

FAQ 1

Whether procedures are available to a debtor when commencing insolvency proceedings?

Proposal for voluntary arrangement

8. (1) A proposal to the company and to its creditors may be made, by any of the persons mentioned in subsection (2), for a voluntary arrangement.

(2) The persons referred to in subsection (1) are —

(a) the directors of a company (other than one which is in judicial management or being wound up);

(b) where the company is in judicial management, the judicial manager;

(c) where the company is being wound up, the liquidator.

(3) A voluntary arrangement may include —

(a) a composition in satisfaction of its debts;

(b) restructuring of debts through restatements of assets and liabilities and agreement with creditors on maintaining payments;

(c) reorganising the company by restructuring the ownership and management of the company to lead to better decision-making and execution; and

(d) any other acts as may be necessary for the rehabilitation or rescue of the company.

(4) A proposal under subsection (1) shall provide for some person (the nominee) to act in relation to the voluntary arrangement either as trustee or otherwise for the purpose of supervising its implementation; and the nominee must be a person who is qualified to act as an insolvency practitioner or authorised to act as nominee, in relation to the voluntary arrangement.

(5) Creditors who are entitled to vote on the proposal are those whose rights are affected or modified by the proposal shall —

(a) designate classes of claims or interests;

(b) specify any class of claims or interests that is not impaired under the proposal or the order;

- (c) specify the treatment of any class of claims or interests that is impaired under the proposal or the order;
- (d) provide the same treatment for each claims or interests of a particular class, unless the holder of a particular claims or interests agrees to a less favorable treatment of such particular claims or interests.

Application to Court for company to be placed under judicial management and for appointment of judicial manager

32. (1) Where a company or where a creditor or creditors of the company consider that —
- (a) the company is or will be unable to pay its debts; and
 - (b) there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up,
- an application may be made to the Court for an order that the company be placed under the judicial management of a judicial manager.
- (2) Where a company or its directors (pursuant to a resolution of its members or the board of directors) or a creditor or creditors (including any contingent or prospective creditor or creditors or all or any of those parties, together or separately), makes an application for a judicial management order under subsection (1), the Court may make a judicial management order in relation to the company if, and only if, —
- (a) it is satisfied that the company is or will be unable to pay its debts; and
 - (b) it considers that the making of the order would be likely to achieve one or more of the following purposes;
- (i) the survival of the company, or the whole or part of its undertaking as a going concern;
 - (ii) the approval under section 13 of a voluntary arrangement between the company and any such creditors or members as are mentioned in that section or the Authoriti Monetori Brunei Darussalam;
 - (iii) a more advantageous realisation of the company's assets would be effected than on a winding up.

(3) Any judicial management order made under subsection (2) shall direct that during the period in which the order is in force the affairs, business and property of the company shall be managed by a judicial manager appointed for the purpose by the Court; and such an order shall specify the purpose or purposes for whose achievement the order is made.

(4) (a) In any application for a judicial management order under subsection (1), the applicant shall nominate a person who is a public accountant, who is not the auditor of the company, to act as a judicial manager.

(b) The Court may reject the nomination of the applicant and appoint another person in his stead.

(c) where a nomination is made by the company, a majority in number and value of the creditors (including contingent or prospective creditors) may be heard in opposition to the nomination and the Court may, if satisfied as to the value of the creditors' claims and as to the grounds of opposition, invite the creditors to nominate a person in his stead and, if it sees fit, adopt their nomination.

(d) Nothing in this subsection shall prevent the Minister from himself nominating a person to act as a judicial manager if he considers that the public interest so requires and in such a case the Minister may be heard in support of his nomination and for this purpose may be represented.

(e) Notwithstanding paragraph (a), where a person is appointed by the Court or nominated by the Minister to act as a judicial manager that person need not be a public accountant.

(5) When an application for a judicial management order is made under subsection (1), notice of the application —

(a) shall be published in the *Gazette* and in a Malay and English local daily newspaper and a copy thereof sent to the Registrar; and

(b) shall be given —

(i) to the company, in a case where a creditor is the applicant; and

(ii) to any person who has appointed or is or may be entitled to appoint a receiver and manager of the whole (or substantially the whole) of a

property of a company under the terms of any debentures of a company secured by a floating charge or by a floating charge and one or more fixed charges.

(6) Subject to subsection (11), the Court shall dismiss an application for a judicial management order if it is satisfied that —

- (a) a receiver and manager referred to in subsection (4) has been or will be appointed; or
- (b) the making of the order is opposed by a person who has appointed or is entitled to appoint such a receiver and manager.

(7) On hearing the application for a judicial management order, the Court may dismiss the application or adjourn the hearing conditionally or unconditionally or make an interim order or any other order that it thinks fit.

(8) A judicial management order shall not be made in relation to a company —

- (a) after the company has gone into liquidation;
- (b) where the company is a bank licensed under the Banking Order, 2006 (S45/2006), Islamic Banking Order, 2008 (S96/2008), International Banking Order, 2000 (S53/2000) or is a finance company licensed under the Finance Companies Act (Chapter 89); or
- (c) where the company is an insurance company licensed under the Insurance Order, 2006 (S48/2006) or a takaful company licensed under the Takaful Order, 2008 (S100/2008).

