A BRIEF OUTLINE ON MALAYSIAN BANKRUPTCY LAW AND CORPORATE INSOLVENCY AND RESTRUCTURING PROCEDURES IN MALAYSIA

BY MR. LEONG WAI HONG

SKRINE, MALAYSIA

LEX MUNDI CONFERENCE, SAN FRANCISCO, SEPTEMBER 2003

INTRODUCTION

In 1997, the Asian economic crisis hit Malaysia swift and hard. The Non-performing loans in financial institutions shot up from 3.5% to about 6% in just a few months after the crisis started. Businesses were driven to insolvency. Without the stringent methods put in place by the Malaysian government to stem the effects of the crisis the Malaysian economy would undoubtedly have been brought to a standstill.

Two main economic controls introduced into the Malaysian system came in the form of Capital Controls and the ‘Pengurusan Danaharta Nasional Berhad Act 1998’ (or the “National Asset Management Limited Act 1998”, in English).

Capital controls were introduced to stabilise the Malaysian currency by pegging the Malaysian Ringgit to the US Dollar, thus insulating it from the reach of financial speculators. The ‘National Asset Management Limited Act’ worked on a different basis. This Act established a corporation

---

1 For an overview of the impact of the economic crisis in Malaysia, Indonesia, Korea and Thailand see ‘Governance Re-Invented: The Progress, Constraints, and Remaining Agenda in Bank and Corporate Restructuring in East and South-East Asia’ (by the Development Research & Policy Analysts Division of the United Nations Economic & Social Commission for Asia & the Pacific) [last updated 27 December 2001] [hereafter the ‘Governance Re-Invented Report’].
‘Danaharta’, or ‘Asset Corporation’ to acquire non-performing loans in the banking and financial institutions. More importantly for our topic today, this Act allows the Asset Corporation to appoint Special Administrators to help manage and reconstruct Companies that are practically insolvent. I will explain more on this Act later.

**NO DISCRIMINATION UNDER MALAYSIAN LAW BETWEEN CLAIMS OF LOCAL CREDITORS AND FOREIGN CREDITORS**

Before I proceed, I must point out that Malaysia’s insolvency procedures do not discriminate between local and foreign creditors barring certain provisions in the *Exchange Control Act 1953*. The latter requires foreign creditors to obtain the permission of the Controller of Exchange Control in repatriating the monies once their claim is satisfied. Permission is easily obtained and granted as a matter of formality.

**BANKRUPTCY LAWS IN MALAYSIA**

Malaysia’s *Bankruptcy Act 1967* [hereafter ‘BA ’67’], is based on the English *Bankruptcy Act of 1914*. A debtor is defined in *Section 3(3) BA ’67* to include those personally present in Malaysia, ordinarily resident or had a place of residence in Malaysia, was carrying on business in Malaysia either personally or by means of an agent, or was a member of a firm or partnership which carried on business in Malaysia. The burden of proving that a debtor is a debtor within the meaning of this section falls on the Petitioning Creditor.\(^3\)

---

\(^2\) Under *Section 88 BA ’67*, the High Court is the Court having jurisdiction over bankruptcy claims.

\(^3\) See *Algemene Bank Nederland NV v Loo Choon Yow* [1989] 2 MLJ 258
Section 3(1) BA ’67 details the acts of bankruptcy that a debtor can commit, following which a bankruptcy petition can be filed in Court by either the debtor or his creditor/s. Acts of bankruptcy under Section 3(1) include situations where the debtor gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts, and where a creditor has served a bankruptcy notice on the debtor, and the debtor does not comply with the said notice.

The Bankruptcy Petition

Following an act of bankruptcy, a bankruptcy petition may be presented to the Court. The conditions that a creditor has to satisfy before being allowed to present the bankruptcy petition are set out under Section 5(1) BA ’67. Under the section, the debt owed to the petitioning creditor by the debtor must amount to a minimum of ten thousand Malaysian ringgit (about US$ 2600). If there is more than one petitioning creditor, the aggregate amount of the debts owing to the petitioners must amount to at least ten thousand ringgit. Further, the debt must be a liquidated sum payable either immediately or at some certain future date, and the relevant act of bankruptcy must have occurred within six months before the presentation of the petition.

At the hearing of the bankruptcy petition, the Court shall require proof of the petitioning creditor’s debts, the act/s of bankruptcy, and the service of the petition (should the debtor not be present at the hearing). If the Court is not satisfied with the proof of the above, the Court may dismiss...

