide reasonable assistance to the Liquidator.

    This will include handing over the company's books and papers held by him, together with documents he has received in relation to the meeting of creditors (e.g., statement of claims, proxies, Statement of Affairs, shareholders' resolution, attendance lists and minutes of the creditors' meeting). It is expected that this information will be handed over as quickly as possible. Likewise, all sums received by the advising member cum interim Liquidator from the company or on its behalf, less any proper disbursements which he has made, duly vouched, should also be handed over.

Solicitation to Obtain Nomination

77. Members are reminded of the provisions of Section 537 (Inducement to be appointed as Liquidator, etc.) of the Act and Rule 136 (Solicitation by Liquidator to obtain proxies) that prohibits any person from giving or agreeing to give any member or creditor of the company any valuable consideration for securing his appointment or nomination.

L3: A LIQUIDATOR'S ASSESSMENT AND REVIEW INTO THE AFFAIRS OF THE INSOLVENT COMPANY

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Introduction

1. This Guide is issued for the use of members in connection with the liquidation of insolvent companies registered in Malaysia under the provisions of the Companies Act 2016 (Act).

2. This Guide concentrates on the duty of a Liquidator of an insolvent company to assess and review the company's affairs. The winding up of a company may be either by the Court or voluntary.

Duties of Liquidator

3. The Liquidator's primary duty in the conduct of liquidation is to take possession and realise the assets of the company and distribute them to the creditors, after establishing the liabilities of the company. Hence, though there is no specific provision in the Act that requires the Liquidator to carry out an investigation, the Liquidator is to undertake an assessment and review what assets can be realised and what other recoveries can be made. The creditors have an interest in the Liquidator's assessment and review, because both the level of recoveries and the costs of the assessment and review will affect the funds that are available for distribution to them. The Liquidator should maintain communication with the creditors to obtain their views about actual and prospective assessment and review, and to keep them informed of the progress and possible outcome.

4. While the primary purpose of undertaking an assessment and review is to determine the assets and liabilities of the company, the Liquidator appointed under a Court Order should note the requirements of Section 485 of the Act. Under this Section, a Liquidator is required to submit a preliminary report to the Court as soon as practicable after receiving the Statement of Affairs from the directors. This report must state the following:

   a. the amount of capital issued, subscribed and paid up and the estimated amount of assets and liabilities;
   b. if the company has failed and the causes of the failure; and
   c. whether in the Liquidator's opinion, further inquiry is desirable as to any matter relating to the promotion, formation or failure of the company or the conduct of the business thereof.

5. Apart from recovering assets for the benefit of the creditors, the Liquidator may also assume other ancillary duties upon taking over the affairs of the company. Certain statutes such as the Housing Development Act 1966 and Strata Management Act 2013 put the Liquidator into the shoes of the developer to fulfil unmet obligations of the developer such as applying for strata titles, conveyancing matters, formation of Joint Management Body and Management Committee, etc.

6. Under Section 485 of the Act, the Liquidator may also, if he thinks fit, furnish further reports to the Court stating the manner in which the company was formed and whether, in his opinion, any fraud has been committed or any material fact has been concealed by any person in its promotion or formation or since its formation or if any officer of the company has contravened or failed to comply with the Act. In addition, the Liquidator is required to report to the Court on any other matters. which in his opinion,

are desirable to be brought to the attention of the Court. The Liquidator should also take cognisance of Rules 36 to 38 of the Companies (Winding-Up) Rules 1972 (Rules) in considering reports under Section 485 of the Act. It must be noted that the Liquidator of a company which is an insurer is no longer required to submit the preliminary report to Bank Negara Malaysia at the same time as he submits them to Court (by summons *ex parte*).

7. The Liquidator is required under Section 542(3) of the Act that if it appears to him, in the course of any winding up, the insolvent company will be unable to pay its unsecured creditors more than fifty cents in the dollar, to report the matter in writing to the Official Receiver and to furnish the Official Receiver with such information and give to him such access to and facilities for inspecting and taking copies of any document as the Official Receiver may require.

8. The extent and nature of the work to be carried out for the purposes stated in the paragraphs above will vary from company to company and is subject to the availability of funds as provided in Section 519 of the Act, but the Liquidator should consider including the work as set out in the paragraphs that follow.

9. One of the objectives is to reassure creditors that the Liquidator has followed a minimum standard procedure in assessing and reviewing the affairs of the insolvent company whether there are assets or not and to report thereon to the creditors or Committee of Inspection (COI), if one has been formed. The assessment and review should also facilitate the rendering of the various reports stated in paragraphs 6 to 8 if they are required.

Records

10. At the outset of the appointment, the Liquidator should ascertain the location and safeguard and list the company's Books and Records and accounting information (including computerised information). If the Liquidator does not receive co-operation, he should take steps in accordance with Section 502 and Section 503 of the Act.

Initial Review

11. At the outset of the liquidation, the Liquidator should conduct an analytical review, based on initial information available, in order to assess whether there is a *prima facie* case for a more detailed assessment and review into any aspect of the company's affairs. In undertaking this review, the Liquidator should undertake the following preliminary enquiries:

    a. invite creditors, or members of COI, if formed, to bring to his attention any matters which they consider require detailed assessment and review;

    b. the Liquidator should make enquiries of the officers and directors of the company as to the affairs of the company, including reasons for failure, location of the company's Books and Records and property. If the Liquidator does not receive co-operation, he should record the steps taken by him;

c. the Statement of Affairs should be compared with the last audited accounts to ascertain whether all the fixed and current assets can be identified and material movements in fixed and current assets can be properly explained; and
d. the Liquidator should conduct a review of the Books and Records over the last six months in order to identify any unusual or exceptional transactions.

12. The Liquidator should consider whether the initial review discloses any matters that suggest there are grounds for more detailed assessment and review or possible rights of action which the company may have against third parties. In conducting this exercise, the Liquidator should take into consideration the size of the case, the level of assets available to fund any further assessment and review, and the materiality of the matters disclosed.

Consultation with Creditors

13. Where the Liquidator believes there are grounds for further assessment and review or possible action, the Liquidator should discuss the matter with the creditors, or COI, if formed, in order to ascertain their views on such further work. This assessment will need to take into account possible benefit and likely costs of the exercise. The Liquidator should provide any information that may be required by the creditors to provide their views.

14. If further assessment and review should be undertaken, the Liquidator should discuss the scope of work and funding issues with the creditors or COI, if formed.

15. The Liquidator should report the progress of the assessment and review at specific intervals or at appropriate stages during the conduct of the assessment and review. When reporting, the Liquidator should provide details of costs incurred to date, and should seek the views of creditors or COI, if formed, on continuing with the assessment and review.

16. Where there is no COI, the Liquidator should seek the views of the creditors either by correspondence or by way of meetings.

Matters for Detailed Assessment and Review

17. Where it is agreed to conduct further assessment and review, the following points may be useful, depending on the circumstances of the case and nature of the assessment and review.

Question / Interview Management

18. The onus is on the Liquidator to consider which directors, including those who held office during the material time prior to liquidation, shadow directors, company secretary, senior officials, employees, and company's professional advisors, are relevant, having regard to their accessibility and information which he believes they may have.

19. The Liquidator should take cognisance of the following statutory requirements:

    a. Section 502 of the Act and Rule 49 in connection with power of the Court to summon persons connected with the company;
    b. Section 503 of the Act and Rule 50 in connection with power of the Court to order public examination of the promoters, directors, or any officers of the company; and
    c. Rules 52 to 58 regarding the Liquidator's further powers and duties in relation to Section 502 and Section 503 of the Act.

    Under Section 503 of the Act, the Liquidator would need to make a report to the Court stating that in his opinion, a fraud has been committed, or that any material fact has been concealed, etc., and the Liquidator may, under Section 503(3) of the Act, take part in the examination either personally or by an advocate.

Statutory Books

20. The statutory books of the company should be examined together with the minutes book and compared with a search obtained from the Registrar. Particular attention should be given to the identity of directors who held office during the material time prior to the liquidation.

Trading Losses

21. The Liquidator should review the deficiency account prepared by the directors and to reconcile the balance on the last available profit and loss account to the deficiency disclosed by the Statement of Affairs. If the apparent trading losses are material, consideration should be given to the preparation of the accounts to support the reasons given by the directors for the losses incurred.

Validity of Charges

22. Details of all securities held by banks and other parties should be obtained and the Liquidator is to check the registration and to consider the possible invalidity of any charge pursuant to Section 352(2) of the Act. Where liquidation follows receivership, the validity of the appointment of the Receivers should also be confirmed.

Reconciliation of Assets with the Last Balance Sheet

23. For the purposes of discovering assets, the Statement of Affairs should be compared with the last audited accounts and the movement in assets reconciled by reference to cash and other records.

Transactions with Related Companies or Connected Persons

24. The Books and Records of the company should be examined to ensure that any transactions with related companies or connected persons were carried out at arm's length and material transactions

should be examined in detail. Particular attention is drawn to transactions involving directors, including any reduction in loan accounts and / or reduction in overdrafts supported by personal guarantees.