(9) A judicial management order shall, unless it is otherwise discharged, remain in force for a period of 180 days from the date of the making of the order but the Court may, on application of a judicial manager, increase this period subject to such terms as the Court may impose.

(10) The costs and expenses of any unsuccessful application for a judicial management order made under this section shall, unless the Court otherwise orders, be borne by the applicant and, if the Court considers that the application is frivolous or vexatious, it

may make such orders, as it thinks just and equitable, to redress any injustice that may have resulted.

(11) Nothing in this section shall preclude a Court —

(a) from making a judicial management order and appointing a judicial manager if it considers the public interest so requires; or

(b) from appointing, after the making of an application for a judicial management order and on the application of the person applying for the judicial management order, an interim judicial manager, pending the making of a judicial management order, and such interim judicial manager may, if the Court sees fit, be the person nominated in the application for a judicial management order. The interim judicial manager so appointed may exercise such functions, powers and duties as the Court may specify in the order.

(12) Any person who has acted as Executive Manager of the company in respect of which a judicial management order is sought may be appointed judicial manager of that company by the Court.

(13) For the purpose of this section, “inability to pay debts” has the meaning assigned to it in section 100.

Application for winding up

101. (1) Subject to the provisions of this section, an application to the Court for the winding up of a company shall be by petition presented by —

(a) the company;

(b) the directors of the company;

(c) any creditor or creditors (including any contingent or prospective creditor or creditors);

(d) contributory or contributories;

(e) a liquidator; or

(f) all or any of those parties, together or separately.

(2) Except as mentioned in subsection (3), a contributory is not entitled to present

a winding up petition unless –

(a) the number of members is reduced to less than two; or

(b) the shares in respect of which he is a contributory, or some of them, were originally allotted to him, or have been held by him, and registered in his name, for at least 6 months during the 18 months before the commencement of the winding up, or have devolved on him through the death of a former holder.

(3) A person who is liable to contribute to a company's assets in the event of its being wound up may petition on either of the grounds set out in section 99(e) and (g), and subsection (2) does not then apply; but unless the person is a contributory otherwise than under section 58, he may not, in his character as contributory, petition on any other ground.

(4) A winding up petition on the ground set out in section 99(f) may only be presented by one or more creditors.

(5) A winding up petition may be presented by the Minister –

(a) If the ground of the petition is that set out in section 99(b); or

(b) in a case falling within section 102.

(6) Where a company is being wound up voluntarily, a winding up petition may be presented by the Official Receiver attached to the Court as well as by any other person authorised in the behalf under the other provisions of this section; but the Court shall not make a winding up order on the petition unless it is satisfied that the voluntary winding up cannot be continued with due regard to the interests of the creditors or contributories.

FAQ 2

Does the insolvency framework allow a creditor to file for insolvency of the debtor?

Application to Court for company to be placed under judicial management and for appointment of judicial manager

- 32.** (1) Where a company or where a creditor or creditors of the company consider that —
- (a) the company is or will be unable to pay its debts; and
 - (b) there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up,
- an application may be made to the Court for an order that the company be placed under the judicial management of a judicial manager.
- (2) Where a company or its directors (pursuant to a resolution of its members or the board of directors) or a creditor or creditors (including any contingent or prospective creditor or creditors or all or any of those parties, together or separately), makes an application for a judicial management order under subsection (1), the Court may make a judicial management order in relation to the company if, and only if, —
- (a) it is satisfied that the company is or will be unable to pay its debts; and
 - (b) it considers that the making of the order would be likely to achieve one or more of the following purposes;
- (i) the survival of the company, or the whole or part of its undertaking as a going concern;
 - (ii) the approval under section 13 of a voluntary arrangement between the company and any such creditors or members as are mentioned in that section or the Authoriti Monetori Brunei Darussalam;
 - (iii) a more advantageous realisation of the company's assets would be effected than on a winding up.
- (3) Any judicial management order made under subsection (2) shall direct that

during the period in which the order is in force the affairs, business and property of the company shall be managed by a judicial manager appointed for the purpose by the Court; and such an order shall specify the purpose or purposes for whose achievement the order is made.

(4) (a) In any application for a judicial management order under subsection (1), the applicant shall nominate a person who is a public accountant, who is not the auditor of the company, to act as a judicial manager.

(b) The Court may reject the nomination of the applicant and appoint another person in his stead.

(c) where a nomination is made by the company, a majority in number and value of the creditors (including contingent or prospective creditors) may be heard in opposition to the nomination and the Court may, if satisfied as to the value of the creditors' claims and as to the grounds of opposition, invite the creditors to nominate a person in his stead and, if it sees fit, adopt their nomination.

