

A New Career Opportunity As An Insolvency Practitioner In Malaysia Under The Companies Act 2016

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Abstract: The Companies Act 2016 is now the legal framework that regulates the law and practices of companies that are incorporated under this Act. It repealed the previous Companies Act 1965 after five decades later. The CA 2016 came into force on 31st January 2017 and became operational on that date. It comprises 620 sections and 13 schedules and it is the result of the strenuous study by the Corporate Law Reform Committee (“CLRC”) which was established by the Companies Commission of Malaysia and had undertaken the review of the 1965 Act. CLRC was part of the CCM’s strategic direction initiatives formulated in 2003 to develop a dynamic and conducive environment for business in Malaysia. The 2016 Act has brought in the modernizing of Insolvency Law by introducing Corporate Rescue Mechanisms to revive financially troubled companies, restructuring the concept of scheme of arrangements between a company and its creditors and refining the role of receivers/receivers & managers. The 2016 Act has also decoupled the requirement for an approved liquidator to be an approved auditor as under the old Act, it requires the approved liquidator to hold an audit licence before he or she can apply for a liquidator’s licence. Under Section 433(3) of CA 2016, any person who is a member of a recognised professional body may apply to the Minister of Finance to be approved as a liquidator. The Minister of Finance may approve such a person as a liquidator if he is satisfied with the experience and capacity of the person and upon payment of the prescribed fee by such a person. The minister, in consultation with the Minister of Finance has prescribed Malaysian Institute of Accountants (“MIA”) and Malaysian Institute of Certified Public Accountants (“MICPA”) as recognised professional bodies with effect from 15th March 2018. According to the statistics of liquidators as at 31 December 2018 compiled by the MIA, there are 197 Chartered Accountants who are in possession of liquidators’ licences. Out of these 197, a total of 143 or 73% are aged 60 to 81 and above. This means that when these approved liquidators retire at age 60 and above, there are 54 approved liquidators left who may not be in active practice. The statistics revealed that there is an acute shortage of approved liquidators in Malaysia. These liquidators would not be able to cope with handling the huge number of companies that have gone into compulsory liquidation, which at present stand at 42,406 from 2009 to 2019 of which 25,950 cases are being handled by the Official Receiver. With the limited resources at the Official Receiver’s offices nationwide, it proves that it would take a long time for the Official Receiver to complete the winding up of the affairs of the wound up companies. The 2016 Act has opened the door for a chartered accountant of MIA or Certified Public Accountant to apply directly for liquidator’s licence without the need to possess an audit licence 1st. This paper will deal with the various types of appointment which an insolvency practitioner can act, the basis of their remuneration, the authority that supervises their conduct in handling the affairs of the wound up companies, the various networks which the insolvency practitioner can build their network and the areas in which the industrial revolution 4.0 has disrupted businesses which can have an impact on the values of the property or assets to be disposed of.

1. Introduction

The Companies Act 2016 is now the legal framework that regulates the law and practices of companies that are incorporated under this Act. It repealed the previous Companies Act 1965 after five decades later. The CA 2016 came into force on 31st January 2017 and became operational on that date. It comprises 620 sections and 13 schedules and it is the result of the strenuous study by the Corporate Law Reform Committee (“CLRC”) which was established by the Companies Commission of Malaysia and had undertaken the review of the 1965 Act. CLRC was part of the CCM’s strategic direction initiatives formulated in 2003 to develop a dynamic and conducive environment for business in Malaysia¹.

In December 2003, CLRC commenced the structured review process of the 1965 Act with the primary objectives of creating a legal and regulatory structure that facilitates the ease of doing business in Malaysia after taken into account the World Bank’s Ease of Doing Business Report. The other objective is to promote accountability and protection of corporate directors and members. Throughout the Law Reform Programme, consultation with various stakeholders was held and the views and feedback of the industries and stakeholders were taken into account in formulating the recommendations. Over a period of 10 years, CLRC had made a total of 188 recommendations of which 183 were accepted and translated into 19 policy statements for approval by the cabinet.

The 2016 Act has brought the modernizing of Insolvency Law by introducing Corporate Rescue Mechanisms to revive financially troubled companies, restructuring the concept of scheme of arrangements between a company and its creditors and refining the role of receivers/receivers & managers. The new rescue mechanism comprising

corporate voluntary arrangement (“CVA”) and judicial management (“JM”) together with the Companies (Corporate Rescue Mechanism) Rules 2018 which contain the rules came into force on 1st March 2018.