Other General Matters

Recovery – Rights of Action

25. Should the Liquidator's assessment and review of the affairs of the company unearth any rights of action which the company or the Liquidator may have against third parties, the Liquidator's attention is drawn in particular to the following provisions in the Act:

Section 223	Approval of company required for disposal by directors of company's undertaking or property **penalty increased from RM30,000.00 to not exceeding RM3,000,000.00*
Section 228	Transactions with directors, substantial shareholders or connected persons **penalty increased from imprisonment of seven years or RM250,000 to imprisonment for a term not exceeding five years or to a fine not exceeding RM3,000,000.00*
Section 224	Loans to directors **penalty increased from fine of RM10,000.00 to imprisonment for a term not exceeding five years or to a fine not exceeding RM3,000,000.00 or to both.*
Section 225	Prohibition of loans to persons connected with directors **penalty increased from RM10,000.00 to imprisonment for a term not exceeding five years or to a fine not exceeding RM3,000,000.00 or to both.*
Section 435	Liability as contributories of present and past members
Section 456	Powers of Liquidator in a voluntary winding up
Section 472	Avoidance of dispositions of property or certain attachment, etc
Section 484	Submission of Statement of Affairs of company
Section 486	Powers of Liquidator in winding up by Court
Section 489	Settlement of list of contributories and application of assets
Section 495	Debt due by contributory to company and extent of set off
Section 496	Power of Court to make calls

Section 528	Undue preference
Section 529	Effect of floating charge
Section 530	Liquidator's right to recover in respect of certain sales to or by company
Section 536	Offences by officers of companies in liquidation
Section 539	Liability where proper accounts not kept
Section 540	Responsibility for fraudulent trading
Section 542	Prosecution of delinquent officers and members of company

26. The provisions stated above are not exhaustive and the Insolvency Practitioner may need to refer to other specific Sections of the Act and the Rules depending on the nature and circumstances surrounding the transactions being assessed and reviewed.

27. If in the course of a winding up, where a Liquidator appointed under a voluntary winding up discovers that criminal acts have been committed, he should consider relevant laws and regulations, and may wish to obtain legal advice, before rendering any report to the creditors. If it appears to the Liquidator in the course of a voluntary winding up, that any past or present officer, or any member of the company has been guilty of any offence in relation to the company for which he is criminally liable, he shall forthwith report the matter to the Minister under Section 542(2) of the Act. It is advisable that the Liquidator obtain legal advice before making the report.

28. If, during the course of the assessment and review, any apparent preferences or rights of action come to light, the Liquidator should seek legal advice as to whether or not any particular transaction can be set aside.

29. The Liquidator should obtain the sanction of the creditors or the COI, if one has been formed, in respect of any decision to bring or defend any action or other legal proceedings in the name of the company. This sanction is not a statutory requirement as the Liquidator has the power to do so. However, it is recommended that the Liquidator seek this consent in instances where the likelihood of any tangible benefit to the creditors as a result of taking such action is not clear. The Liquidator should take cognisance that he can exercise the powers under Part II of the Twelfth Schedule of the Act with the approval of either the Court or the COI as regard to the matters listed therein. Should the COI or body of creditors disagree with the Liquidator on the conduct of further assessment identified in his report to the Court, the Liquidator should apply to the Court for direction.

30. Two additional powers conferred in the Twelfth Schedule of the Act are:

    a. to compromise any debt due to the company other than calls and liabilities for calls and a debt where the amount claimed by the company to be due to the company exceeds RM10,000; and

    b. the Liquidator may apply to the Court or the COI for the authority given for the purpose of subparagraph 1(e), Part II of the Twelfth Schedule of the Act, without additional approval provided, that the debts referred to therein does not exceed RM50,000.00

31. In a voluntary winding up, the Liquidator is empowered by Section 456 of the Act to exercise any powers given to a Liquidator under the Twelfth Schedule of the Act with approval of a special resolution in the case of a member's voluntary winding up or with the approval of the Court or the COI in the case of a creditors' voluntary winding up.

L4: SUMMONING AND HOLDING MEETINGS OF CREDITORS UNDER COURT WINDING UP

Introduction

Convening Meetings of Creditors

- Venue and Time
- Notice of Meeting

Quorum

Proxies

Attendance at the Meeting

Committee of Inspection

Proof of Debt or Submission of Claims

Information to be Provided at the Meeting

Conduct of the Meeting

Minutes of Meeting

Introduction

1. This Guide is issued for the use of members in connection with liquidations of companies registered in Malaysia under the provisions of the Companies Act 2016 (Act).

2. This Guide focuses on the procedure for summoning and holding meetings of creditors in respect of the General Meetings of Creditors and Contributories in relation to Winding Up by the Court.

Convening Meetings of Creditors

3. If there is no Liquidator appointed, the Official Receiver shall summon separate meetings of creditors and contributories within 21 days after the date of the winding up order to determine whether or not an application is to be made to the Court for appointing a Liquidator in place of the Official Receiver.
[Section 4771(b) of the Act]
[Rule 106]

4. The Liquidator may, from time to time, call for meetings to ascertain the wishes of the creditors in all matters relating to the companies' winding up [Section 487(2) of the Act / Rule 112(1)] at such times as the creditors by resolution direct or whenever requested in writing to do so by not less than ten per centum in value of the creditors.

5. There may be circumstances where the Court may direct that meetings be held to ascertain the wishes of the creditors. In such instances, the Court may appoint a chairman for such a meeting and direct how the meeting should be held and conducted.
[Section 521(1) of the Act]

Venue and Time

6. The date and time for the meeting should be fixed with the convenience of the majority of the creditors being taken into consideration (Rule 116). The venue chosen should be adequate to accommodate those who are likely to attend the meeting as well as having regard to the geographical location of the creditors.

Notice of Meeting

7. The Liquidator may, by notice in Form 67: *Notice of Meeting (General Form)* of the Rules summon, hold and conduct a meeting to ascertain the wishes of the creditors in all matters relating to the winding up.
[Rule 112(1)]

8. The Rules provide that the notices of the meeting should be sent to the creditors not less than seven clear days (meaning days which do not include the day of the notice and the day of the meeting)

before the date of the meeting. However, to meet the time constraints that creditors may have, it is advisable to ensure all notices of the meeting are despatched at least 14 days before the day on which the meeting is to be held.
[Rule 114(1)]

9. The notice of time and place of the meeting shall be advertised in the Gazette and in one or more local newspapers. Advertisement of the notice should be at least seven days before the date of the meeting.
[Rule 114(1)]

Quorum

10. A meeting (except for the election of a chairman, the proving of debts and the adjournment of the meeting) shall not proceed unless there are at least three creditors who are entitled to vote, present at the meeting, or if the number of creditors is less than three, all creditors entitled to vote must be present.
[Rule 123(1)]

11. If within 30 minutes from the time appointed for the meeting, a quorum of creditors is not present or represented, the meeting should be adjourned to the same day in the following week at the same time and place or to such other day as the chairman may appoint not being less than seven or more than 21 days [Rule 123(2)]. The Liquidator should inform the creditors of the adjourned meeting.

12. If within 30 minutes from the time appointed for the adjourned meeting, a quorum of creditors is not present or represented, the adjourned meeting shall not be further adjourned and notice of termination of meeting in Form 71: *Notice of Termination of Meeting* of the Rules shall be made.
[Rule 123(3)]

Proxies

13. The forms of proxy should conform to those of either Form 73: *General Proxy* or Form 74: *Special Proxy* of the Rules, as the case may be, and every written part shall be in the handwriting of the person giving the proxy or of any manager or clerk or other person in his regular employment or of a Commissioner for Oaths.
[Rule 132]

14. These forms should be sent together with the notice summoning the meeting.
[Rule 133]

15. No name or description of the Liquidator or any other person should be printed or inserted in the proxy forms to be sent out.
[Rule 133]

16. The time for lodging of proxies should be as close to the time of the meeting as practicable. A proxy shall be lodged with the Liquidator or if there is no Liquidator appointed, with the person named in the notice convening the meeting not later than 12:00 noon of the day before the meeting or adjourned meeting at which it is to be used.
[Rule 139(2)]

17. A proxy which is lodged out of time or incorrectly completed in a material way will be invalid. There is the requirement for the proxy to be signed by the principal or by a person authorised by him, in which case the nature of the authority must be stated. A proxy which is unsigned or which does not explain the authority under which it is signed will be invalid. However, a proxy should not be rejected simply because of a minor error in its completion provided that:

    a. the correct form has been used; and
    b. the identity of the creditor and the proxy holder, the nature of the proxy holder's authority and any instructions given to the proxy holder are clear.

18. Faxed or PDF copies of proxy should not be treated as invalid solely on that basis. If transmitted within the time period for submission, such proxies which are otherwise in proper form, may be accepted if the original copies are produced for verification on the day of the meeting.

19. There is no requirement for proxies which are considered invalid to be returned to the creditors who have lodged them.

20. The proxies and proof of debts (PODs) (including rejected ones) which have been validly lodged can be inspected either immediately before or during the meeting by any person other than the disinterested third parties. It is advisable for the Liquidator or the chairman to inspect the proxies at least 30 minutes before the meeting to ascertain and confirm their validity for purposes of the meeting.

Attendance at the Meeting

21. Creditors and their authorised representatives are entitled to attend the meeting.

22. The chairman of the meeting should be advised that he must decide whether to allow any third parties, such as shareholders or the press to attend, after taking into consideration the views of the creditors present.

Committee of Inspection

23. The Liquidator may, by himself and must, if requested by any creditor or contributory, summon separate meetings of the creditors and contributories for the purpose of determining whether or not the creditors or contributories require the appointment of a Committee of Inspection (COI) to act with the Liquidator, and if so, who are to be members of the COI.
[Paragraph 1, Tenth Schedule of the Act]

24. The COI shall consist of creditors and / or contributories or persons holding:

    a. general powers of attorney from creditors or contributories; or
    b. special authority from creditors or contributories authorising the persons named therein to act on such a COI,

    appointed in the meetings of creditors and contributories in such proportions as are agreed or in case of difference, as are determined by the Court.
    [Paragraph 5, Tenth Schedule of the Act]

25. The Liquidator may elect eligible persons to form the COI at the first meeting and if it is agreed, it should be advised at the meeting, the voting procedure which will be followed.