(d) Nothing in this subsection shall prevent the Minister from himself nominating a person to act as a judicial manager if he considers that the public interest so requires and in such a case the Minister may be heard in support of his nomination and for this purpose may be represented.

(e) Notwithstanding paragraph (a), where a person is appointed by the Court or nominated by the Minister to act as a judicial manager that person need not be a public accountant.

(5) When an application for a judicial management order is made under subsection (1), notice of the application —

(a) shall be published in the *Gazette* and in a Malay and English local daily newspaper and a copy thereof sent to the Registrar; and

(b) shall be given —

(i) to the company, in a case where a creditor is the applicant; and

(ii) to any person who has appointed or is or may be entitled to appoint a receiver and manager of the whole (or substantially the whole) of a property of a company under the terms of any debentures of a company secured by a floating charge or by a floating charge and one or more fixed

charges.

(6) Subject to subsection (11), the Court shall dismiss an application for a judicial management order if it is satisfied that —

- (a) a receiver and manager referred to in subsection (4) has been or will be appointed; or
- (b) the making of the order is opposed by a person who has appointed or is entitled to appoint such a receiver and manager.

(7) On hearing the application for a judicial management order, the Court may dismiss the application or adjourn the hearing conditionally or unconditionally or make an interim order or any other order that it thinks fit.

(8) A judicial management order shall not be made in relation to a company —

- (a) after the company has gone into liquidation;
- (b) where the company is a bank licensed under the Banking Order, 2006 (S45/2006), Islamic Banking Order, 2008 (S96/2008), International Banking Order, 2000 (S53/2000) or is a finance company licensed under the Finance Companies Act (Chapter 89); or
- (c) where the company is an insurance company licensed under the Insurance Order, 2006 (S48/2006) or a takaful company licensed under the Takaful Order, 2008 (S100/2008).

(9) A judicial management order shall, unless it is otherwise discharged, remain in force for a period of 180 days from the date of the making of the order but the Court may, on application of a judicial manager, increase this period subject to such terms as the Court may impose.

(10) The costs and expenses of any unsuccessful application for a judicial management order made under this section shall, unless the Court otherwise orders, be borne by the applicant and, if the Court considers that the application is frivolous or vexatious, it may make such orders, as it thinks just and equitable, to redress any injustice that may have resulted.

(11) Nothing in this section shall preclude a Court —

(a) from making a judicial management order and appointing a judicial manager if it considers the public interest so requires; or

(b) from appointing, after the making of an application for a judicial management order and on the application of the person applying for the judicial management order, an interim judicial manager, pending the making of a judicial management order, and such interim judicial manager may, if the Court sees fit, be the person nominated in the application for a judicial management order. The interim judicial manager so appointed may exercise such functions, powers and duties as the Court may specify in the order.

(12) Any person who has acted as Executive Manager of the company in respect of which a judicial management order is sought may be appointed judicial manager of that company by the Court.

(13) For the purpose of this section, “inability to pay debts” has the meaning assigned to it in section 100.

Application for winding up

101. (1) Subject to the provisions of this section, an application to the Court for the winding up of a company shall be by petition presented by —

(a) the company;

(b) the directors of the company;

(c) any creditor or creditors (including any contingent or prospective creditor or creditors);

(d) contributory or contributories;

(e) a liquidator; or

(f) all or any of those parties, together or separately.

(2) Except as mentioned in subsection (3), a contributory is not entitled to present a winding up petition unless —

(a) the number of members is reduced to less than two; or

(b) the shares in respect of which he is a contributory, or some of them, were originally allotted to him, or have been held by him, and registered in his name, for at least 6 months during the 18 months before the commencement of the winding up, or have devolved on him through the death of a former holder.

(3) A person who is liable to contribute to a company's assets in the event of its being wound up may petition on either of the grounds set out in section 99(e) and (g), and subsection (2) does not then apply; but unless the person is a contributory otherwise than under section 58, he may not, in his character as contributory, petition on any other ground.

(4) A winding up petition on the ground set out in section 99(f) may only be presented by one or more creditors.

(5) A winding up petition may be presented by the Minister –

- (a) If the ground of the petition is that set out in section 99(b); or
- (b) in a case falling within section 102.

(6) Where a company is being wound up voluntarily, a winding up petition may be presented by the Official Receiver attached to the Court as well as by any other person authorised in the behalf under the other provisions of this section; but the Court shall not make a winding up order on the petition unless it is satisfied that the voluntary winding up cannot be continued with due regard to the interests of the creditors or contributories

FAQ 3

What basis for commencement of insolvency proceedings is allowed under the insolvency framework?

Meaning of “inability to pay debts”

100. (1) A company is deemed unable to pay its debts if —

(a) if a creditor (by assignment or otherwise) to whom the company is indebted in a sum exceeding \$10,000 then due has served on the company, by leaving it at the company’s registered office, a written demand (in the prescribed form) requiring the company to pay the sum so due and the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) execution or other process issued on a judgment, decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.

(2) The money sum for the time being specified in subsection (1)(a) is subject to increase or reduction by an order under section 236.