The 2016 Act has also decoupled the requirement for an approved liquidator to be an approved auditor as under the old Act, it requires the approved liquidator to hold an audit licence before he or she can apply for a liquidator’s licence².

Under Section 433(3) of CA 2016, any person who is a member of a recognised professional body may apply to the Minister of Finance to be approved as a liquidator. The Minister of Finance may approve such a person as a liquidator if he is satisfied with the experience and capacity of the person and upon payment of the prescribed fee by such a person³. The minister, in consultation with the Minister of Finance has prescribed Malaysian Institute of Accountants and Malaysian Institute of Certified Public Accountants as recognised professional bodies with effect from 15th March 2018⁴.

2. Statistics of liquidators @ 31 december 2018

Table A⁵

Aged band	No. of approved liquidators	Percentage %
Below 30	0	0
31 – 40	1	0
41 – 50	16	8.1
51 – 60	37	18.8
61 – 70	93	47.2
71 – 80	44	22.3
81 & above	6	3.0
Total	197	100%

Table B⁶

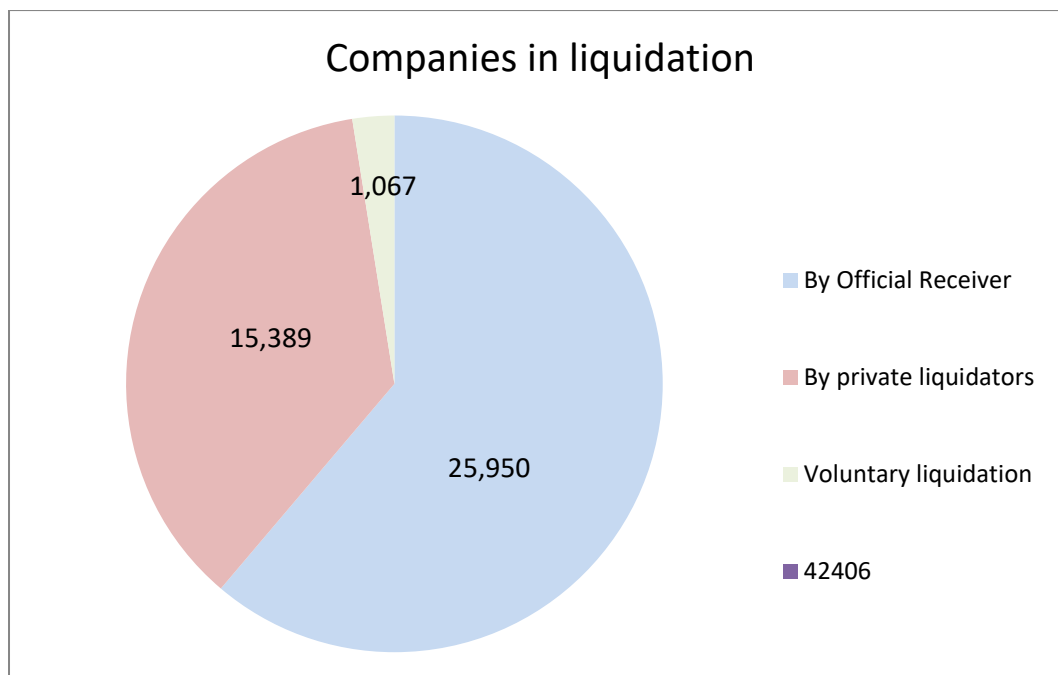
Membership statistics @ December 2018				
Practising certificate holders			Licence holders	
Male	Female	Total	Audit licence holder	Liquidator licence holder
2,590	1,089	3,679	1,679	197

S 2 of Companies Act 2016 defines an “approved liquidator” as a person who has been approved under s 433 as a liquidator and whose approval has not been revoked. However, S 4 of Companies Act 1965 defines an “approved liquidator” as an approved company auditor who has been approved by the Minister under s 8 as a liquidator and whose approval has not been revoked.

1. S 433(4) CA 2016
2. Federal Government Gazette dated 8 March 2018, P.U. (B) 123, 13 March 2018
3. Table A – source from Malaysian Institute of Malaysia, membership statistics as at 31 December 2018
4. Ibid

Table A shows that there are 197 liquidators in practice and out of this number, there are 54 (27.4%) liquidators whose age is below 60 whereas 143 (72.6%) liquidators are 60 and above. It is a concern that out of the 197 liquidators, only 50 of them are in active practice. In comparison to the audit licence holders of 1,679 as shown in **Table B**, it is considered that the number of liquidator licence holder in practice is 197, is far too low for insolvency profession, a specialised field for accountant.