26. The COI may act by a majority of the members present at the meeting but cannot act unless a majority of the COI is present (Paragraph 7, Tenth Schedule of the Act). Notwithstanding any vacancy in the COI, the continuing members may act if there are at least two continuing members.
[Paragraph 13, Tenth Schedule of the Act]

27. Certain powers of the Liquidator can only be exercised with the consent of either the Court or the COI. Creditors may also summon meetings of creditors to make their views known to the Liquidator, and the Liquidator is to have regard to their views.

28. The Liquidator shall have regard to any directions given by resolution of the creditors at any general meeting or by the COI in the administration and distribution of the assets of the company, and any directions given by the creditors at any general meeting shall in case of conflict, override any directions given by the COI.
[Section 487(1) of the Act]

Proof of Debt or Submission of Claims

29. The Liquidator may require the creditors to submit their PODs, for the purpose of voting at the meeting (Rule 124). The PODs shall be submitted together with the proxies, pursuant to the submission deadline stated in the proxy form.

30. Alternatively, creditors may submit statements of claims before the meeting. A statement of claim which has been submitted should be verified by the Liquidator against the records of the company and should be validly accepted for voting purposes provided that it identifies:

    a. the creditor; and
    b. the amount claimed by the creditor with sufficient clarity.

31. The amount for which the POD or statement of claim is admitted for voting purposes should be endorsed on the form or document which has been submitted.

Information to Be Provided at the Meeting

32. Copies of the directors' sworn Statement of Affairs shall be laid before the meeting. This Statement of Affairs will usually include a list of the major creditors and the amounts owing to them. The statements of affairs will show the book values of the company's assets with the directors' estimated realisable values in a winding up. Sufficient copies of the list of creditors should be available to facilitate its inspection by those attending the meeting.

33. The following information should be provided during the meeting:

    a. a brief report on the company's relevant trading history which should include:
        i. names of current board members and company secretary;
        ii. names of major shareholders together with details of their shareholdings;
        iii. directors' reasons for the failure of the company;
        iv. the names and professional qualifications of any valuers whose valuations have been relied upon for the basis or bases of valuation; and
        v. such other information considered necessary to give the creditors a proper appreciation of the company's affairs;
    b. if the company is also in receivership, a report, if available, should be provided at the meeting, on the conduct of the receivership to date, including a summary of the Receiver's receipts and payments; and
    c. an explanation of the contents of the statements of affairs, if available.

Conduct of the Meeting

34. All creditors and their representatives attending the meeting are required to sign an attendance list. The list should be made available for inspection to anyone attending the meeting. In addition, any creditor or creditor's representative wishing to speak, ask questions, or make a nomination, should be asked to identify himself and the creditor he represents.

35. Creditors and their representatives should be given the opportunity to ask questions. However, there are circumstances where the chairman may be advised to refuse a question put to him if, for example:

a. the questioner refuses to give the name of the creditor he represents and his own name or that of his firm;
b. the questioner does not claim to be or to represent a creditor;
c. the answer could prejudice the outcome of the liquidation or the creditors' interests;
d. the answer could be construed as slanderous if subsequently proved incorrect; or
e. the answer requires the disclosure of information which may be protected by contract or by rule of law.

36. The chairman should be advised to state the grounds on which he refuses to allow a question or to answer a question. Creditors are entitled to information for the company's failure. However, it is not appropriate for a detailed investigation of the company's affairs to be undertaken at the meeting.

37. Resolutions shall be deemed to be passed when a majority in number and value of creditors has voted in favour of the resolution.
[Rule 119]

38. Voting papers should be made available for inspection by any creditor or the creditor's representative whose claim has been admitted for voting purposes, at any time during the meeting or during normal business hours on the day following the meeting.

39. The admission or rejection of claims for voting purposes is the responsibility of the chairman of the meeting. In most instances, it is expected that prior to the meeting, the chairman will mark on each POD form or statement of claim the amount for which it is admitted.

Minutes of Meeting

40. Once the meeting is closed, minutes should be prepared setting out details of the decisions reached, and for such minutes to be signed by the chairman of the meeting or of the next ensuing meeting. The duly signed minutes should be kept together with other winding up records and papers of the company.

41. The minutes of meeting should be circulated to the creditors and all matters arising therefrom should be tabled and / or discussed in the next meeting. Creditors should also be asked to bring to the Liquidator's attention any matters of which they consider he should be aware of.

SCHEME OF ARRANGEMENT (SOA)

SCHEME OF ARRANGEMENT

Introduction

1. A Scheme of Arrangement (SOA) is a restructuring mechanism under the Companies Act 2016 (Act) that allows a company to enter into a compromise or arrangement with the company's members or the company's creditors. This Guide focuses on the use of the SOA between a company and the company's creditors. This is often where the company is in some form of financial distress. One of the key objectives of a SOA is to provide a mechanism to effect a formal compromise to bind dissenting creditors, so long as the statutory majority of votes have been achieved. It is a 'debtor in possession' process; management will remain in control of the company.

2. As a summary, such a SOA would involve three stages.

3. The first stage is obtaining a Court Order for permission, or leave, to hold meetings of creditors or classes of creditors of the company. Where the company is in financial distress, the company may require moratorium protection against creditors' actions. The first stage may then also involve the application for a restraining order in order to obtain such protection.

4. The second stage is the holding of the meeting of creditors or classes of creditors itself. An Explanatory Statement would have been issued to these creditors to explain the details and mechanics of the proposed SOA. At least 75% of the total value of the creditors or class of creditors present and voting at the meeting must approve the proposed SOA.

5. The third stage involves the Court granting sanction of the approved SOA.

6. This Guide concentrates on the requirements of Section 366 to Section 369 of the Act, and the practice to be adopted in terms of the SOA process.

Pre-Commencement Considerations

7. The company, any creditor or member of the company, or the Liquidator (if the company is being wound up) may initiate the procedure [see Section 366(1) of the Act]. Additionally, a Judicial Manager may also initiate a SOA if so allowed for as one of the purposes of the making of a JMO [see Section 405(1)(b)(ii) of the Act].

8. It is ordinarily the company that initiates the procedure. There is no prerequisite for the company to be insolvent before initiating the process.

9. It is not mandatory for a SOA to have to involve an Insolvency Practitioner (IP) or any external financial advisor. However, it is common for the debtor company to engage an IP or an external financial advisor to assess the financial position of the company and to draw up the proposed SOA in consultation with the management of the debtor company.

10. More often than not, the thought of embarking on a SOA arises when the debtor company realises that it can no longer settle its debts as and when they fall due or when it faces legal proceedings

from its creditors, customers, suppliers or service providers. Hence, when the need arises, it is vital to consider certain pre-commencement considerations prior to proceeding with such scheme. Such considerations may include the following:

a. the cause or causes for the distress situation;
b. the viability of the existing business;
c. availability of non-core assets for divestment;
d. working capital requirement;
e. support level of essential creditors;
f. at least 50% existing support level from creditors of each class;
g. support level from secured creditors;
h. any winding up petitions filed by creditors;
i. liquidation scenario;
j. fairness of skeletal scheme to creditors;
k. any integrity issue with the Board of Directors;
l. accuracy of financial records; and
m. the number of companies in the group being proposed for the scheme.

11. When drawing up the details of the proposed SOA, it will be important to assess whether there needs to be different classes of creditors. Each class of creditors will be based on their different legal rights. It will be important to have the appropriate legal advice on the classification of creditors.

12. At an early stage of the engagement, the company would consider whether it requires moratorium protection through an application for a restraining order.

13. If applying for the restraining order, the company would need to consider the requirements of Sections 368(2)(a)-(d) of the Act and can obtain the appropriate legal advice.

14. Under Section 368(2)(a) of the Act, the Court has to be satisfied that there is a proposal for a scheme of compromise or arrangement between the company and its creditors representing at least 50% in value of all creditors.

15. Under Section 368(2)(b) of the Act, the company would have to show that the restraining order is necessary to enable the company and its creditors to normalise the proposed SOA. In other words, there must be some evidence to show the need for such protection through a restraining order.

16. Under Section 368(2)(c) of the Act, the company will have to draw up a statement of particulars as to the affairs of the company. The Statement of Affairs must be made up to a date not more than three days before the filing of the restraining order application. In practice, a similar format of the Form 484: *Affidavit Verifying Statement of Affairs* may be used as the Statement of Affairs for the restraining order application.

17. Under Section 368(2)(d) of the Act, the company would have to obtain more than 50% in value of the creditors in the proposed SOA to agree to nominate a director.

Court Application for Leave for the Court Convened Meeting

18. The company will engage lawyers to prepare the necessary Court papers to seek leave to hold the Court convened meeting.

19. While the proposed scheme need not be in a finalised form, the Court will require some details to see that the proposed SOA is feasible and has merits, for consideration by the creditors.

20. At this stage for leave, the Court will likely want to ensure the correct classification of the creditors. Appropriate legal advice should be obtained.

Restraining Order Application

21. Along with the application for leave for the Court convened meeting, the company may also apply for a restraining order.

22. The Court papers will have to demonstrate compliance with Section 368(2) of the Act.

23. If the restraining order is granted, the restraining order will have an initial validity of three months. There can be subsequent applications to extend the validity of the restraining order up to a further maximum period of nine months. Each extension application will have to comply with the Section 368(2) of the Act requirements afresh.

24. Under Section 368(2)(d) of the Act, the Court will appoint the creditor nominated director. The Court appointed director has a right of access at all reasonable times to the accounting and other records including registers of the company. The Court appointed director is also entitled to require from any officer of the company such information and explanation as he or she may require for the purposes of his or her duty.

25. The restraining order will restrain all further proceedings against the company, except by leave of the Court, and does not affect other operations (such as the transfer of shares) except for the disposition of property by the company in the ordinary course of business.