4 Section 3(1)(g) BA ’67
the petition\textsuperscript{6}. The Court may also dismiss the petition if it is satisfied that the debtor will be able to pay his debts, or for other sufficient cause no order ought to be made\textsuperscript{7}.

In practice, a debtor that is advised by capable solicitors can challenge the bankruptcy proceedings against him for many years by taking legal and technical objections at every stage. Further delays can be caused by appeals and stay applications to the higher courts on every decision made at the court below. The whole process can take several years or more\textsuperscript{8}.

**Receiving Orders**

Once an act of bankruptcy is committed under \textbf{Section 3 BA ’67}, the Court may make a receiving order for the protection of the debtor’s estate upon presentation of the bankruptcy petition\textsuperscript{9}. Once a receiving order has been thus made, the Official Assignee will be made the receiver of the debtor’s property\textsuperscript{10}.

It should be noted that once the receiving order has been made, no creditor can have a remedy against either the property of the debtor or the debtor himself, nor can the creditor/s commence or proceed with any action in relation to the debt (legal or otherwise) unless the Court gives them leave to do so.\textsuperscript{11} A creditor may only retain the benefit of an execution against property or an attachment against debt or property if

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{5} Section 3(1)(i) BA ’67
\item \textsuperscript{6} Sections 6(2) and 6(3) BA ’67
\item \textsuperscript{7} Section 6(3) BA ’67
\item \textsuperscript{8} See \textit{Re: Raju Exp OCBC Bank (M) Bhd. (1999) 4 MLJ 593} and \textit{Moscow Narodny Bank Ltd v Ngan (2001) 4 MLJ 369} for examples of protracted bankruptcy proceedings.
\item \textsuperscript{9} Section 4 BA ’67
\item \textsuperscript{10} Section 8(1) BA ’67
\end{itemize}
\end{footnotesize}
he has completed these transactions before the date of the receiving order/presentation of the bankruptcy petition/the commission of the relevant act of bankruptcy\(^{12}\).

Despite the above, it should be noted that a foreign creditor who has reason to believe that a debtor might dissipate his assets may apply for a word-wide Mareva injunction from the foreign court. Such a word-wide Mareva injunction can include assets in Malaysia\(^{13}\).

After the receiving order has been made, the creditors may agree (in a creditors’ meeting, by a majority resolution representing at least three-fourths in value of all the creditors) on a composition in satisfaction of the debts owing, or a scheme of arrangement of the debtor’s affairs. Once such a composition or scheme is agreed on, an application may be made to the Court by either the debtor or Official Assignee to approve the scheme or composition. The Court has the discretion to refuse the application. If accepted by the Court, such a composition or scheme shall be binding on all the creditors\(^{14}\), including those who may have been opposed to it previously.

Under the BA ’67, the Court also has the power to appoint the Official Assignee as an interim receiver of the debtor’s property at any time after the presentation of the bankruptcy petition and before a receiving order is made\(^{15}\). Further, under Section 10(2) BA ’67, the Court may stay any

---

11 Ibid
12 Section 50 BA ’67
13 For a recent case on a world-wide Mareva Injunction granted by the Brunei High Court which covered assets in inter-alia Malaysia see [The State of Brunei and 1 other v Prince Jefri Bolkiah & 71 others (Brunei High Court Suit No.31 of 2000)] ;Zainal Abidin Bin Haji Abdul Rahman v Century Hotel Sdn Bhd [1982] 1 MLJ 260
14 Section 18 BA ’67
15 Section 10(1) BA ’67
action (legal or otherwise) against the debtor’s property or the debtor himself at any time after the bankruptcy petition has been presented.

**Adjudgment as a Bankrupt**

If the debtor is unable to show the Court that he is capable of offering a composition or making a scheme of arrangement with the creditors, the debtor shall be adjudged a bankrupt at the time a receiving order is made. If this happens, his property shall become divisible among his creditors and shall vest in the Official Assignee, in accordance with **S.24(4) BA ‘67**. Property in this instance does not include property held on trust by the bankrupt for another, the bankrupt’s tools of trade and his and his family’s other necessaries. The value of such tools of trade and necessaries cannot exceed Five Thousand Ringgit on whole. 16

Once the debtor is adjudged bankrupt, the creditors would still have the opportunity to agree on a scheme or composition, in accordance with the same procedures as detailed above. If such a scheme or composition is approved by the Court, the Court has the power to order the bankruptcy annulled and the property will be vested either in the bankrupt or in any person whom the Court appoints 17.

