

INSOLVENCY ACT 1967: FROM FILING THE REQUEST TILL THE BANKRUPTCY ORDER



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Relevant legislation

- Insolvency Act 1967 [Act 360] (“IA 1967”)
- Insolvency Rules 2017 (“IR 2017”)
- Rules of Court 2012 (R. 284 IR 2017, ROC 2012 to apply in the event of *lacunae*)

Preliminaries

- Language of all cause papers
- Under the repealed Bankruptcy Rules 1969, practitioners would file in English
- Accepted practice by Courts as the Bankruptcy Rules 1969 were not available in a Bahasa Malaysia version
- *Meera Hussain [1999] MLJU 499*

Abdul Hamid Mohamed J (retired as CJ):

Isu pertama yang diujahkan oleh peguam Penghutang Penghakiman ialah Notis itu tidak sah kerana ianya dibuat dalam Bahasa Inggeris dan tidak dalam Bahasa Kebangsaan. Beliau merujuk kepada seksyen 8 Akta Bahasa Kebangsaan 1963/67 dan juga kepada Arahan Ketua Hakim Negara bertarikh 22 Oktober 1998.

Saya menolak hujah ini kerana walaupun Kaedah-kaedah Kebankrapan 1969 ada naskhah Bahasa Malaysianya (ejaan lama dan sukar diperolehi), ia bukanlah naskhah sahih. Naskhah sahih adalah naskhah Bahasa Inggeris. Selain dari itu, Akta Kebankrapan 1967 pun tidak mempunyai naskhah Bahasa Malaysia dan naskhah sahihnya adalah naskhah Bahasa Inggeris.

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Language

- Insolvency Rules 2017 are in Bahasa Malaysia and English
- Insolvency Act 1967 is also in Bahasa Malaysia and English
- ROC 2012 shall apply *mutatis mutandis* to fill any lacunae
- O. 92, r. 1 ROC 2012 mandates that all cause papers shall be in the national language and may be accompanied by an English translation thereof
- All cause papers should therefore be in the national language

Issuing the Bankruptcy Notice

- R. 90 IR 2017
- JC to file a *Request for Issue of Bankruptcy Notice* (Form 35)
- JC to also file a *Bankruptcy Notice* (Form 34)

Maklumat Kes

Lokasi Mahkamah:	<input type="text" value="Kompleks Sultan Salahuddin Abdul Aziz Shah"/>	Kod Kes:	<input type="text" value="29NCC - Kebankrapan"/>				
Bidang Kuasa:	<input type="text" value="Mahkamah Tinggi"/>	Perihal Tindakan:	<input type="text" value="Kebankrapan"/> Tambah				
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Dokumen Pemula Kes:	<input type="text" value="Notis Kebankrapan"/>						
Jumlah Tuntutan:	<input type="text" value="MYR"/> <input type="text" value="50,000.00"/>						

Jika tuntutan kewangan

Butiran Pihak [+ Tambah Pihak](#)

Pemiutang Penghakiman	dan	Penghutang Penghakiman
Tiada Rekod.		Tiada Rekod.

Dokumen-dokumen [Muat Naik Dokumen](#)

ID Pemfailan	Jenis Dokumen	Difail Oleh	Dokumen	Fi Pemfailan (RM)	Bayaran JTT (RM)
Tiada Rekod.					

Attachments to the Request

- R. 90 (1) IR 2017

(a) Office copy of the Judgment or Order on which the BN is founded;

(b) Copy of the Writ or OS on which the BN is founded;

(c) Produce a copy of the agreement on which a Judgment or order is made;

(d) File the BN and Request for Issue;

(e) Lodge sufficient number of copies of the BN to be sealed

O. 90 (2) IR 2017: Court shall reject application to issue a BN if the creditor fails to comply with the requirements of this rule

(Mandatory requirement, *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329)

Bankruptcy Notice: Problems

- R. 90(1)(c) IR 2017- *Produce a copy of the agreement in which a Judgment or order is made*
- In certain cases, there is no agreement

E.g., verbal contracts, verbal friendly loan agreements, claim for damages pursuant to tortious acts, etc.