26. Any dispositions of the property of the company, other than those made in the ordinary course of business, are void unless the Court otherwise orders. Where a company disposes of or acquires any property, other than in the ordinary course of business, without leave of the Court, then every officer of the company who is in default is guilty of an offence.

Court Appointment under Section 367 of the Act

27. Section 367 of the Act provides that on an application, the Court may appoint an approved Liquidator (i.e., an IP) to assess the viability of the proposed scheme. Some key considerations when conducting the assessment may include reasonableness of assumptions used, whether valuation figures are supported, credibility of the business plans and supporting cashflows. The appointed IP shall prepare a report for submission to the applicant. The IP 's report shall be tabled at the Court convened meeting.

28. Section 367 of the Act appears to be wide enough to allow for an application to be made by either the company or the creditor for the appointment of the IP.

Notice of Meeting and the Explanatory Statement

29. In calling for the Court convened meeting of the creditors, a notice summoning the meeting must be issued. The notice must be accompanied with the Explanatory Statement issued pursuant to Section 369 of the Act.

30. The purpose of the Explanatory Statement is to explain the effect of the proposed SOA to the creditors and in particular, stating any material interests of the directors, whether as directors or as members or as creditors of the company or otherwise. The Explanatory Statement will state the effect of the proposed SOA where the effect is different for different creditors. *[Section 369(1)(a) of the Act]*

31. Legal advice should be obtained to ensure that the Explanatory Statement discloses the necessary material information to the creditors for the creditors to make an informed decision when voting.

32. Where the proposed SOA affects the rights of debenture holders, the Explanatory Statement shall give the like explanation with respect to the trustee for the debenture holders. *[Section 369(2) of the Act]*

33. The notice summoning the meeting shall be advertised. Further, the notice summoning the meeting shall either contain the Explanatory Statement, or a notification of the place at which and the manner in which the creditors or members entitled to attend the meeting may obtain copies of the Explanatory Statement [see Section 369(1)(b) of the Act]. The creditor or member can be furnished with a copy of the Explanatory Statement free of charge by the company.
[Section 369(3) of the Act]

34. The Explanatory Statement may include information of, among others, the following:

    a. The financial position, includes all assets and liabilities of the company;
    b. The details of the SOA;
    c. The rationale for the SOA;
    d. Where applicable, if the SOA involves a white knight to be involved in the rescue scheme, then background information about the white knight including its directors, shareholders, operational and historical audited financial information;

e. Prospects and risk factors;
f. Financial effects of the SOA including the share capital, net assets and gearing as well as the substantial shareholders and shareholders structure if the SOA involves a white knight;
g. Where applicable, if there is an independent advisor appointed to advise on related party transactions and / or at the request of the creditors, then the report and advice from the independent advisor;
h. Where applicable, if the scheme involves independent valuation of properties, to include the valuation certificates from the independent valuer; and
i. Secured creditor securities and the collaterals.

35. The Explanatory Statement would also usually attach as appendices:

a. The proxy form for voting at the Court convened meeting;
b. The Rules of the Court convened meeting setting out the procedures for attending and voting at the meeting;
c. Any necessary financial information and audited financial statements of the company; and
d. Creditors listing.

Preparation for the Court Convened Meeting

36. Ahead of calling for the Court convened meeting, the following sets out key logistical matters to be considered:

a. A venue for the Court convened meeting that is convenient to the majority of the creditors. If a situation arises that prevents a physical meeting (e.g., a pandemic), the debtor company can consider a virtual meeting platform to hold the Court convened meeting provided that it does not contravene the Court Order on application of Section 366 of the Act.
b. Proxy forms for voting at the meeting would need to be received by the debtor company 48 hours prior to the meeting. Similarly, if a situation that prevents or limits the debtor company to receive the proxy forms physically, the debtor company should consider electronic forms (i.e., email) as an alternative.
c. The chairperson for the Court convened meeting may have been set out in the Order granting leave for the Court convened meeting. The chairperson may be any director of the company, or the Court appointed creditor-nominated director or the liquidator / Judicial Manager who has filed for the SOA.
d. Appointment of a poll administrator to support and carry out to voting logistics during the Court convened meeting.
e. Appointment of an independent scrutineer to supervise the conduct of the voting process and to verify the poll results.

37. The debtor company should also consider other key attendees during the meeting to support the proceedings:

    a. Financial advisors to the debtor company's SOA
    b. Legal advisors
    c. Company secretary
    d. Investment bankers, where applicable

Holding the Court Convened Meeting

38. The proceeding of the Court convened meeting shall be as follows:

    a. Chairman opening address covering the background and agenda of the Court convened meeting.
    b. Confirmation of the number of attendees and proxy forms received, indicating the number and value of the debts.
    c. Presentation of a summary of the scheme. The presentation should cover the proposed resolution and the indicative return as compared to return in the event of a liquidation. The presentation may be presented by the chairman or the financial advisor.
    d. Upon presentation, the chairman will open up the meeting for a Q&A session to address any query and clarification in relation to the proposed SOA.
    e. Once the Q&A session is closed, the meeting will proceed with the polling process, which will be carried out by the poll administrator.
    f. The independent scrutineer will verify the poll results.
    g. Upon final tally of the poll results, the meeting will reconvene where the chairman will announce the results of the poll covering the number and value of votes in percentages 'for' and 'against' the scheme.
    h. Upon declaration of the results, the chairman will call for the meeting to be closed.
    i. Meeting minutes / chairman's report to be finalised and signed by the chairman.

Application for Court Sanction of the Proposed Scheme

39. After the SOA has been agreed to by 75% majority in value of the creditors (or each class of creditors), present and voting, an application has to be made to the Court for the sanction of the proposed scheme.

40. The Court application would normally include evidence of, among others, the following:

    a. The notice of the Court convened meeting and the Explanatory Statement, and any advertisements carried out;
    b. The Chairperson's report of the Court convened meeting;

c. The Scrutineer's report of the results of the Court convened meeting; and

d. The minutes of the Court convened meeting.

41. The Court may approve the proposed SOA as it is or the Court may make necessary alterations thereto or impose conditions as the Court thinks just.
[Section 366(4) of the Act]

42. At this final stage, the Court would have to be generally satisfied that all the requirements of the Act have been met and whether the scheme is generally fair and reasonable. If these conditions are met, the Court would be slow to differ from the views of the statutory majority of creditors expressed at the Court convened meeting.

Proposed Amendments to the Act

43. This Guide briefly touches on the proposed amendments to the Act and the impact on the SOA process. These points are based on the Consultative Document on the proposed Companies (Amendment) Bill 2020.

44. First, the Court can allow a restraining order to be extended to a subsidiary, holding company or ultimate holding company. Essentially, the purpose of such an extended restraining order is where the related company plays a necessary and integral role in the proposed SOA.

45. Second, as part of the proposed SOA proceedings, the Court may make an order allowing for super priority for rescue financing.

46. Third, the Court can allow a cramdown of dissenting classes of creditors in a SOA.

47. Fourth, the Court can order a revote by holding a further Court convened meeting.

48. Fifth, for the purposes of the voting at the Court convened meeting, there will be provisions providing for the creditors' filing of the POD, the adjudication of the POD and how to resolve a dispute on the rejection or admission of the POD.

49. Sixth, there will be a mechanism to allow for a pre-packaged SOA. This mechanism dispenses with the need for a Court application for the Court convened meeting and the need for the meeting itself. This truncates the normal SOA process.

CORPORATE VOLUNTARY ARRANGEMENT (CVA)

CORPORATE VOLUNTARY ARRANGEMENT (CVA)

Introduction

1. A Corporate Voluntary Agreement (CVA) is one of the corporate rescue mechanisms which allows directors to make a proposal to the company and to its creditors for a voluntary arrangement. The CVA can be proposed by the directors of the company [which is not being wound up or under a Judicial Management Order (JMO)], the Judicial Manager (if the company is under a JMO) or the company's Liquidator.

2. A proposal for voluntary arrangement will need to be prepared and submitted to a Nominee for his opinion. The Nominee must be an Insolvency Practitioner (IP) and may also be the supervisor for the implementation of the voluntary arrangement.

3. The role of an IP as Nominee is to provide his opinion on whether:

   i. The proposal has a reasonable prospect of being approved and implemented;
   ii. The company is likely to have sufficient funds during the moratorium to enable it to carry on its business; and
   iii. If meetings of the members and creditors should be called to consider the proposal.

   However, in the capacity of Supervisor, an IP would be involved in the implementation of the voluntary arrangement as approved in the meetings of members and creditors, e.g., ensuring that the company adheres to the terms proposed.

Basis of the Arrangement

4. A comprehensive and accurately drafted proposal is fundamental to the arrangement. In view of the importance of the proposal, the IP should, where the circumstances are complex, consider whether it should be prepared or approved by a lawyer. The contents of the proposal are given further consideration in paragraphs 14 to 16 and the Appendix.

5. In dealing with a CVA, an IP should bear in mind his overriding duty to ensure a fair balance between the interests of the company, the creditors and any other parties involved.

6. In considering whether to accept appointment as either nominee or supervisor, an IP should have regard to the ethical guidelines that applies to him.

Initial Contact with the Directors / Debtor

7. On initial contact with the directors / debtor, the IP should offer to meet personally, or arrange for a suitably experienced member of his staff to meet the directors / debtor, in view of the complex nature of CVA.

8. At the initial interview, the IP should explain to the directors / debtor the different roles he will perform during the conduct of the case and the different duties and responsibilities that they entail. He should point out to the directors / debtor the need for the nominee and supervisor to maintain independence.

9. The IP should consider the need for separate representation of any third parties who intend to inject funds or who are otherwise affected by the CVA.