**Distribution of Dividends**

Following a bankruptcy, the Official Assignee appointed shall distribute dividends to those creditors who have proved their debts 18. If a creditor

---

16 Section 48 BA ‘67
17 By virtue of Section 26 BA ‘67
18 Section 62 BA ’67. Note, Section 43 sets out the priority of debts.
has not proved his debt, he would still be entitled to the dividends before
the money is used in the distribution of future dividends, but he cannot
disturb the distribution of dividends declared before he proved his debt\(^\text{19}\).

A final dividend will be declared if the Official Assignee feels he has
realised all the property concerned or so much thereof as can, in his
opinion, be realised without needlessly protracting the proceedings in
bankruptcy. Creditors who have not proven their debts by this time will
have to do so to the Court’s satisfaction before they collect their final
dividend. If they do not do so, the final dividends will be distributed
without regard to their claim\(^\text{20}\).

It should be noted that under Section 64(1) BA ‘67, provision shall be
made by the Official Assignee for the distribution of dividends due to
those resident in places that are so distant from the place where the
Official Assignee is acting that in the ordinary course of communication
they have not had sufficient time to tender their proofs or to establish
them if disputed, and also for debts provable in bankruptcy the subject of
claims not yet determined. This provision should be quite useful to foreign
creditors residing outside Malaysia.

Under Section 64(2) BA ‘67, the Official Assignee shall also make provision
for any disputed proofs or claims and for the expenses necessary for the
administration of the estate or otherwise, and subject to the foregoing
provisions, he shall distribute as dividend all money in hand.

\(^{19}\) Following Section 65 BA ‘97
\(^{20}\) Section 66 BA ‘67
In practice, it can take many years before the Official Assignee distributes any dividends. This is due to the numerous cases that the Official Assignee is usually saddled with.

**Discharge of Bankruptcy**

A bankrupt may at any time after being adjudged bankrupt apply to the Court for an order of discharge, and the Court shall appoint a day for hearing the application\(^1\). On the hearing of the application, the Court may either grant or refuse an absolute order of discharge, or suspend operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any income or earnings which may afterwards become due to the bankrupt, or with respect to his after-acquired property\(^2\).

Another possible method of discharge is for the bankrupt to request the Official Assignee to issue a certificate discharging his bankruptcy. However the Official Assignee shall not issue a certificate discharging a bankrupt from bankruptcy unless a period of five years has lapsed since the date the receiving order and the order by which the bankrupt was adjudged bankrupt were made\(^3\).

However, before issuing a certificate of discharge, the Official Assignee must serve on each creditor who has filed a proof of debt a notice of his intention to issue the certificate, together with a statement of his reasons for wanting to do so\(^4\). Within twenty-one days from the date of service of the Official Assignee’s notice, a creditor who wishes to object to the

---

\(^1\) *Section 33(1) BA ’67*
\(^2\) *Section 33(3) BA ’67*
\(^3\) *Section 33A BA ’67*
issuance of a certificate discharging the bankrupt must furnish a notice of objection stating the grounds of his objection. A creditor who does not furnish a notice of his objection and the grounds of his objection shall be deemed to have no objection to the discharge.

If the creditor’s objection has been rejected by the Official Assignee, the creditor may apply to the court, within twenty-one days of being informed by the Official Assignee of this rejection, for an order prohibiting the Official Assignee from issuing a certificate of discharge. The Court, if it thinks it just and expedient, may either dismiss the application or make an order that for a period not exceeding two years a certificate of discharge shall not be issued by the Official Assignee.

**RECIPROCAL PROVISIONS RELATING TO SINGAPORE AND DESIGNATED COUNTRIES**

---

24 Ibid, Section 33B(1)
25 Ibid, Section 33B(2)
26 Section 33B(3) BA ‘67
27 Section 33B(4) BA ‘67
28 Ibid, Section 33B(6) BA’ 67
The Malaysian High Court is expressly authorised to assist in any orders of the Courts of Singapore or any designated country provided certain conditions are satisfied.29

FOREIGN COMPANIES GO INTO LIQUIDATION. WHAT HAPPENS TO THEIR ASSETS IN MALAYSIA?

A company which is incorporated outside Malaysia [defined as a foreign company under the Malaysian Companies Act 1965 ("CA 1965")]) may have assets in Malaysia.