- How is a BN to be issued in such circumstances?
- No clear answer from the Rules
- Possible workaround: file the SOC and the Grounds of Judgment together, if available

Request for issue of a BN against a person other than a social guarantor

- R. 97- JC must seek the leave of Court before filing a request to issue and a BN against a guarantor other than a social guarantor
- Application should be made via SIC supported by an AIS
- Court must be satisfied that the petitioner has exhausted all modes of execution and enforcement under S. 5(6) [WSS, Judgment Debtor Summons, Garnishment]
- AIS should contain a full set of all cause papers filed, together with the sealed Judgments/Orders

Service of the BN

Service on the DGI

- BN must be served on the DGI by post or otherwise (R. 91). As a practice point, it should be served by hand, with an acknowledgement of receipt

Service on the JD

- Must be served via personal service
- R. 95 mandates service in accordance with the rules prescribed for the service of a creditor's petition
- R. 108- CP to be personally served
- R. 94- BN is only valid for 3 months. Period may be extended by an order of court at its discretion (Yap Heng Cheong v Citibank Bhd [1999] 6 MLJ 607)

Substituted service of the BN

- R. 109- Allows for substituted service of the CP and by extension, the BN (cross-refer R. 95)
- An order for SS must be sought pursuant to R. 109
- JC to file a Summons in Chambers supported by an Affidavit in Support (R. 17, mandates SIC)
- SS may be allowed in the following manner:
 - (a) Advertising the BN in one local paper;
 - (b) Affixing the BN on the Court notice board; and
 - (c) Any other means (usually, leave the BN at the JD's last known address)
- Application for SS must be served on the JD in accordance with R. 18
- R. 18 does not mandate personal service. Service of the SIC and AIS for SS must be done via A.R. Registered Post (R. 65)

Application to set-aside the BN

- The JD has recourse to set-aside the BN
- R. 93(1)- The filing of an affidavit by the JD shall operate as an application to set-aside the BN
- R. 93(2)- No act of bankruptcy is committed if the Registrar should extend time to hear the JD's objections
- Application to set-aside the BN cannot go behind the judgment (Sovereign General Insurance v Koh Tian Bee [1988] 1 MLJ 304, SC; Azmer Bin Idris v Malaysia Debt Ventures [2017] MLJU 454)

Principles for setting-aside the BN

- Onus is on the JD [*Bank Simpanan Nasional v Axis Line Entertainment & Ors [2017] MLJU 541*]
- If the JD is moving under R. 93, the JD must descend into particulars and show, via the affidavit, that he has a “counterclaim, set-off or cross demand” against the JC
- If the JD has any other grounds to challenge the BN, he must take out a fresh SIC and AIS, to set-aside the BN

Datuk Lim Kheng Kim v Malayan Banking Bhd [1993] 3 CLJ 324, SC

- *In our opinion, failure on the part of the appellant to follow r. 18 renders his "Affidavit in Opposition" ineffective and bad in law because unless the Court otherwise directs, challenges to the creditor's petition or bankruptcy notice other, than that he has a counterclaim, set-off or cross demand which equals or exceeds the judgment debt, must be made by filing a notice of motion supported by an affidavit. Unfortunately, he has failed to do so in this case.*

After the SS Order

- After obtaining the SS order, the JC should:
 - (a) Advertise the BN in one local paper (Form 38);
 - (b) BN must be affixed on the Court notice board;
 - (c) BN must be left in a prominent place at the last known residence of the JD.
- JC must file an affidavit of service (R. 110).
- The AOS must contain a sealed copy of the BN annexed as an exhibit, together with proof of service (*Form 37*)
- Failure to do so may invalidate the process and cause the bankruptcy action to be struck-out for non-compliance with the Rules

- Re Samuel Pakianathan [1997] 5 MLJ 737

In its written submission, the respondent argued that there was no requirement under the Rules that a sealed copy of the bankruptcy notice and creditor's petition be annexed to the affidavits of service. All that is required for service is that a sealed copy of the bankruptcy notice and creditor's petition be served 'personally on the debtor' (see r 109). This argument is jumbled and is wrong in that two things are mentioned therein, that is, proof of service and mode of service. Both the mode and proof specified in the Rules require that the sealed copies be served and the sealed copies be annexed to the affidavits of service.