10. The IP should take all necessary steps to familiarise himself with the debtor's financial circumstances. He should exercise his professional judgement to satisfy himself that the debtor has received appropriate advice on his position and the options available to him. He should also ensure that the consequences of his decision to propose a CVA have been fully explained to him.

11. The IP should explain his role as a nominee in relation to the proposal and of his duty to perform an independent, objective review and assessment of the proposal for the purposes of reporting his opinion to the Court and generally balancing the interests of the company / debtor and the creditors. The IP should make it clear to the directors / debtor that his duties as a nominee cannot be fettered by any instructions of the directors / debtor or any third party.

12. The IP should also send a letter of engagement to the directors / debtor setting out in writing their respective duties and responsibilities in relation to the proposal in order to minimise the scope for misunderstandings.

Statement of Affairs and Obtaining Additional Information

13. The Statement of Affairs should detail the nature and amount of all the company's / debtor's assets and liabilities. A misstatement of the amount of the assets and liabilities may give grounds for an approved CVA to be challenged by an aggrieved creditor. In addition, a director / debtor commits an offence if he makes any false representations or commits any other fraud for the purpose of obtaining the approval of the creditors to the proposed arrangement. The directors / debtor should be informed of these dangers; they are to provide a full and frank disclosure.

Consideration of the Proposal

14. Throughout the IP's consideration of the above factors, he should be forming his opinion of the appropriate method of dealing with the company's / debtor's affairs. Although this will be partly a subjective review of the factors already referred to, the IP should take into account:

    a. the directors' / debtor's attitude;
    b. the likelihood of the company / debtor adhering to the terms of the proposal; and
    c. the extent of the control over the assets exercised by the company / debtor as opposed to the supervisor of the proposal, bearing in mind that in a CVA, the assets do not automatically vest in the supervisor by operation of law.

15. In considering the proposal, the IP should bear in mind the following questions:

    a. is it feasible?
    b. is it fair to the creditors?
    c. is it an acceptable alternative to formal insolvency?
    d. is it fit to be considered by the creditors?
    e. is it fair to the company / debtor?
    f. where the company / debtor has previously put forward a proposal which has been rejected by the creditors, are there good reasons why the creditors should be asked to consider the current proposal?

    In view of the importance of the contents of the proposal, the IP should, prior to submitting his report and supporting comments to the Court, satisfy himself that the proposal is structured and drafted in such a way that the terms of the CVA can be clearly understood and that the arrangement is likely to proceed to a successful conclusion.

16. The following information should also be provided, either in the proposal or in the nominee's comments:

    a. any payments made, or proposed to be made, to the nominee or his firm by the company / debtor; and
    b. an estimate of the total fee to be paid to the IP as a nominee and supervisor, together with a statement of assumptions in producing the estimate.

The Nominee's Statement / Report and Comments

17. The nominee is required to state whether, in his opinion:

    a. the proposed arrangement has a reasonable prospect of being approved and implemented;
    b. the company is likely to have sufficient funds available during the proposed moratorium to enable the company to carry on its business; and
    c. a meeting of creditors should be held to consider the proposal: Section 397(2) of the Companies Act 2016.

18. Where the nominee reports in the affirmative on the matters referred to in paragraph 17, he is required to set out his comments on the proposal and to annex them to his statement or report. The matters upon which the nominee will wish to comment will vary from case to case but they should normally include:

    a. the extent to which the nominee has investigated the company's / debtor's circumstances;
    b. the basis upon which assets have been valued;
    c. the extent to which the nominee considers that reliance can be placed upon the directors' / debtor's estimate of the liabilities to be included in the CVA;

d. information on the attitude adopted by the directors / debtor with particular reference to instances of failure to co-operate with the nominee;
e. the result of any discussions between the nominee and secured creditors or other interested parties upon whose co-operation the performance of the CVA will depend;
f. information on the attitude of any major unsecured creditor which may affect the approval of the arrangement by creditors;
g. details of any previous history of failures in which (any of) the directors / debtor has been involved, in so far as they are known to the nominee;
h. an estimate of the result for the creditors if the CVA is approved, explaining why it is more beneficial for creditors than any alternative insolvency proceeding;
i. the likely effect of the proposal's rejection by the creditors;
j. details of any claims which have come to his attention which might be capable of being pursued by a Liquidator or Judicial Manager if one was appointed; and
k. where the conditions set out in paragraph 17 above have not been met, the basis on which the nominee is recommending that a meeting be held.

19. If the company / debtor has, within the previous 12 months, put forward a proposal that has been rejected, the nominee's comments should include a statement to that effect, and an explanation of why it is considered appropriate for the creditors to consider and vote on the current proposal.

20. If the nominee reports that the proposed arrangement does not have a reasonable prospect of being approved and implemented or that meetings should not be held, he must give his reasons for that opinion. If the company / debtor is unlikely to have sufficient funds available during the proposed moratorium to enable the company to carry on its business, he must say so.

The Meeting of Creditors and Members

21. Notice of the meeting must be given to all known creditors.

22. It should be noted that creditors who did not receive the notice of the meeting, may, on becoming aware that the meeting has taken place, apply to the Court on the grounds that the arrangement unfairly prejudices their interests or that there has been a material irregularity in relation to the meeting. It is unacceptable for the notice to be deliberately withheld from a creditor.

23. Before the creditors' meeting, the nominee should take the following steps:

a. record all proxies received in advance of the meeting and details of claims;
b. complete the meeting record as far as possible, detailing the names and voting value of creditors;
c. prepare a report for presentation at the meeting, summarising the proposal, outlining the likely effects of acceptance and rejection and giving details of any changes in circumstances which have arisen since the proposal was sent to the creditors; and
d. consider voting rights and requisite majority.

24. After the chairman has presented his report at the creditors' meeting, he should allow creditors an opportunity to make comments and ask questions.

25. The nominee should request the directors / debtor to attend the creditors' meeting in order to answer questions.

Implementation Following the Meeting of Creditors

26. The supervisor's main duty is to ensure that the CVA proceeds in accordance with the terms of the agreed proposal. In order to do this, he should maintain regular contact with the directors / debtor, obtaining reports as may be appropriate to the case. If the supervisor or directors / debtor consider that the terms of the arrangement may not be achieved, then the supervisor should take steps to discuss the situation with the directors / debtor and explain the circumstances to creditors and members at the next available opportunity.

27. If it becomes clear to the supervisor that the fee payable to him will exceed the estimate provided, he must, in his next report to creditors:

    a. notify the creditors of that fact;
    b. explain why the fee has exceeded the estimated amount; and
    c. provide a revised estimate.

Conclusion / Termination of the Arrangement

28. Where the arrangement has been fully implemented, the supervisor should conclude his administration as expeditiously as possible.

29. In circumstances of likely failure or default, it will be necessary to consider how matters should proceed. The proposal should have set out in specific terms the circumstances in which it shall be deemed to have failed and state what action the supervisor is required to take in the event of failure. Where failure has occurred, the supervisor should notify the creditors accordingly and advise them what action he has taken or proposes to take.

30. In the event of failure, particular care must be taken to ascertain who is entitled to the remaining assets, and in the event of the presentation of a winding up, whether disposal of the assets would be an undue preference or void.

31. Where a supervening winding up order is made against the company / debtor, the IP should advise the appointed Liquidator of the circumstances. If the effect of the order is that the CVA is terminated, the IP should arrange for the prompt handover of assets, funds, Books and Records to the appointed Liquidator.

Note:

This Guide is adapted from the Insolvency Guidance Papers issued by the Institute of Chartered Accountants in England and Wales (ICAEW) dated 1 April 2007, which has been approved by the Joint Insolvency Committee (JIC) and adopted by each of the recognised professional bodies listed below:

- *Association of Chartered Certified Accountants*
- *Insolvency Practitioners' Association*
- *Institute of Chartered Accountants in England and Wales*
- *Institute of Chartered Accountants in Ireland*
- *Institute of Chartered Accountants of Scotland*
- *Law Society of England and Wales*
- *Law Society of Scotland*

Appendix

Corporate Voluntary Arrangement: Contents of the Proposal

The proposal should include sections covering the following:

a. The background to the arrangement, including details of the circumstances in which the company / debtor has become insolvent, including any relevant personal circumstances of the directors / debtor;

b. The Statement of Affairs, which should include full details of assets and liabilities;

c. A realistic comparison of the estimated outcomes of the CVA and of winding up;

d. The actual financial proposal to be put to the creditors should include:

   i. details of assets to be realised for the benefit of creditors;
   ii. proposals regarding future profit / income;
   iii. details of any contributions from the shareholders (e.g., from future earnings), including the amounts (or the basis on which they are to be computed) and frequency; and
   iv. whether third party funds are to be injected;

e. The intentions with regard to any business operated by the company / debtor stating in particular whether the business is to be continued, and if so, the extent, if any, to which the supervisor shall exercise any degree of control over the business. If the supervisor is not to exercise any degree of control, this should be specifically stated in the proposal. The purpose or aim of continued trading should be stated, considering the following:

   i. have new opportunities been created that will generate profits to pay creditors;
   ii. is the trade being wound down to generate funds from asset realisations or is the business being marketed (and if so, how) as a going concern; and
   iii. a summary of cash flow flow projection;

f. The powers, duties and responsibilities of the supervisor. This will need to deal with the question of admission or rejection of claims, the manner in which funds are to be distributed to creditors and the basis on which the supervisor is to report to creditors;

g. Whether a committee of creditors is to be appointed and if so, what will be its powers, duties and responsibilities;

h. What will happen to surplus funds arising, for example, from more beneficial trading than was originally envisaged, when the CVA is concluded;

i. Confirmation that when the terms of the CVA have been successfully completed, the creditors will no longer be entitled to pursue the company / debtor for the balance of their claim: that the CVA is in full and final settlement of their liabilities;

j. What will happen to unclaimed dividends or unpresented cheques when the CVA is concluded;

k. How to deal with creditors who have not made claims;

l. The power of the supervisor to summon meetings of the CVA creditors for the purpose of obtaining their views and in particular for obtaining their approval to any modifications to the CVA; and

m. In view of the fact that the assets do not automatically vest in the supervisor, it may be advisable for the proposal to provide for the supervisor to be granted with power of attorney with appropriate powers.