Under Section 340(2) of the CA 1965, where the foreign company goes into liquidation or is dissolved in its place of incorporation or origin, the foreign liquidator, until a liquidator for Malaysia is appointed by the Malaysian Court, shall have the powers and functions of a liquidator for Malaysia. As such, the foreign liquidator could claim, take possession of, realise or deal with assets of the foreign company in Malaysia.

Malaysian debts and liabilities incurred in Malaysia by the foreign company should be satisfied prior to the net amount recovered and realised (following the liquidation) being paid to the liquidator of that foreign company for the place where it was formed or incorporated.30 The priority of payment of debts of a foreign company is the same as for a Malaysian incorporated company.31

---

29 Section 104 BA '67
30 Section 340(3)(c) CA 1965
31 See Section 340(7) CA 1965
WINDING-UP ACTIONS IN MALAYSIA AGAINST FOREIGN COMPANIES.

A foreign company may be wound-up under Section 315 CA 1965 if the Company is (inter-alia) dissolved, if the Company is unable to pay its debts, and if the Malaysian Court is of the opinion that it is just and equitable that the Company be wound-up.

Following the dissolution of a foreign company, the place of incorporation of which is in a designated country, any Malaysian property, moveable or immovable, belonging to the company concerned shall be vested in such person as is entitled thereto according to the law of the place of incorporation or origin of the company. A foreign country is a designated country by notice published in the Gazette as directed by the Minister.

CORPORATE INSOLVENCY IN MALAYSIA.

There are four types of insolvency and/or corporate restructuring procedures in Malaysia, namely:

(a) General Liquidation.
(b) Receivership.
(c) Schemes of Arrangement
(d) Special Administration under the Pengurusan Danaharta Nasional Berhad Act 1998.

32 Ibid, Section 318.
33 Ibid.
GENERAL LIQUIDATION

Under Sections 217 and 218 CA 1965, a corporate debtor may be wound-up upon presentation of a Winding-Up Petition if it is unable to pay its debts. A company shall be deemed to be unable to pay its debts if a creditor has served a demand for a sum of RM500.00 (about US$130/-) and the Company has for three (3) weeks neglected to pay the sum or to secure compound for it to the reasonable satisfaction of the creditor.

Once the winding-up order is made, a court-appointed liquidator will be entrusted with the job of overseeing the liquidation process, including the handling of the wound-up Company's assets and the repayment of debts.

It should be noted that once the winding-up order is made, no action or proceeding should be proceeded with or commenced against the Company except by leave of the Court. This is to prevent unsecured creditors from continuing with claims in court and thus dissipating the assets of the wound-up company. However, secured creditors can apply for leave to enforce their claim. Registered charges over land and debentures over the debtor's assets are typical securities that retain priority over unsecured creditors in the event of liquidation.

RECEIVERSHIP

34 Section 226(3) CA 1965
If a foreign creditor has a debenture over the assets of a Malaysian Company, he may appoint a receiver to run the business for a limited period with a view to realising it as a going concern.

**COURT-APPROVED SCHEMES OF ARRANGEMENT**

Section 176 CA 1965 allows companies that are in financial difficulty to apply to the Courts for Court-approved schemes of arrangement. During the 1997 crisis, this device was used by numerous debtor companies in order to buy time to restructure their finances. The typical modus operandi was to file an application to Court for Court approval of a proposed scheme of arrangement, and pending that hearing, applying ex-parte to the High Court to stay all proceedings against the Company until the Court makes a decision on the proposed scheme. The company may continue to operate pending the outcome of the scheme.

In practice, the Courts were not in a position to scrutinise the proposed schemes and to determine whether it was a viable scheme or not unless a creditor who had the necessary means and determination decided to present evidence to oppose the proposed scheme. Hence, the debtor companies kept on applying for an extension of time to complete the scheme and also extended the ex-parte stay. This indefinite situation caused a lot of prejudice to creditors.

---

35 See S.176(10) CA 1965.
However, this abuse of Section 176’s provision was checked by a new Section 176 (10)(A) CA 1965 which was enacted to restrict any period of stay to merely 90 days or such longer period as the Court may for good reason allow if and only if:

(a) it is satisfied that there is a proposal for a scheme of compromise or arrangement between the company and its creditors or any class of creditors representing at least one-half in value of all the creditors;

(b) the restraining order is necessary to enable the company and its creditors to formalise the scheme of compromise or arrangement for the approval of the creditors or members pursuant to Section 176(1);

(c) a statement in the prescribed form as to the affairs of the company made up to a date not more than three days before the application is lodged together with the application; and

(d) it approves the person nominated by a majority of the creditors in the application by the company under Section 176(10) to act as a director or if that person is not already a director, notwithstanding the provisions of this Act or the memorandum and articles of the company, appoints the person to act as a director.