(3) For the purpose of subsection (1)(c), in determining whether a company is unable to pay its debts, the Court shall take into account its contingent and prospective liabilities.

FAQ 4

Does the insolvency framework allow the continuation of contracts supplying essential goods and services to the debtor (goods and services necessary for the survival of the business), even where the debtor is in breach?

Members of company

5. For the purposes of this Order, a person who is not a member of a company but to whom shares in the company have been transferred, or transmitted by operation of law, is to be regarded as a member of the company, and references to a member or members are to be read accordingly.

FAQ 5

Does the insolvency framework allow the rejection by the debtor (or by insolvency representative) or by court on debtor's behalf of overly burdensome contracts (the cost of performance is greater than the benefit to be received), where both parties have not fully performed their obligations?

Connected with company

5. (1) For the purposes of this Order, a person is connected with a company if —
- (a) he is a director of the company or an associate of such director; or
 - (b) he is an associate of the company.

FAQ 6

Does the insolvency framework allow avoidance of the following transactions executed before the filing for insolvency?

- (a) Preferential transactions, which resulted in a creditor obtaining more than its prorate share of the debtor's assets and which occurred when the debtor was insolvent.

Preferences.

209. (1) This section applies as does section 208.

(2) Where the company has at a relevant time, as defined in section 208, given a preference to any person, the office-holder may apply to the Court for an order under this section.

(3) Subject to subsection (4), (5), (6) and (7), the Court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not given that preference.

(4) For the purposes of this section and section 211, a company gives a preference to a person if—

(a) that person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities, and

(b) the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done.

(5) The Court shall not make an order under this section in respect of a preference given to any person unless the company which gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (4)(b).

(6) A company which has given a preference to a person connected with the company (otherwise than by reason only of being its employee) at the time the preference

was given is presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire as is mentioned in subsection (5).

(7) The fact that something has been done in pursuance of the order of a Court does not, without more, prevent the doing or suffering of that thing from constituting the giving of a preference.

FAQ 7

Does the insolvency framework allow avoidance of the following transactions executed before the filing for insolvency?

- (b) Undervalued transactions which were made as a gift or in exchange for less than equivalent value and which occurred when the debtor was insolvent or resulted in the debtor becoming insolvent.

Transactions at an undervalue.

- 208.** (1) This section applies in the case of a company where—
(a) the company enters judicial management;
(b) the company goes into liquidation;
and “the office-holder” means the judicial manager or the liquidator, as the case may be.
- (2) Where the company has at a relevant time (defined in section 208) entered into a transaction with any person at an undervalue, the office-holder may apply to the Court for an order under this section.
- (3) Subject to subsection (4) and (5), the Court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction.
- (4) For the purposes of this section and section 211, a company enters into a transaction with a person at an undervalue if—
(a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or
(b) the company enters into a transaction with that person for a consideration the value of which, in money or money’s worth, is significantly less than the value, in money or money’s worth, of the consideration provided by the company.
- (5) The Court shall not make an order under this section in respect of a transaction at an undervalue if it is satisfied that—
(a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business, and
(b) at the time it did so, there were reasonable grounds for believing that the transaction would benefit the company.

FAQ 8

Does the insolvency framework provide for the possibility of the debtor obtaining credit after commencement of insolvency proceedings (post commencement credit) to finance its ongoing needs during the proceedings?

Connected with company

5. (1) For the purposes of this Order, a person is connected with a company if —
- (a) he is a director of the company or an associate of such director; or
 - (b) he is an associate of the company.

FAQ 9

Does the insolvency framework assign priority to post-commencement credit?

Preferential payments.

147. (1) Subject to the provisions of this Order, in a winding up there shall be paid in priority to all other unsecured debts —

(a) firstly, the amount payable to any creditor for any unsecured credit granted by the creditor after the commencement of any insolvency proceedings;

(b) secondly, the costs and expenses of the winding up including the taxed costs of the applicant for the winding up order payable, the remuneration of the liquidator and the costs of any audit carried out;

(c) thirdly, subject to subsection (2), all wages or salary (whether or not earned wholly or in part by way of commission) including any amount payable by way of allowance or reimbursement under any contract of employment or award or agreement regulating conditions of employment of any employee;

(d) fourthly, subject to subsection (2), the amount due to an employee as a retrenchment benefit or ex gratia payment under any contract of employment or award or agreement that regulates conditions of employment whether such amount becomes payable before, on or after the commencement of the winding up;

(e) fifthly, all amounts due in respect of contributions payable during the 12 months next before, on or after the commencement of the winding up by the company as the employer of any person under any written law relating to employees' superannuation or provident funds or under any scheme of superannuation which is an approved scheme under the law relating to income tax;

(f) sixthly, all remuneration payable to any employee in respect of vacation leave, or in the case of his death to any other person in his right, accrued in respect of any period before, on or after the commencement of the winding up; and

(g) seventhly, the amount of all tax or rates assessed due under any written law before the commencement of the winding up or assessed at any time before the time fixed for the proving of debts has expired.