JUDICIAL MANAGEMENT (JM)

JUDICIAL MANAGEMENT (JM)

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Introduction

1. Judicial Management is a Court supervised corporate rescue mechanism introduced whereby the Court may make a Judicial Management Order (JMO) if, among others, the order would be likely to achieve the survival of the company as a going concern or a more advantageous realisation of the company's assets would be effected than on a winding up.

2. From the time an application for a JMO is made until the application is dismissed or a JMO is granted, among others, no proceedings or other legal process commenced or continued against a company without leave of Court. Upon granting of a JMO, a similar moratorium is afforded to the company.

Appointment

Qualification of Judicial Manager

3. Under the Companies Act 2016 (Act), an Insolvency Practitioner (IP), who is not the auditor of the company, is qualified and may be appointed as a Judicial Manager.

4. As a matter of best practice, an IP should not accept an appointment as a Judicial Manager where he has a material professional relationship with the company.

5. A material professional relationship would arise where the IP is carrying out, or has during the previous two years carried out material professional work for the company, for instance:

   a. Where the IP has carried out, or has been appointed to carry out audit work for the company.
   b. Where the IP has carried out assignments, whether of a continuing nature or otherwise, which render his objectivity in carrying out his duty as a Judicial Manager may reasonably be seen to be prejudiced.

Remuneration

6. Under Section 407(4) of the Act, a Judicial Manager is entitled to receive salary or remuneration by way of percentage or otherwise throughout the period of his appointment. The salary or remuneration is determined in the following manner:

   a. By agreement between the Judicial Manager and the company or creditors, as the case may be;
   b. Failing such agreement, by a resolution passed at a meeting of creditors by a majority of not less than 75% in value and of the creditors present in person or by proxy and voting at meeting and whose debts have been admitted to vote, which meeting shall be convened by the Judicial Manager by a notice to each creditor to which notice shall be attached a statement of all receipts and expenditure by the Judicial Manager and the amount of remuneration sought by him; or
   c. Failing, a determination in a manner referred to in paragraph 6a or 6b by the Court.

7. Remuneration and expenses incurred by the Judicial Manager in the course of carrying his work are to be paid out of the assets of the company.

8. Prior to his appointment, the Judicial Manager should clearly identify his terms of appointment, in particular, the basis on which any fees are charged, and which services are covered by those fees.

9. During his appointment, the Judicial Manager should clearly itemise his remuneration, charge fees and commissions based on his terms of appointment.

10. The Judicial Manager should ensure that appropriate authority has been obtained for the payment or part payment of his remuneration before he withdraws such funds from the company.

11. The Judicial Manager should be prepared to justify the amount of any remuneration received.

Preliminary Assessment

Evaluation of Preliminary Proposal of the Company

12. It is good practice for IPs to work with the solicitors of the company to ensure the company applying for judicial management complies and fulfil the conditions under Section 403, Section 404 and Section 405 of the Act.

    The IP who is nominated as a Judicial Manager should review the preliminary proposal and evaluate if the proposal may achieve the objectives of the judicial management.

Upon Commencement

Commencement of Judicial Management

13. The judicial management of a company shall commence once the Court grants an order via Form 13: *Judicial Management Order* of the First Schedule of the Companies (Corporate Rescue Mechanism) Rules 2018 (CCRM 2018) and it is in force for a period of six months from the making of the order.

14. During the period where the JMO is in force, the following shall have effect:

    a. Resolution to wind up the company shall not be passed and any application for the winding up of the company shall be dismissed;
    b. Receiver or Receiver and Manager (Receiver) shall not be appointed and the existing Receiver shall vacate the office; and
    c. Unless with the leave from the Court, no legal proceedings or steps to enforce securities or transfer of shares or alter the status of any members of the company can be taken.

Notification by the Applicant

15. The applicant shall inform the appointed Judicial Manager via Form 14: *Notice of Judicial Manager of Judicial Management Order* of the First Schedule of the CCRM 2018 within two days from the order is made.

Notification by the Judicial Manager

16. Once the Judicial Manager has been notified on the JMO, he shall publish and advertise a notice of JMO via Form 15: *Notice of Judicial Management Order* of the First Schedule of the CCRM 2018 in widely circulated newspapers in the national language and English language respectively within five days from the notification.

17. Unless otherwise directed by the Court, the Judicial Manager shall send a copy of the JMO to the company at the registered office of the company by hand or by registered post.

18. The Judicial Manager shall within seven days from when the order is made, give a notice of JMO to Suruhanjaya Syarikat Malaysia (SSM). The Form 418(1)(a): *Notification of Notice of Judicial Management Order* of the Act together with the JMO shall be lodged with SSM.

19. The Judicial Manager shall give the notice of JMO to the directors and inform the directors to submit a Statement of Affairs of the company as at the date of the JMO within 14 days from the receipt of the JMO or within the period allowed by the Judicial Manager, which should not exceed 60 days.

20. The Statement of Affairs shall be lodged with SSM within seven days from the receipt of such statement from the company.

21. The Judicial Manager may give notice of the JMO via registered post to the members, company secretary and any of the officers of the company and require the parties to surrender the properties of the company, if any, to the Judicial Manager.

22. The Judicial Manager may also give notice to the financial institutions, the statutory bodies and other relevant parties that he thinks fit.

Notification to Creditors

23. The Judicial Manager shall within 30 days give the notice of JMO via registered post to all the creditors of the company, including any person who is entitled to appoint a Receiver, at their last known address based on the company's records, unless the Court otherwise directs.

24. The Judicial Manager shall inform the creditors to submit their proof of debts via Form 16: *Proof of Debt* of the First Schedule of the CCRM 2018 within 14 days from the receipt of the notification by the Judicial Manager.

25. It is advisable for the Judicial Manager to advertise and publish in a widely circulated newspaper to notify the creditors to submit their proof of debt (POD) to the Judicial Manager within the stipulated timeframe.

26. Upon the Judicial Manager receiving a copy of the Statement of Affairs from the directors, the Judicial Manager shall, as soon as practical, send a copy of the Statement of Affairs, with any accompanying observations on the Statement of Affairs to each creditor mentioned in the Statement of Affairs.

Administration and Operation of the Company

27. The Judicial Manager shall immediately take control of the company and safeguard the assets of the company upon his appointment.

28. The Judicial Manager shall ensure that all forms of correspondences, invoices whether in hard copy or electronic mail that are issued by the company or the Judicial Manager, and every official website of the company contain a statement that the affairs, business and property of the company are being managed by the Judicial Manager.

29. The Judicial Manager shall arrange meetings with the directors, senior management and employees of the company to understand the structure and operations of the business and to explain the role of the Judicial Manager and duties of every party to the management and the employees of the company.

30. The Judicial Manager shall immediately notify the banks on the appointment of the same and to update the banking and operation procedure of the company to include the Judicial Manager as the co-signatory towards all the transactions to be made by the company.

31. The Judicial Manager shall immediately secure all the assets of the company notwithstanding the cash kept in the premises and titles of assets. It is advisable for the Judicial Manager to evaluate the security personnel of the company, and to effect any change of security guards at the operation / risk locations and report directly to himself.

32. The Judicial Manager shall review the existing insurance policies to ensure sufficient and appropriate insurance coverage exists over the assets of the company. The Judicial Manager may revise on the same if he deems necessary.

33. It is also advisable for the Judicial Manager to establish a clear working relationship with the respective departments of the company to implement internal control procedures to improve and monitor the business operations of the company.

34. The Judicial Manager shall review the books and records of the company including all the contracts entered into by the company, to assess and determine if such contracts are beneficial to the business of the company to maintain the viability of the operations.

35. The Judicial Manager may adopt or disclaim such contracts entered into by the company prior to his appointment if he thinks fit. In the event the contracts are adopted, he may give notice to the parties

to disclaim any personal liabilities under the contract. Any new contract entered into by the Judicial Manager shall be personally liable.

36. Any contracts adopted or disclaimed by the Judicial Manager must be communicated to the creditors.

Disposal of Assets

37. The Judicial Manager is empowered to dispose the assets of the company under the Ninth Schedule of the Act.

38. In such an event, the Judicial Manager should consider conducting a valuation of properties and may consider to conduct an expression of interest exercise for the said disposal provided any disposal of assets under the statement of proposal has been approved by the creditors.

Records of the Judicial Manager

39. It is advisable for the Judicial Manager to maintain his own records including all the transactions made throughout the JMO period.

Extension and Discharge

Extension of Judicial Management Order

40. The Judicial Manager could, for various reasons, apply to the Court for an extension of the JMO pursuant to Section 406(1) of the Act, for a period of another six months. Reasons for application will vary from case to case such as implementation of approved Judicial Manager's proposal, extension of time for the Judicial Manager to formulate the statement of proposal, natural disaster (i.e., COVID-19), etc.

41. The Judicial Manager may liaise with the company's solicitors to discuss and apply for an extension of JMO if he thinks fit. The said application may be filed to the Court by way of Form 20: *Application to Extend Period of Judicial Manager Order* of the First Schedule of the CCRM 2018 at least 30 days before the expiry of the initial JMO.

42. Upon the application being filed with the Court, the Judicial Manager shall notify SSM via Form 406(3): *Notification of Application for the Extension of Judicial Management* together with a copy of the Form 20: *Application to Extend Period of Judicial Manager Order* of the First Schedule of the CCRM 2018 within seven days from the date of application.