Creditor's petition

- Section 2 IA 2017 has been amended. A “bankruptcy petition” shall refer to a creditor’s petition or a debtor’s petition for bankruptcy.
- From the act of bankruptcy, the CP must be presented within 6 months (S. 5(1)(b) IA 1967)
- R. 98, Form 41- Form of Creditor’s Petition
- A sealed copy of the petition must be served on the DGI (R. 98(3))
- Address of the JD must be specified in the petition (R. 99(2))
- Generally, the Petition is to be filed in the same Court in which the BN was filed (R. 100)
- Where the JD has carried on business in another State (but resides in another State), the petition may be presented there (R. 100(2))

Ancillary matters

- Deposit for the presentation of a petition by the JC shall be RM2,000.00 (R. 102(1))
- Petition must be verified by an affidavit [*Affidavit of Truth of Statements in Petition*, R. 105, Form 42).
- Petition is to be investigated by the Registrar (Rule 107, also in the previous BR 1969)
- CP is to also be served personally (R. 108).
- If personal service is not possible, SS (R. 109, refer above)

Time for computation: What if the JD challenges the BN?

- If the JD files an affidavit in opposition to the BN, the time for computation of the 6 months begins to run from the date it (challenge) is dismissed (i.e., the application is decided in favour of the JC)
- Refer:
- Choo Cheng Hee v HLBB (Bankruptcy No.:29-3601-09/2011)
- Westech v Thong Weng Lock [2017] MLJU 1016 (FC)

The language of Rule 95 of the BR is such that it can only admit to the construction that once the Registrar has listened with attention (with the contents of affidavit being central in the hearing) and meted down a decision, which dismisses the challenge, the matter ends there. There is no need to wait for the appeal to be heard first by the Judge in Chambers, like a normal litigation under appeal, before Rule 95 of the BR takes effect. Shorn of all the trimmings, with the challenge having been rejected by the Registrar, a deferment of the act of bankruptcy takes place and count down of the 6 months begin. The way is now open for the CP to be filed.

Hearing of the petition

- CP may only be heard upon the expiration of 8 clear days from the date of service (R. 113(2)) [Re Yau Kin Mun [2001] 2 MLJ 185]
- Upon hearing the petition, the Court shall forthwith make a bankruptcy order (R. 113(1), *Form 51*)
- DGI will be appointed to act as receiver, manager, administrator and trustee of the estate of the bankrupt

Debtor intending to show cause

- Like a BN, a JD may show cause pursuant to R. 116 ONLY if he has a counterclaim, set-off or cross-demand that equals or exceeds the Judgment Debt.
- The JD must file *Form 45*
- If the JD has any other grounds on which he intends to rely, he MUST file a SIC supported by an AIS (*Zamri Naim Bin Ismail [2015] 10 MLJ 193*)
- This is akin to the situation outlined above for BNs
- If the JC should fail to attend to the CP Hearing, he may not present any other CP against the JD without the leave of Court (R. 119)

Appeals

- Appeals against any order must be filed and served on the Court and all other parties within 14 days from the date on which the order is given (R. 87).
- Should a person be rendered bankrupt, he is still capable of appealing against the same. NO SANCTION from the DGI is necessary [*Ho Ken Seng v Progressive Insurance [2013] 2 MLJ 335, FC*]
- The appeal shall be by way of re-hearing, pursuant to O. 56 ROC 2012 [*Khor Boon Hoch v Tong Beng Han [2016] MLJU 34*]
- The Notice of Appeal is contained in Form 114, ROC 2012

Courtroom etiquette

- Bankruptcy proceedings always take place before the Registrar, at first instance
- Have all documents and cause papers ready
- Always know your file inside-out
- Ensure that all cause papers are in order
- Be early
- Eye-contact

QUESTION AND ANSWER SESSION