(2) The amount payable under subsection (1)(c) and (d) shall not exceed an

amount that is equivalent to 5 months salary whether for time or piecework in respect of services rendered by the employee to the company or \$7,500, whichever is the lesser.

(3) The Minister may, by order published in the *Gazette*, amend subsection (2) by varying the amount specified in that subsection as the maximum amount payable under subsection (1)(c) and (d).

(4) For the purposes of —

(a) subsection (1)(c) and (d) —

“employee” means a person who has entered into or works under a contract of service with an employer and includes a subcontractor of labour;

“wages or salary” shall be deemed to include —

(i) all arrears of money due to a subcontractor of labour;

(ii) any amount payable to an employee on account of wages or salary during a period of notice of termination of employment or in lieu of notice of such termination, as the case may be, whether such amount becomes payable before, on or after the commencement of the winding up; and

(iii) any amount payable to an employee, on termination of his employment, as a gratuity under any contract of employment, or under any award or agreement that regulates conditions of employment whether such amount becomes payable before, on or after the commencement of the winding up;

(b) subsection (1)(d) —

“ex gratia payment” means the amount payable to an employee on the winding up of a company or on the termination of his service by his employer on the ground of redundancy or by reason of any re-organisation of the employer, profession, business, trade or work, and “the amount payable to an employee” for these purposes means the amount stipulated in any contract of employment, award or agreement, as the case may be;

“retrenchment benefit” means the amount payable to an employee on the winding up of a company or on the termination of his service by his employer on the ground of redundancy or by reason of any re-organisation of the employer, profession, business, trade or work, and “the amount payable to an employee” for these purposes means the amount stipulated in any contract of employment, award or agreement, as the case may be, or if no amount is stipulated therein, such amount as is stipulated by the Commissioner for Labour.

(5) The debts in each class, specified in subsection (1), shall rank in the order therein specified but as between debts of the same class shall rank equally between themselves, and shall be paid in full, unless the property of the company is insufficient to meet them, in which case they shall abate in equal proportions between themselves.

(6) Where any payment has been made to any employee of the company on account of wages, salary or vacation leave out of money advanced by a person for that purpose, the person by whom the money was advanced shall, in a winding up, have a right of priority in respect of the money so advanced and paid, up to the amount by which the sum in respect of which the employee would have been entitled to priority in the winding up has been diminished by reason of the payment, and shall have the same right of priority in respect of that amount as the employee would have had if the payment had not been made.

(7) So far as the assets of the company available for payment of general creditors are insufficient to meet any preferential debts specified in subsection (1)(a), (b), (c), (e) and (f) and any amount payable in priority by virtue of subsection (4), those debts shall have priority over the claims of the holders of debentures under any floating charge created by the company (which charge, as created, was a floating charge), and shall be paid accordingly out of any property comprised in or subject to that charge.

(8) Where the company is under a contract of insurance (entered into before the commencement of the winding up) insured against liability to third parties, then if any such liability is incurred by the company (either before or after the commencement of the winding

up) and an amount in respect of that liability is or has been received by the company or the liquidator from the insurer the amount shall, after deducting any expenses of or incidental to getting in such amount, be paid by the liquidator to the third party in respect of whom the liability was incurred to the extent necessary to discharge that liability or any part of that liability remaining not discharged in priority to all payments in respect of the debts referred to in subsection (1).

(9) If the liability of the insurer to the company is less than the liability of the company to the third party, nothing in subsection (6) shall limit the rights of the third party in respect of the balance.

(10) Notwithstanding anything in subsection (1), where a company has given security for the payment or repayment of any amount to which subsection (1)(g) relates, that paragraph shall apply only in relation to the balance of any such amount remaining due after deducting from the net amount realised from such security.

(11) Where in any winding up, assets have been recovered under an indemnity for costs of litigation given by certain creditors, or have been protected or preserved by the payment of moneys or the giving of indemnity by creditors, or where expenses in relation to which a creditor has indemnified a liquidator have been recovered, the Court may make such order as it thinks just with respect to the distribution of those assets and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risks run by them in so doing.

FAQ 10

Which creditors vote on the proposed reorganisation plan?

Proposal for voluntary arrangement

8. (1) A proposal to the company and to its creditors may be made, by any of the persons mentioned in subsection (2), for a voluntary arrangement.

(2) The persons referred to in subsection (1) are —

- (a) the directors of a company (other than one which is in judicial management or being wound up);
- (b) where the company is in judicial management, the judicial manager;
- (c) where the company is being wound up, the liquidator.

(3) A voluntary arrangement may include —

- (a) a composition in satisfaction of its debts;
- (b) restructuring of debts through restatements of assets and liabilities and agreement with creditors on maintaining payments;
- (c) reorganising the company by restructuring the ownership and management of the company to lead to better decision-making and execution; and
- (d) any other acts as may be necessary for the rehabilitation or rescue of the company.

