A COMPARISON OF BANKRUPTCY DISCHARGE ANDPRE-REHABILITATION IN MALAYSIA AND UNITED KINGDOM: AN ANALYSIS

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Keywords - Bankruptcy discharge, Bankruptcy pre-rehabilitation

I. INTRODUCTION

In Malaysia, the enforcement of IA 1967 is marking the dawn of the new Malaysian Bankruptcy regime. The reform is towards the promoting rescue mechanism to a debtor and discharge mechanism to a bankrupt person. Prior to the amendment, there was no provision regarding automatic discharge and as well as voluntary arrangement. In United Kingdom several forms of bankruptcy discharge and bankruptcy pre-rehabilitation mechanism also has been enforced as provided mainly under Insolvency Act 1986 (IA 1986) and following the coming into force of the Enterprise Act 2002.The availability of the bankruptcy discharge and pre-rehabilitation may assist a debtor or a bankrupt not to remain liable forever on debts and to have a fresh starts in his life. Accordingly, the discussion of this paper starts with the bankruptcy discharge and pre-rehabilitation available in Malaysia and United Kingdom and follows by the discussion and conclusion.

II. BANKRUPTCY DISCHARGE MECHANISMIN MALAYSIA AND UNITED KINGDOM

2.1 Discharge of bankrupt by court order

Discharge of bankrupt by court order is provided under section 33 of the IA 1967 andsection 280 IA 1986 in which application in both jurisdiction is subjected to the discretion of the court. It means that the court may upon application refuse to discharge the bankrupt from bankruptcy, make an order discharging him absolutely, or make an order discharging him subject to any conditions. In Public Bank v Choong Yew Wah (2014), in granting a discharge by court order, the court must have regard not only the interest of the debtor-creditor but also the public at large for the simple reason that the society at large must not have the impression that being a bankrupt is not a serious matter.In relation to application for discharge, section 33(1) IA 1967 provides that, a bankrupt may apply to the court for an order of discharge at any time after the bankruptcy order has been made. In contrast, a bankrupt in United Kingdom may at any time apply to be discharged from bankruptcy only after the end of the period of 5 years after the date of adjudication of bankruptcy.

2.2 Discharge by Court's Annulment

In contrary to discharge by court order, to order an annulment, it is not a duty of the court. The power to grant it is discretionary in nature. Discharge by court annulment in Malaysia and United Kingdom bear the same effect. If a bankruptcy order is annulled by the court, the effect of the annulment is as if the bankruptcy order had never been made. Usually the court will grant an order for annulment when the bankrupt has settled his debts in full or it involved a technical ground. In the case of Hasnah Che Hasan v Hongkong Bank Malaysia Bhd (2010) the bankrupt appealed to annul the bankruptcy order to be granted among others as the calculation of interest in the bankruptcy notice was inaccurate. The court held that the miscalculation in the interest and that the interest claimed in the bankruptcy notice was more than the amount due and the bankruptcy notice was therefore a nullity.

2.3 Discharge by certificate of Director General of Insolvency

Discharge by certificate of Director General of Insolvency is only available in Malaysia. Section 33A (1) of the IA 1967 gives the power to the DGI to issue a certificate discharging a bankrupt from bankruptcy after a period of 5 years lapse since the date of bankruptcy order was made.Although the provision reflects a wide discretion of DGI in discharging a bankrupt, it is not absolute. In Re Benny Ong Swee Siang; Ex p United Overseas Bank (Malaysia) Bhd [2016] 3 CLJ 1001, the High Court held that the DGI does not have an absolute discretion to issue the certificate of discharge and his discretion must be exercised reasonably and with due consideration as demanded by public interest, reason and justice. Further, in Mayban Finance Bhd v Lee Kee Sen [2014] 10 CLJ 543, the High Court said that the discretion muat be played in just to promote the balance interests of the bankrupt to free himself from the chains of bankruptcy and the right of the creditors to receive the judgment sum. Interestingly, although

the discharge is subject to the creditor's objection, section 33A (2A) of IA 1967 has provides that the objection cannot be brought to prevent the following bankrupt to obtain discharge by certificate of DGI which include:

(a) a bankrupt who was adjudged bankrupt by reason of him being a social guarantor,
(b) a bankrupt who is registered as a person with disability under the Persons with Disabilities Act 2008
(c) a deceased bankrupt
(d) a bankrupt suffering from a serious illness certified by a government Medical Officer.

2.4 Automatic Discharge

As compared with United Kingdom, automatic discharge is only been introducedin Malaysia under section 33c (1) of IA 1967 in 2017. Accordingly, a bankrupt is allows to be automatically discharge after 3 years from the date of submitting his statement of affairs. Upon application for the automatic discharge and payment of the prescribed fees, the certificate of the discharge will be issued by the DGI. Previously, even if a debtor has paid off his debts, he is not automatically discharged from bankruptcy under the law. He needs to apply to the court for an order to be discharged from bankruptcy and he has to wait for at least five years before the DGI issues a certificate of discharge to the debtor. In addition, automatic discharge in Malaysia also subjected to the target contribution set by the DGI and has rendered an account of monies and property to the DGI as provided under 33c(1)(a) and (b) of IA 1967. Furthermore, it is also subjected to the creditor's objection among others includes the objections relating to criminal conducts of a bankrupt and also the failure to give cooperation in dealing with the bankrupt's property.In contrary automatic discharge in United Kingdom under 279 IA 1986 provides that a bankrupt will be discharged one year from the making of the bankruptcy order where that order is made on or after 1 April 2004. However, automatic discharge will not release him from all debts which include:

(a) any money owed under family court proceedings for example, for maintenance or CSA payments or arising from any personal injury claims against you, unless the court directs otherwise.
(b) any court fines or debts arising from fraud or certain other crimes.
(c) debts incurred after the bankruptcy order.
(d) all outstanding student loans for those who made bankrupt before 13 April 2005.