43. The Judicial Manager shall also notify the company's directors, members and creditors including any person who is entitled to appoint a Receiver or Receiver and Manager by way of registered post enclosing the Form 406(3) of the Act and Form 20: *Application to Extend Period of Judicial Manager Order* of the First Schedule of the CCRM 2018 on the said application.

44. Upon the extension of the JMO (Extension Order) being granted by the Court, the Judicial Manager shall within seven days notify SSM on the said extension. The Form 418(1)(a): *Notification of Extension of Judicial Management Order* of the Act together with the Extension Order shall be lodged with SSM within seven days from the Extension Order.

45. A notice of the Extension Order via Form 22: *Notice of Extension Order of Judicial Management Order* of the First Schedule of the CCRM 2018 shall be published within seven days in widely circulated newspapers in Malaysia in the national language and English language respectively.

46. Thereafter, unless otherwise directed by the Court, the Judicial Manager shall send a copy of the Extension Order to the company at the registered office of the company by hand or by registered post.

47. It is advisable for the Judicial Manager to notify the company's directors, members and creditors, including any person who is entitled to appoint a Receiver or Receiver and Manager on the Extension Order by registered post.

48. In the event the Court dismisses the Judicial Manager's application for the extension of JMO, the Judicial Manager shall apply to Court to discharge the JMO and duty as a Judicial Manager. The discharge of the JMO and duty of Judicial Manager is detailed in paragraphs 49 to 54.

Discharge of Judicial Management Order

49. Upon the conclusion of the judicial management, i.e., the purpose specified in the order either has been achieved or is incapable of achievement, the Judicial Manager shall apply to Court to discharge the JMO.

50. The application to discharge the JMO shall be made via Form 23: *Notice of Application* of the First Schedule of the CCRM 2018 and the same shall be served to the relevant parties not less than three clear days before the date of hearing.

51. Once the Court grants the JMO to be discharged (Discharged Order), the Judicial Manager ceases to act pursuant to Section 417 of the Act.

52. The Judicial Manager may apply to the Court to discharge himself as the Judicial Manager, and subject to the provisions under Section 424 of the Act, the Court may, by application of the Judicial Manager, make an order discharging the Judicial Manager from liability in respect of any act or omission by him in the management of the company.

53. The Judicial Manager shall within seven days of the order being made, lodge with SSM the Form 421(7) / 424(3) / 425(5): *Notification for the Discharge of Judicial Management Order* of the Act together with a copy of the Discharge Order.

54. It is advisable for the Judicial Manager to give notice of the discharge of JMO and notify his cessation of the responsibility and accountability as Judicial Manager to the directors, members and creditors, including any person who is entitled to appoint a Receiver or Receiver and Manager, company secretary, financial institutions, statutory bodies and any other relevant parties that he thinks fit.

Meeting of Creditors

Statement of Proposal

55. Upon obtaining the JMO, the Judicial Manager shall, within 60 days or such longer period as the Court may allow:

    a. Prepare and send a statement of proposal for achieving one or more purpose of judicial management application to the SSM and all creditors of their last known address;
    b. Lay a copy of the statement before the meeting of company's creditors summoned for the period of not less than 14 days; and
    c. Send a copy of the statement of proposal to all members of the company to the last known address of all members; or publish a notice on widely circulated newspapers in Malaysia in both the national language and in English, informing the address to which members could write in to request for copies of the statement of proposal free of charge.

56. The Judicial Manager may approach the secured creditors and / or majority of the creditors in value to review and obtain feedback on the draft preliminary statement of proposal prepared by the company, and to ascertain their conditions and requests. This would increase the chances of the statement of proposal being approved in the meeting of creditors. Thus, allowing the company to achieve one or more of the following:

    a. The survival of the company, or the whole or part of its undertaking as a going concern;
    b. The approval under Section 366 of the Act of a compromise or arrangement between the company and such person mentioned in that Section; or
    c. A more advantageous realisation of the company's assets would be effected compared to a winding up.

Meeting of Creditors

57. The Judicial Manager may convene the meeting of creditors in accordance with Section 420 or Section 366 of the Act.

58. The meeting of creditors is to be held in order to approve the proposal put forth by the Judicial Manager.

59. In the event the Judicial Manager intends to apply for compromise or arrangement under Section 366 of the Act, he shall call for a meeting of creditors in accordance to the said Section.

60. The guidance herein is referred to meeting held under Section 420 of the Act.

61. Pursuant to Rule 24(1) of the CCRM 2018, the Judicial Manger is to make an affidavit in Form 18: *Affidavit of Notice of Creditors' Meeting* of the First Schedule of the CCRM 2018 upon sending of the notice of the meeting (Notice), which is to filed to Court within seven days from the date of service of the same.

62. The affidavit will be deemed as sufficient evidence of such notice having been duly sent to the person to whom it was addressed.

Notice of Creditors' Meeting

63. The meeting shall be summoned by the Judicial Manager upon sending of a notice of the meeting to every creditor of the company, as well as every person appearing as a creditor of the company in its books, for a period of not less than 14 days.

64. Notice is to be provided to all creditors of the company or their representatives not less than 14 days from the meeting to:

    a. The address in the creditors' POD;
    b. The address provided in the Statement of Affairs if the creditor has not proved his POD; or
    c. The last known address of the creditor.

65. The Notice is also to be published in widely circulated newspapers in Malaysia in both the national language and in English.

66. The Judicial Manager is also to send the Notice to any director or officer of the company being placed under judicial management, who in the opinion of the Judicial Manager ought to attend the meeting at the company's registered address not less than seven days from the date of the meeting. Any director or officer who received the said Notice is required to attend the meeting.

67. The proceedings at a meeting shall not be invalidated by reasons such as the summary of the Statement of Affairs of the company or Notice required by the CCRM 2018 not having been sent or received before the meeting.

Place of Meeting

68. Pursuant to Rule 26 of the CCRM 2018, the meeting is to be held by the Judicial Manager at a place considered most convenient to the majority in total value of the creditors.

Chairman of the Meeting

69. The meeting, or any meetings summoned by the Judicial Manager under Rule 22 or Rule 23 of the CCRM 2018 shall be presided by the Judicial Manager or any other person nominated by the Judicial Manager.

70. Any other creditors' meeting aside from the abovementioned meeting shall be presided by any person appointed by resolution by the members of the meeting.

Quorum

71. The meeting can only proceed upon fulfilment of the requirement of at least three creditors who are entitled to vote are present. If the number of creditors is less than three, all creditors entitled to vote must be present.

72. The meeting should be adjourned to the same time and place within the timeline of not less than seven days and not more than 21 days in the event that a quorum of creditors is not present or represented within 30 minutes from the time appointed for the meeting. The notice of adjournment is to be informed to all creditors by the Judicial Manager.

73. In the event a quorum of creditors is not present or represented within 30 minutes from the time appointed for the adjourned meeting, the Judicial Manager shall not fix another date for the creditors' meeting. The results are to be reported to the Court pursuant to Section 421(4) or Section 423(5) of the Act and as the case may be, stated that the quorum of the meeting was not present.

Creditors' Eligibility to Vote

74. During the meeting or any adjourned meeting, creditors are only allowed to vote if they have submitted a POD in Form 16: *Proof of Debt* of the First Schedule of the CCRM 2018 in accordance with Rule 18 of the CCRM 2018 or not later than the specified date for submission in the notice summoning the meeting or adjourned meeting.

75. Creditors are not entitled to vote in respect of the following:

    a. Any unliquidated or contingent debt;
    b. Any debt of which the value is not ascertained; or
    c. Any debt secured by a current bill of exchange or promissory note held by the creditor unless the creditor is willing to treat the liability to him on the bill of exchange or promissory note of every person who is liable antecedently to the company, and against whom a bankruptcy order, or in the case of a company, a winding up order has not been made, as a security in his hands.

    Note to point c above: The creditor shall estimate the liability and for the purpose of voting, the amount of the estimated liability shall not be included in the total value of his POD.

76. For secured creditors, they are to state in their POD, for the purpose of voting:

    a. The particulars of his security;
    b. The date on which the security was given; and
    c. The value at which he assesses the security.

77. Secured creditors are only entitled to vote in respect of the balance of their debt, if any, after deducting the value of the security.

78. If the secured creditor votes in respect of his whole debt without deducting the value of the security, the security is deemed to have been surrendered unless the Court, on application by any person, is satisfied that the omission to value the security has risen from inadvertence.

Admission / Rejection of Proof of Debts

79. Pursuant to Rule 32(1) of the CCRM 2018, the chairman of the meeting is empowered to admit or reject a POD for voting purposes.

80. In the event that the chairman is in doubt whether to admit or reject the POD, he is to treat the POD as being objected. Under such circumstances, the chairman shall allow the creditor to vote, and it shall be stated in the report of the meeting filed under Rule 34 of the CCRM 2018 that the POD has been treated as objected.

Consideration of Proposal at the Meeting

81. The final proposal is to be approved by 75% of the total value of creditors whose claims have been admitted by the Judicial Manager present and voting either in person or by proxy at the meeting. The Proposal may also be approved with modifications subject to the Judicial Manager's consent to each modification.

82. Upon approval of the proposal pursuant to Section 421(2) of the Act, the proposal will be binding on all creditors regardless whether they have voted in favour of the same.

83. Upon conclusion of the meeting, the Judicial Manager is to report the results to the Court and to provide notice to the SSM and / or any persons / bodies which are approved by the Court. In the event that the proposal, with or without modifications, was not approved at the meeting, the Court may take the following actions:

    a. Discharge the JMO by order;
    b. Impose any consequential provision to the proposal as it deems fit;
    c. Conditionally / unconditionally adjourn the hearing; or
    d. Make a temporary order or any order that it deems fit.