(4) A proposal under subsection (1) shall provide for some person (the nominee) to act in relation to the voluntary arrangement either as trustee or otherwise for the purpose of supervising its implementation; and the nominee must be a person who is qualified to act as an insolvency practitioner or authorised to act as nominee, in relation to the voluntary arrangement.

(5) Creditors who are entitled to vote on the proposal are those whose rights are affected or modified by the proposal shall —

- (a) designate classes of claims or interests;
- (b) specify any class of claims or interests that is not impaired under the proposal or the order;

(c) specify the treatment of any class of claims or interests that is impaired under the proposal or the order;

(d) provide the same treatment for each claims or interests of a particular class, unless the holder of a particular claims or interests agrees to a less favorable treatment of such particular claims or interests.

FAQ 11

Does the insolvency framework require that the following provisions must be followed in order for the reorganisation plan to be approved?

Proposal for voluntary arrangement

8. (1) A proposal to the company and to its creditors may be made, by any of the persons mentioned in subsection (2), for a voluntary arrangement.

(2) The persons referred to in subsection (1) are —

(a) the directors of a company (other than one which is in judicial management or being wound up);

(b) where the company is in judicial management, the judicial manager;

(c) where the company is being wound up, the liquidator.

(3) A voluntary arrangement may include —

(a) a composition in satisfaction of its debts;

(b) restructuring of debts through restatements of assets and liabilities and agreement with creditors on maintaining payments;

(c) reorganising the company by restructuring the ownership and management of the company to lead to better decision-making and execution; and

(d) any other acts as may be necessary for the rehabilitation or rescue of the company.

(4) A proposal under subsection (1) shall provide for some person (the nominee) to act in relation to the voluntary arrangement either as trustee or otherwise for the purpose of supervising its implementation; and the nominee must be a person who is qualified to act as an insolvency practitioner or authorised to act as nominee, in relation to the voluntary arrangement.

(5) Creditors who are entitled to vote on the proposal are those whose rights are affected or modified by the proposal shall —

(a) designate classes of claims or interests;

- (b) specify any class of claims or interests that is not impaired under the proposal or the order;
- (c) specify the treatment of any class of claims or interests that is impaired under the proposal or the order;
- (d) provide the same treatment for each claims or interests of a particular class, unless the holder of a particular claims or interests agrees to a less favorable treatment of such particular claims or interests.

FAQ 12

Does the insolvency framework require that a reorganisation plan must specify that the anticipated return to dissenting creditors will be at least equal to the return that they would obtain in a liquidation?

Implementation of proposal

17. (1) This section applies where a voluntary arrangement has effect under section 14(2).

(2) The person who is for the time being carrying out, in relation to the voluntary arrangement, the functions conferred —

(a) on the nominee by virtue of the approval given at one or both of the meetings summoned under section 11;

(b) by virtue of section 10(4) or 12(2) on a person other than the nominee, shall be known as the supervisor of the voluntary arrangement.

(3) If any of the company's creditors or any other person is dissatisfied by any act, omission or decision of the supervisor, he may apply to the Court; and on the application, the Court may —

(a) confirm, reverse or modify any act or decision of the supervisor;

(b) give him directions;

(c) make such other order as it thinks fit.

(4) The supervisor —

(a) may apply to the Court for directions in relation to any particular matter arising under the voluntary arrangement; and

(b) is included among the persons who may apply to the Court for the winding up of the company or for a judicial management order to be made in relation to it.

(5) The Court may, whenever —

(a) it is expedient to appoint a person to carry out the functions of the supervisor; and

(b) it is inexpedient, difficult or impracticable for an appointment to be made without the assistance of the Court,

make an order appointing a person who is qualified to act as an insolvency practitioner or authorised to act as supervisor, in relation to the voluntary arrangement, either in substitution for the existing supervisor or to fill a vacancy.

(6) The power conferred by subsection (5) is exercisable so as to increase the number of persons exercising the functions of supervisor or, where there is more than one person exercising those functions, so as to replace one or more of those persons.

Protection of interests of creditors and members

49. (1) At any time when a judicial management order is in force, a creditor or member of the company may apply to the Court for an order under this section on the ground that —

(a) the affairs, business and property are being or have been managed by the judicial manager in a manner which is or was unfairly prejudicial to the interests of its creditors or members generally or of some part of its creditors or members (including at least himself) or of a single creditor that represents one-quarter in value of the claims against the company; or

(b) any actual or proposed act or omission of the judicial manager is or would be so prejudicial.

(2) On an application for an order under this section, the Court may make such order as it thinks fit for giving relief in respect of the matters complained of, or adjourn the hearing conditionally or unconditionally, or make an interim order or any other order that it thinks fit.

(3) A dissenting creditor shall receive as much under the judicial management as he would receive on a winding up.

(4) Subject to subsection (5), an order under this section may —

(a) regulate the future management by the judicial manager of the

company's affairs, business and property;

(b) require the judicial manager to refrain from doing or continuing an act complained of by the applicant or to do an act which the applicant has complained he has omitted to do;

(c) require the summoning of a meeting of creditors or members for the purpose of considering such matters as the Court may direct;

(d) discharge the judicial management order and make such consequential provision as it thinks fit;

(e) require a dissenting creditor to receive as much under the judicial management as he would receive on a winding up.