3. Statistics on winding up of companies⁷



The above pie chart shows that there is a total of 42,406 (25,950 + 15,389 + 1,067) companies that had been wound up compulsorily by the court and under voluntary liquidation over the last 11 years, of which 25,950 of them were handled by the Official Receiver and 16,456 (15,389 + 1,067) by private liquidators.

With a huge volume of companies in liquidation presently handled by the Official Receiver of Malaysia and the acute shortage of private liquidators qualify to handle such companies, there is a great opportunity for any qualify person who is a member of MIA to apply for a liquidator licence. Statistics compiled as at December 2019 by Jabatan Insolvensi Malaysia (www.mdi.gov.my)

5. Appointment of insolvency practitioner

An insolvency practitioner is an approved liquidator who has been approved under Section 433 of CA 2016 as a liquidator and whose approval has not been revoked. They can be appointed to all types of insolvency proceedings in Malaysia which include:

- Receiver or receiver and manager under an instrument or by court⁸;
- Receiver or receiver and manager on behalf of the debenture holders or other creditors of the company being wound up by the court⁹;
- Court appointed interim liquidator or liquidator¹⁰;
- Scheme administrator or manager of a scheme of arrangement sanctioned by the court¹¹; and
- Liquidator in a members' voluntary liquidation⁵ or creditors' voluntary liquidation¹²

Official Receiver of Malaysia can also be appointed as liquidator for companies in liquidation, usually by creditor who nominated them when the company is dormant or by default when a private liquidator is not nominated at the time of filing of petition for winding up.

6. Qualification of insolvency practitioner

Under the Malaysian law, a receiver, liquidator or interim liquidator must have a professional qualification and be licensed. The licence is issued by the Ministry of Finance and the licence is to be renewed every two years¹⁴, 3 months before the expiry date under the BLESS system. They must be a member of the Malaysian Institute of Accountants. Most of them are also members of the Insolvency Practitioners Association of Malaysia.

With effect from 15th March 2018, the minister, in consultation with the Minister of Finance has prescribed Malaysian Institute of Accountants and Malaysian Institute of Certified Public Accountants as recognised professional bodies. It is the intention of the Minister of Finance to allow members of other professional bodies in the future to be recognised to apply for liquidator's licence to fill up the wide disparity in the profession. Ibid, s 385

7. Companies (Amendment) Act 2019, s 433(4B) states that “Every approval under this section including the renewal of approval of a liquidator shall be in force for a period of two years after the date of issue unless sooner revoked by the Minister charged with the responsibility for finance.

Applicant who is interested to apply for a liquidator’s licence must have at least a total of 5 years full time experiences in insolvency and this experience can be gained before the applicant becomes a member of the recognised professional bodies. Applicant who had not left insolvency practice for not more than 3 years or who had left insolvency practice for more than 3 years, must return to insolvency practice in Malaysia for at least 1 year before submission of the application for liquidator’s licence¹⁵.

6. Supervision over liquidator

The conduct of a court appointed liquidator is supervised by the Official Receiver of the Malaysian Insolvency Department. Where a person other than the Official Receiver is the liquidator in a winding up of a company by the court, the Official Receiver shall take cognizance of his conduct and if the liquidator does not faithfully perform his duties and duly observe all the requirements imposed on him by any written law or otherwise with respect to the performance of his duties or if any complaint is made to the Official Receiver by any creditor or contributory in regard to performance of his duties, the Official Receiver shall inquire into the matter, and take such action thereon as he may think expedient¹⁶.

Further, the Official Receiver may at any time require the liquidator to answer any inquiry and provide any information or documents in relation to any winding up or direct a local investigation to be made of the books and vouchers of the liquidator¹⁷.

Other parties who have the right to supervise an insolvency practitioner are:-

- Committee of Inspection;
- The court; or
- Malaysian Institute of Accountants.
- Creditor, shareholder or director, with leave of court, may apply to the court to have particular aspect of the liquidation examined. Garis Panduan Untuk Kelulusan Sebagai Penyelesai Di Bawah Akta Syarikat 2016 issued by Jabatan Akauntan Negara Malaysia in January 2020

8. Remuneration of insolvency practitioner

The remuneration of insolvency practitioner is to be paid out of the gross proceeds of the realisation of assets of the company in priority to all other unsecured creditors’ claims in respect of the following appointments:

- a) Receiver or receiver and manager¹⁸;
- b) Liquidator in a winding up by the court¹⁹;
- c) Liquidator in a voluntary winding up²⁰;
- d) Judicial manager²¹; and
- e) Interim Liquidator²²

An insolvency practitioner’s remuneration may be calculated in the following ways:

- a) As a percentage of the value of the property sold and a certain fixed percentage upon the loan outstanding amount at the time of the appointment;
- b) Time costs basis at the firm’s prevailing standard hourly charge out rate and the time spent on the engagement.