84. A copy of any order made by the Court under Section 421(5) of the Act is to be published in widely circulated newspapers in Malaysia in both the national language and in English.

85. An office copy of the JMO is to be sent to the SSM within seven days from the dischargement of the order failing which, without reasonable excuse, the Judicial Manager is subject to a fine of not exceeding RM500 each day of which the offence continues.

Committee of Creditors

86. Upon approval of the proposal, a committee of creditors (Committee) may be established and if it thinks fit, may require the Judicial Manager to attend and furnish prior to the meeting to provide the meeting with such information relating to carrying out of the Judicial Manager's functions as the meeting may reasonably require under Section 422 of the Act.

87. Pursuant to Rule 36(2) of the CCRM 2018, the Committee is to hold a meeting at least once every 14 days unless the Committee resolves otherwise.

88. The Committee shall consist of not less than five and not more than seven individuals whereby:

    a. one of whom shall be:
        i. An employee of the company other than the director or former director; or
        ii. Where the employees are members of a trade union, and the trade union is recognised by the company to represent the employees of the company; and
    b. one of whom shall be a shareholder of the company to represent the shareholders.

89. The abovementioned employee / trade union and shareholder (Representatives) shall attend all meetings of the Committee but will not be entitled to vote as a member of the Committee.

90. In any meetings, the Committee shall:

    a. Elect a chairman, other than the Representatives, who is entitled to vote from amongst its members; and
    b. Decide on the quorum of the meeting.

91. All decisions in such meetings shall be made by a resolution in writing signed by a majority in number of the members entitled to vote.

92. Any vacancies in the Committee shall be filled at its own discretion.

Minutes

93. Minutes of the proceedings at the meeting are to be prepared and entered into a book, of which the same is to be signed by the chairman presiding the said meeting or by the chairman of the ensuing meeting.

Filing of Result of Meeting with the Court

94. Upon conclusion of the meeting, the results are to be filed by the Judicial Manager to the Court in Form 19: *Result of the Creditors' Meeting* of the First Schedule of the CCRM 2018 within seven days from the Meeting along with other relevant documents specified in Form 19: *Result of the Creditors' Meeting* of the First Schedule of the CCRM 2018.

Cost for Summoning of Meeting by other Persons

95. The cost for summoning of the meeting by any persons other than the Judicial Manager shall, pursuant to Rule 35(1) of the CCRM 2018:

    a. Be paid by the person summoning the meeting; or
    b. Be paid out of the assets of the company in the event it is directed by Court, or the creditors by resolution.

96. The abovementioned person summoning the meeting is to deposit a sum as security for the payment of the costs of the meeting to the Judicial Manager as may be required by the Judicial Manager prior to the meeting.

97. The costs of summoning the meeting including all disbursements for printing, stationery, postage and the hire of room shall be calculated as below for each creditor to whom notice is required to be sent:

    a. RM5 for each creditor of the 50 creditors;
    b. RM3 for each creditor for the next 50 creditors; and
    c. RM2 for each creditor for any number of creditors after the first 100 creditors.

Statutory Lodgement

Lodgement of Statutory Forms

98. All documents / forms are to be lodged over the counter at SSM offices.

99. Before any documents / forms are lodged, all particulars in the documents / forms should be duly completed, acted upon and executed.

100. For documents / forms that are not submitted within the specified timeframe, a late lodgement penalty shall be applied.

Application of Judicial Management Order

101. A company or a creditor of a company shall file for an application of JMO to Court by filing in Form 6: *Application for Judicial Management Order* of the First Schedule of the CCRM 2018.

102. The filing of Form 6: *Application for Judicial Management Order* of the First Schedule of the CCRM 2018 should be together with Form 7: *Supporting Affidavit of Application for Judicial Management Order* of the First Schedule of the CCRM 2018 that acts as a supporting affidavit.

103. Upon the application for JMO, the applicant should notify SSM of the application.
    [Section 408(2) of the Act]
    [Rule 8 of the CCRM 2018]

Advertisement of Application of Judicial Management Order

104. Within 14 days before the hearing date of the application of JMO, the applicant is to place an advertisement of the notice of application for JMO in Form 9: *Notice of the Application for Judicial Management Order* of the First Schedule of the CCRM 2018 and shall on the same day, lodge a copy of the notice with the SSM.
[Section 408(1)(a) of the Act]
[Rule 11 of the CCRM 2018]

105. If the applicant fails to comply, the Court may:

a. Dismiss the application of the JMO; and

b. Fix a new hearing date.

Judicial Management Order

106. Once the Court makes a JMO, this shall be in Form 13: *Judicial Management Order* of the First Schedule of the CCRM 2018.
[Section 405 of the Act]

107. Within two days from the date of the order, the applicant shall inform the Judicial Manager of the JMO in Form 14: *Notice of the Application for Judicial Management Order* of the First Schedule of the CCRM 2018

108. The Judicial Manager shall then publish a copy of the notice of the JMO in Form 15: *Notice of Judicial Management Order* of the First Schedule of the CCRM 2018 within five days of being informed.

109. The Judicial Manager shall within seven days of making of the order, send a copy of the order together with Notification of Notice of JMO to SSM.
[Section 418(1)(a) of the Act]
[Rule 17 of the CCRM 2018]

Lodgement of Statement of Affairs

110. The Judicial Manager shall lodge a copy of the Statement of Affairs with SSM within seven days of receiving the Statement of Affairs from the company.
[Section 419(5) of the Act]

Statement of Proposals

111. Within 60 days, or a period longer granted by the Court, after the JMO has been made, the Judicial Manager shall send his proposal to SSM (Notification of Statement of Proposals), members and all creditors of the company.
[Section 420(1)(a) of the Act]

Results of Meeting

112. Upon reaching a conclusion at the meeting of creditors, the Judicial Manager shall inform the Court of the results in Form 19: *Result of the Creditors' Meeting* of the First Schedule of the CCRM 2018 within seven days of the date of the meeting.

113. In accordance to Section 421(4) and Section 423(5) of the Act, the Judicial Manager shall report the results to SSM and to other persons / bodies that is approved by the Court.
[Rule 34 of the CCRM 2018]

Application To Extend Period of Judicial Management Order

114. If the Judicial Manager intends to extend the period of JMO, he may do so by making an application to Court in Form 20: *Application to Extend Period of Judicial Management Order* of the First Schedule of the CCRM 2018 at least 30 days before the date of expiry of the order.
[Section 406(1) of Act]
[Rule 37 of the CCRM 2018]

115. The Judicial Manager should within seven days notify SSM of the application of extension of the order.
[Section 406(3) of the Act]

116. If the Court has granted for an extension, the Judicial Manager, within seven days from the date of making of the extension order, shall publish a notice of extension order in Form 22: *Notice of Extension Order of Judicial Management Order* of the First Schedule of the CCRM 2018.
[Rule 37 of the CCRM 2018]

Discharge of Judicial Management Order

117. Where the company has been discharged from JMO, the Judicial Manager must within seven days lodge with SSM a copy of the order and the Notification for the Discharge of Judicial Management Order to effect the discharge.
[Section 424(3) of the Act]
[Section 421(7) of the Act]

118. The Judicial Manager may apply to Court for his discharge of duty as Judicial Manager.
[Section 417(1)(b) of the Act]
[Section 424(4) of the Act]

No.	Section / Rules	Description	Time frame for lodgement with SSM	Action By
1	Section 408(2) of the Act / Rule 8 of CCRM 2018 – Form 6 and Form 7	Notification of application for Judicial Management Order	On the same day the application is filed to the Court	The Applicant (Company / Creditor)
2	Section 408(1) of the Act / Rule 11 of CCRM 2018 – Form 9	Notification for advertisement of notice of the application for Judicial Management Order	On the same day the notification is advertised	The Applicant (Company / Creditor)
3	Section 405 of the Act / Rule 17 of CCRM 2018 – Form 13	Judicial Management Order		High Court
4	Section 405 of the Act / Rule 17 of CCRM 2018 – Form 14	Notice to Judicial Manager of Judicial Management Order	Within two days from the date of the order	The Applicant (Company / Creditor)
5	Section 418(1)(a) of the Act / Rule 17 of CCRM 2018 – Form 15	Notification of notice of Judicial Management Order	Within seven days from the date of the order	Judicial Manager

No.	Section / Rules	Description	Time frame for lodgement with SSM	Action By
6	Section 419(5) of the Act	Company Statement of Affairs as at the date of the Judicial Management Order	Within seven days from the receipt of such statement from the company	Judicial Manager
7	Section 420(1)(a) of the Act	Notification of statement of proposals	Within 60 days or such longer period as the Court may allow after the date of the making the order	Judicial Manager
8	Section 421(4) and 423(5) of the Act / Rule 34 of CCRM 2018 – Form 19	Notification of results of the creditors meeting	Within seven days from the date of the meeting	Judicial Manager
9	Section 406(1) of the Act / Rule 37 of CCRM 2018 – Form 20	Application of extension of Judicial Management Order	Apply to Court at least 30 days before the expiry date of the order	Judicial Manager
10	Section 406(2) of the Act / Rule 37 of CCRM 2018 – Form 21	The extension order of the Judicial Management Order		High Court
11	Section 406(1) of the Act / Rule 37 of CCRM 2018 – Form 22	Notification of extension of Judicial Management Order	Within seven days from the date of the making of the order	Judicial Manager
12	Section 421(7) and Section 424(3) of the Act	Notification for the discharge of Judicial Management Order	Within seven days from the date of making of the order	Judicial Manager
13	Section 417 and Section 424(4) of the Act	Notification for the discharge of Judicial Manager		Judicial Manager

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