(5) An order under this section shall not prejudice or prevent the implementation of any composition or scheme approved under section 11.

(6) Where the judicial management order is discharged, the judicial manager shall immediately send to the Registrar a copy of the order effecting the discharge.

(7) If the judicial manager, without reasonable excuse, fails to comply with subsection (5) he is guilty of an offence and is liable on conviction to a fine not exceeding \$5,000, and, in the case of a continuing offence, with a further fine not exceeding \$250 for every day or part thereof during which the offence continues after conviction.

FAQ 13

Does the insolvency framework require that creditors (through either a decision of the creditors' meeting or a decision of the creditors' committee) nominate the insolvency representative or approve/rectify//reject the appointment of the insolvency representative?

Application to Court for company to be placed under judicial management and for appointment of judicial manager

- 32.** (1) Where a company or where a creditor or creditors of the company consider that —
- (a) the company is or will be unable to pay its debts; and
 - (b) there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up,
- an application may be made to the Court for an order that the company be placed under the judicial management of a judicial manager.
- (2) Where a company or its directors (pursuant to a resolution of its members or the board of directors) or a creditor or creditors (including any contingent or prospective creditor or creditors or all or any of those parties, together or separately), makes an application for a judicial management order under subsection (1), the Court may make a judicial management order in relation to the company if, and only if, —
- (a) it is satisfied that the company is or will be unable to pay its debts; and
 - (b) it considers that the making of the order would be likely to achieve one or more of the following purposes;
- (i) the survival of the company, or the whole or part of its undertaking as a going concern;
 - (ii) the approval under section 13 of a voluntary arrangement between the company and any such creditors or members as are mentioned in that section or the Authoriti Monetori Brunei Darussalam;

(iii) a more advantageous realisation of the company's assets would be effected than on a winding up.

(3) Any judicial management order made under subsection (2) shall direct that during the period in which the order is in force the affairs, business and property of the company shall be managed by a judicial manager appointed for the purpose by the Court; and such an order shall specify the purpose or purposes for whose achievement the order is made.

(4) (a) In any application for a judicial management order under subsection (1), the applicant shall nominate a person who is a public accountant, who is not the auditor of the company, to act as a judicial manager.

(b) The Court may reject the nomination of the applicant and appoint another person in his stead.

(c) where a nomination is made by the company, a majority in number and value of the creditors (including contingent or prospective creditors) may be heard in opposition to the nomination and the Court may, if satisfied as to the value of the creditors' claims and as to the grounds of opposition, invite the creditors to nominate a person in his stead and, if it sees fit, adopt their nomination.

(d) Nothing in this subsection shall prevent the Minister from himself nominating a person to act as a judicial manager if he considers that the public interest so requires and in such a case the Minister may be heard in support of his nomination and for this purpose may be represented.

(e) Notwithstanding paragraph (a), where a person is appointed by the Court or nominated by the Minister to act as a judicial manager that person need not be a public accountant.

(5) When an application for a judicial management order is made under subsection (1), notice of the application —

(a) shall be published in the *Gazette* and in a Malay and English local daily newspaper and a copy thereof sent to the Registrar; and

(b) shall be given —

(i) to the company, in a case where a creditor is the applicant; and

(ii) to any person who has appointed or is or may be entitled to appoint a receiver and manager of the whole (or substantially the whole) of a property of a company under the terms of any debentures of a company secured by a floating charge or by a floating charge and one or more fixed charges.

(6) Subject to subsection (11), the Court shall dismiss an application for a judicial management order if it is satisfied that —

(a) a receiver and manager referred to in subsection (4) has been or will be appointed; or

(b) the making of the order is opposed by a person who has appointed or is entitled to appoint such a receiver and manager.

(7) On hearing the application for a judicial management order, the Court may dismiss the application or adjourn the hearing conditionally or unconditionally or make an interim order or any other order that it thinks fit.

(8) A judicial management order shall not be made in relation to a company —

(a) after the company has gone into liquidation;

(b) where the company is a bank licensed under the Banking Order, 2006 (S45/2006), Islamic Banking Order, 2008 (S96/2008), International Banking Order, 2000 (S53/2000) or is a finance company licensed under the Finance Companies Act (Chapter 89); or

(c) where the company is an insurance company licensed under the Insurance Order, 2006 (S48/2006) or a takaful company licensed under the Takaful Order, 2008 (S100/2008).

(9) A judicial management order shall, unless it is otherwise discharged, remain in force for a period of 180 days from the date of the making of the order but the Court may, on application of a judicial manager, increase this period subject to such terms as the Court may impose.

(10) The costs and expenses of any unsuccessful application for a judicial

management order made under this section shall, unless the Court otherwise orders, be borne by the applicant and, if the Court considers that the application is frivolous or vexatious, it may make such orders, as it thinks just and equitable, to redress any injustice that may have resulted.