MIA²³ and MICPA²⁴ have issued guidance notes on for the insolvency practitioner to refer to. However, there are certain assignments which the insolvency practitioner believes that the realisation of the assets of the company is insufficient to cover their remuneration. In such situation, the insolvency practitioner may require an indemnity or undertaking from the appointor to settle all fees, costs and expenses to be incurred. This is a private arrangement between the appointor and the insolvency practitioner before the appointment is accepted.

An interim liquidator other than the Official Receiver shall be entitled to receive the salary or remuneration by way of percentage or otherwise as is determined by the court²⁵.

In a compulsory liquidation, a liquidator other than the Official Receiver shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is determined²⁶:

- a. By agreement between the liquidator and the Committee of Inspection (“COI”), if any;
- b. If there is no agreement or where there is no COI, by way of a resolution passed at a meeting of creditors by a majority of not less than three-fourths in value and one-half in number present and voting at a meeting of creditors convened by the Liquidator; or

- c. Failing either (a) or (b), by the Court

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 realizations and distributions set under Table C of the Rules. This Rule shall only apply to a liquidator appointed by the Court²⁷.

In creditor's voluntary liquidation, the remuneration of liquidator is determined by the Committee of Inspection or if there is no such COI, the creditors²⁸.

In other type of appointment, their remuneration is approved by the party, which is the company or its creditors that appoint the insolvency practitioner.

9. Network

The insolvency practitioner builds his network with members of statutory bodies and professional bodies to obtain support and keep abreast of the insolvency issues around the region and other parts of the world. The network includes the following:-

a. Malaysian Institute of Accountants ("MIA")²⁹

All practising holders must observe the MIA By-Laws (On Professional Ethics, Conduct and Practice) where it states that no person shall practise or hold out as in providing services among others, audit, tax, insolvency. They must also practise the highest ethical standards of the accountancy profession and any failure to comply by the By-Laws may be held to be liable for unprofessional conduct and disciplinary action may be taken against him.

b. Malaysian Institute of Certified Public Accountants ("MICPA")³⁰

MICPA, as a professional body has since its establishment in 1958 played a very important role in shaping the financial landscape of the nation as it is responsible in setting up accounting standards and technical advisory for its members.

c. INSOL International³¹

INSOL International is a worldwide federation of national associations of accountants and lawyers who specialise in restructuring and insolvency. Besides members from the association of accountants, its members also come from the academia, lenders, judiciary, regulators and individuals. Annual conference is usually held for their members to provide updated information and issues arising from other jurisdictions.

d. International Women's Insolvency and Restructuring Confederation ("IWIRC")³²

When IWIRS was established in 2017, its objective is to promote connectivity and support among women who specialise in restructuring and insolvency and provide opportunity to women professional. However, not all members are women as men are allowed to join as members.

e. Insolvency Practitioners Association of Malaysia ("IPAM")³³

Established in 2010 as a society, IPAM is a membership body whose objective is to promote the highest standards of insolvency conduct by its members. Its members consist of accountants, bankers, lawyers and other professionals specialising in restructuring and insolvency. Annual conference is held jointly with MIA for their members as part of their continuous professional education

10. Industrial revolution 4.0

Insolvency practitioner needs to embrace the advancement of digital technology which has disrupted the way businesses in many parts of the world have been doing and be prepared to transform the way the affairs of the insolvent company are to be administrated. Moving forward, digital disruption in the following areas are to be considered:

- a. Online banking which facilitates funds to be transferred even before the insolvency practitioner effect their appointment and take control of the funds and this call for very swift action to be taken upon effecting the appointment;
- b. Intellectual property which require specialist to value before its disposal;
- c. Advance in logistics and artificial intelligence adopted by the insolvent company which the insolvent practitioner lack capability and understanding in continuing the business operation; and
- d. The manner in which to deal with valuable intangible asset such as patent rights, licences and list of membership data and followers in social media of the insolvent company before its disposal to targeted potential buyer