The schemes would only be approved by the Court if a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at a meeting held pursuant to a Court order under Section 176(1) CA 1965 agrees to any compromise or arrangement. Like all other

[38 S.176(3) CA 1965.]
procedures of insolvency, this procedure would come under the ambit of the High Court.\(^{39}\)


The **Danaharta Act** was by far the most radical reform undertaken by the Malaysian government to combat the economic crisis. In effect, what the introduction of the Act\(^{40}\) did was to empower the Danaharta Corporation, set up by the Act, to acquire non-performing loans from banks and other financial institutions and manage these assets pending their sale by public tenders or auction.

The rationale behind this measure is simple and straightforward. Following the economic recession that hit Malaysia in the late 1990s, non-performing loans were contributing greatly to incidences of insolvency in Malaysia’s financial sector as financial institutions were precluded from granting new loans without recouping their resources from earlier loans.

As such, the Danaharta Corporation was incorporated with the objective of minimising the effect of such a situation on the general Malaysian economy by the management of the assets acquired by the Corporation under the Act and to maximise the recovery value of the assets. ‘The preference was to restructure the loans where possible, and only resort to foreclosure and sale of collateral as a last resort’\(^{41}\).

---

\(^{39}\) See paragraph MAL 40-051, *CCH Report.*

\(^{40}\) on 20\(^{th}\) June 1998.

\(^{41}\) Page 79, *the Governance Re-invented Report*
**Special Administrators**

One aspect of the **Danaharta Act** that would interest foreign creditors is the appointment of Special Administrators to manage distressed companies. The appointment is initiated, either at the corporate debtor’s request\(^{42}\), or by Danaharta’s own initiative\(^{43}\).

Under **Section 25 of the Danaharta Act**, before Special Administration can be set up, the Corporation must be satisfied that it would serve the public interest to do so or:

(a) that the affected person\(^ {44}\) is unable or likely unable to pay its debts or fulfil its obligations to its creditors;

(b) the survival of the primary affected person and the whole or any part of its assets as a going concern may be achieved;

(c) a more advantageous realisation of the assets may be achieved than on a winding up; or

(d) the appointment may achieve a more advantageous realisation or a more expeditious settlement of a duty or liability owed by any person to the Corporation or any subsidiary of the Corporation.

It is interesting, and important, to note that the ambit of Danaharta’s powers is extremely wide. For example, once Special Administration under

---

\(^{42}\) **Section 23 of the Danaharta Act**, ie the ‘board of directors’ or ‘majority of the members’.

\(^{43}\) Ibid, **Section 24**.

\(^{44}\) Ibid, **Section 21**: ie, the corporate debtor concerned or any subsidiary of the Corporation.
the Act commences, a 12-month moratorium is put in place\(^45\). During this time, all actions concerning the said companies whose assets are being managed by Danaharta will not be allowed to proceed and/or will be adjourned. Such actions include winding-up proceedings, receivership except by certain regulatory bodies specified in the Act, execution proceedings, enforcement of any security over any asset of the company and even applications for Schemes of Arrangement under \textbf{Section 176 CA 1965}\(^46\).

Further, the managerial powers of the Special Administrator under the \textbf{Danaharta Act} cover a wide area, with the Special Administrator having the power to remove the board of directors of the institution concerned and assume full management control\(^47\). In support of such power, the \textbf{Danaharta Act} provides that no person shall obstruct or hinder the exercise of any duty, right or power by a Special Administrator\(^48\). Further under \textbf{Section 72 of the Danaharta Act}, notwithstanding any law, an order of court cannot be granted:

(a) which stays, restrains or affects the powers of the Special Administrator;

(b) which stays, restrains or affects any action taken, or proposed to be taken by the Special Administrator;

(c) which compels the Special Administrator to do or perform any act\(^49\).

\(^{45}\text{In accordance with Section 41(2) of the Danaharta Act}\)
\(^{46}\text{Ibid.}\)
\(^{47}\text{see paragraph MAL 45-011, CCH Report.}\)
\(^{48}\text{Section 39(A)(1) of the Danaharta Act}\)
\(^{49}\text{Section 72 of the Danaharta Act.}\)
Court actions involving Danaharta

Indeed, although there have been attempts to obtain injunctions against the decisions of Danaharta in managing the assets of distressed financial institutions\(^{50}\), or of declaring its' powers ultra vires the Malaysian constitution\(^{51}\), these actions have not met with success. Indeed, Danaharta’s interests and objectives are usually given precedence in the event of legal actions against it\(^{52}\).