(11) Nothing in this section shall preclude a Court —

(a) from making a judicial management order and appointing a judicial manager if it considers the public interest so requires; or

(b) from appointing, after the making of an application for a judicial management order and on the application of the person applying for the judicial management order, an interim judicial manager, pending the making of a judicial management order, and such interim judicial manager may, if the Court sees fit, be the person nominated in the application for a judicial management order. The interim judicial manager so appointed may exercise such functions, powers and duties as the Court may specify in the order.

(12) Any person who has acted as Executive Manager of the company in respect of which a judicial management order is sought may be appointed judicial manager of that company by the Court.

(13) For the purpose of this section, “inability to pay debts” has the meaning assigned to it in section 100.

Appointment of liquidator.

73. (1) In a members’ voluntary winding up, the company in general meeting shall appoint one or more liquidators for the purpose of winding up the company’s affairs and distributing its assets.

(2) On the appointment of a liquidator all the powers of the directors cease, except in so far as the company in general meeting or the liquidator sanctions their continuance

Choice of liquidator at meetings of creditors and contributories.

116. (1) This section applies where a company is being wound up by the Court and

separate meetings of the company's creditors and contributories are summoned for the purpose of choosing a person to be liquidator of the company.

(2) The creditors and the contributories at their respective meetings may nominate a person to be liquidator.

(3) The liquidator shall be the person nominated by the creditors or, where no person has been so nominated, the person (if any) nominated by the contributories.

(4) In the case of different persons being nominated, any contributory or creditor may, within 7 days after the date on which the nomination was made by the creditors, apply to the Court for an order either —

(a) appointing the person nominated as liquidator by the contributories to be a liquidator instead of, or jointly with, the person nominated by the creditors; or

(b) appointing some other person to be liquidator instead of the person nominated by the creditors.

FAQ 14

Does the insolvency framework require that creditors (through either a decision of the creditors' meeting or such a decision of the creditors' committee) approve the sale of substantial assets of the debtor, if such sale is made in the course of the insolvency proceedings?

- 6.** Power to sell all or any substantial part of the property of the company, either subject to or free of any lien, or distribute proceeds of such sale among creditors, but approval of the creditors is required for the sale and distribution.

FAQ 15

Does the insolvency framework provide that an individual creditor has the right to request information from the insolvency representative on the debtor's business and financial affairs?

Right of creditor to access information

241. A creditor of a company shall have the right to access information about insolvency proceedings relating to the company, either by requesting it from an insolvency practitioner or by reviewing the official records of the company.

FAQ 16

Does the insolvency framework provide that an individual creditor has the right to object to the decision accepting or rejecting its own claims and claims of other creditors?

Implementation of proposal.

17. (3) If any of the company's creditors or any other person is dissatisfied by any act, omission or decision of the supervisor, he may apply to the Court; and on the application, the Court may —

- (a) confirm, reverse or modify any act or decision of the supervisor;
- (b) give him directions;
- (c) require a dissenting creditor to receive as much under the voluntary arrangement as he would receive on a winding up; or
- (d) make such other order as it thinks fit.

Protection of interests of creditors and members.

49. (1) At any time when a judicial management order is in force, a creditor or member of the company may apply to the Court for an order under this section on the ground that —

- (a) the affairs, business and property are being or have been managed by the judicial manager in a manner which is or was unfairly prejudicial to the interests of its creditors or members generally or of some part of its creditors or members (including at least himself) or of a single creditor that represents one-quarter in value of the claims against the company; or
- (b) any actual or proposed act or omission of the judicial manager is or would be so prejudicial.

(2) On an application for an order under this section, the Court may make such order as it thinks fit for giving relief in respect of the matters complained of, or adjourn the hearing conditionally or unconditionally, or make an interim order or any other order that it thinks fit.

- (3) A dissenting creditor shall receive as much under the judicial management as

he would receive on a winding up.

(4) Subject to subsection (5), an order under this section may —

(a) regulate the future management by the judicial manager of the company's affairs, business and property;

(b) require the judicial manager to refrain from doing or continuing an act complained of by the applicant or to do an act which the applicant has complained he has omitted to do;

(c) require the summoning of a meeting of creditors or members for the purpose of considering such matters as the Court may direct;

(d) discharge the judicial management order and make such consequential provision as it thinks fit;

(e) require a dissenting creditor to receive as much under the judicial management as he would receive on a winding up.

(5) An order under this section shall not prejudice or prevent the implementation of any composition or scheme approved under section 11.

(6) Where the judicial management order is discharged, the judicial manager shall immediately send to the Registrar a copy of the order effecting the discharge.

(7) If the judicial manager, without reasonable excuse, fails to comply with subsection (5) he is guilty of an offence and is liable on conviction to a fine not exceeding \$5,000, and, in the case of a continuing offence, with a further fine not exceeding \$250 for every day or part thereof during which the offence continues after conviction.