Having said that however, it is interesting to note that recently the Court of Appeal, overruled a similar High Court decision in *Kekatong Sdn Bhd v Bumiputra-Commerce Banking Bhd & Anor [2002] 6 MLJ 186*. The Court of Appeal ruled that *Section 72 of the Danaharta Act* is unconstitutional and void\(^{53}\). The case is currently pending appeal at the Federal Court level, that is the highest level of the judiciary in Malaysia, and the final decision on the matter is awaited with interest by those who are interested in the developments of Malaysian insolvency law.

---

\(^{50}\) See the High Court case of *Wong Koon Seng v Rahman Hydraulic Tin Bhd & Ors [2002] 1 MLJ 98*

\(^{51}\) See the High Court case of *Tan Sri Dato’ Tajuddin Ramli v Pengurusan Danaharta Nasional Bhd. & Ors [2002] 5 MLJ 720*. It should be noted that in this case, it was the corporate debtor who sought an injunction against Danaharta in relation to its repayment of debts following an agreed arrangement.

\(^{52}\) See the High Court case of *Reeco Holdings Sdn. Bhd. & Ors v Pengurusan Danaharta Nasional Bhd. & Ors (No.1) [2002] 5 MLJ 637* in relation to a corporate debtor’s application for an injunction, which if granted on the facts of the case, could have severely and irreparably prejudiced Danaharta’s interest, per Abdul Wahab J at page 656

\(^{53}\) [2003] 3 MLJ 1
**Salient parts of the Court of Appeal’s decision in the Kekatong case**

The Court of Appeal held that Section 72 of the Danaharta Act was unconstitutional being in contravention of Article 8(1) of the Federal Constitution which reads:

“All persons are equal before the law and entitled to the equal protection of the law”.

The Court of Appeal further held that whether the High Court had power to grant the injunction sought by the plaintiff depended upon the constitutionality of s 72 of the Act. In order to determine whether s 72 ran foul of the Federal Constitution, it was necessary as a first step to ascertain whether access to justice is a guaranteed fundamental liberty and if so, whether s 72 of the Act denies such access. If access to justice is to be a fundamental liberty then it must be accommodated within Article 8(1) of the Federal Constitution. Article 8(1) is a condification of Dicey’s rule of law. Article 8(1) emphasizes that this is a county where Government is according to the rule of law. There must be fairness of state action of any sort, legislative, executive or judicial. No one is above the law. In Malaysia, it is not the law made by Parliament that is supreme, it is the Federal Constitution which is the supreme law. In Malaysia, the ultimate constraints upon legislative power are not political but legal, that is to say that any law passed by Parliament must meet the fairness test contained in Article 8(1). In summing up this part of the case the Court of Appeal held:
i. The expression ‘law’ in art 8(1) refers to a system of law that incorporates the fundamental principles of natural justice of the common law;

ii. The doctrine of the Rule of Law which forms part of the common law demands minimum standards of substantive and procedural fairness;

iii. Access to justice is part and parcel of the common law; and

iv. The expression ‘law’ in art 8(1) by definition includes the common law. Therefore access to justice is an integral part of art 8(1).

**Section 72 of the Act** is contrary to the rule of law housed within Article 8(1) of the Constitution in that it fails to meet the minimum standards of fairness.

Whilst the court can take judicial notice of the fact that the Act was passed to meet an economic exigency, the Act is not a special law made pursuant to Article 150 to meet a threat to the economic life of the nation. It is an ordinary Act of Parliament passed for a particular purpose, namely to deal with non-performing loans.

**CONCLUSION**
From the above, it can be seen that Malaysia’s insolvency regime, although based on the English common law and English legislation, has evolved into a separate and distinct creature. Foreign creditors are advised to consult Malaysian solicitors if they have any issues concerning Malaysian Insolvency laws.

Leong Wai Hong
SKRINE
Unit No.50-8-1, 8th Floor,
Wisma UOA Damansara,
50 Jalan Dungun,
Damansara Heights,
50490 Kuala Lumpur.
MALAYSIA.
Tel. No:03-20948111
Telefax:03-20943211
E-mail:skrine@skrine.com

Date: 8 September 2003