In addition, application of automatic discharge in United Kingdom is subjected to Bankruptcy Restriction Order (BRO) and Bankruptcy Restriction Undertaking (BRO) in which it will not be granted due to the failure of a bankrupt list down under Schedule 4A Para 2(2) IA 1986 i.e.

a) failing to keep records which account for a loss of property by the bankrupt, or by a business carried on by him, where the loss occurred in the period beginning 2 years before petition and ending with the date of the application
b) failing to produce records of that kind on demand by the official receiver or the trustee;
c) entering into a transaction at an undervalue, "undervalue" being defined in Insolvency Act 1986 Sch.4A, para.2(4) by reference to Insolvency Act 1986 s.339;
d) giving a preference, defined in Insolvency Act 1986 Sch.4A, para.2(4) by reference to Insolvency Act 1986 s.340;
e) making an excessive pension contribution, defined in Insolvency Act 1986 Sch.4A, para.2(4) by reference to Insolvency Act 1986 s.342A;
f) a failure to supply goods or services which were wholly or partly paid for which gave rise to a claim provable in the bankruptcy;
g) trading at a time before commencement of the bankruptcy when the bankrupt knew or ought to have known that he was himself to be unable to pay his debts;
h) incurring, before commencement of the bankruptcy, a debt which the bankrupt had no reasonable expectation of being able to pay;
i) failing to account satisfactorily to the court, the official receiver or the trustee for a loss of property or for an insufficiency of property to meet bankruptcy debts;
j) carrying on any gambling, rash and hazardous speculation or unreasonable extravagance which may have materially contributed to or increased the extent of the bankruptcy or which took place between presentation of the petition and commencement of the bankruptcy;
k) neglect of business affairs of a kind which may have materially contributed to or increased the extent of the bankruptcy;
l) fraud or fraudulent breach of trust;
m) failing to cooperate with the official receiver or the trustee.

Further, the restriction may also can be seen on the application of suspension of automatic discharge by a trustee. In Bagnall v Official Receiver the court has granted the application for suspension an automatic discharge made by the trustee on the grounds that the bankrupt had failed to fulfil his statutory obligations to give certain information to his trustee. If the suspension order were not made, the creditor's right might be prejudiced.In relation to automatic discharge although it was claimed that it is in line with the government's aspiration for bankrupts to return and contribute to the economy, can reduce the time required to administer bankruptcy cases, and benefited the creditors as the dividend could be obtained within a period of three years, it seems don't

appear to address the root cause of bankruptcy.It is only to make difficult for someone to be declared a bankrupt, or making it easier for a bankrupt to be discharged.

III. BANKRUPTCY PRE-REHABILITATION MECHANISM

3.1 Individual Voluntary Arrangement (IVA) or Voluntary Arrangement (VA)

In Malaysia,VA is now considered as the only statutory rescue mechanism in avoiding a debtor from the effect of bankruptcy whereby a debtor can negotiate a debt settlement proposal with his creditors for example, through a five-year repayment plan that can be done any time before a debtor is adjudged a bankrupt.It is submitted that even though the introduction of VA may cause upset to the creditors, the best alternative to enable the repayment must be enforced.The following were the procedures involved in the application of VA under IA 1967.An application for VA under as provided under section 2c (1) of IA 1967 can be made by a debtor to his creditors at any time before he is adjudged bankrupt. However, under subsection (2) of the Act, a debtor who intends to propose a voluntary arrangement shall:

(a) appoint a nominee to act in relation to the voluntary arrangement or for the purpose of supervising the implementation of the voluntary arrangement; and
(b) make an application as prescribed to the court for an interim order of voluntary arrangement and submit a copy of the application to the Director General of Insolvency.

Under subsection (3) of the Act, in case of a firm the VA shall not be proposed to his creditors, unless the firm or a partner of the firm has obtained the consent from all or majority of the partners to enter into a voluntary arrangement. The VA is applicable for all types of debts and debtors except for limited liability partnership.In relation to nominee's appointment, the application of VA has given the right to AKPK to intervene on behalf of debtor to bring the banks to the negotiation table for VA in which the AKPK will act as a nominee for a debtor.The interim order granted by the court is valid for three months in which the period shall not be extended as provided under section 2(d)(3) of IA 1967. Further Section 2(e) of IA 1967 provides that VA gives moratorium effect as the debtor is saved from bankruptcy application or legal process once it is finalized or unless an order from the court is granted..However, a debtor can only apply for the voluntary arrangement once a year. It is submitted that the restrictions to apply for the voluntary arrangement, perhaps to prevent abuse, where a debtor proposes an unreasonable negotiation just to get the 90-day time frame and apply for a new arrangement right after the first one is rejected..

As compared with Malaysia, in United Kingdom,VAmay be made either with or without an interim order from the court. An application for IVA with an interim order is provided under section 253(1) of Insolvency Act 1986 where it can be made by a debtor or if the debtor is an undischarged bankrupt, it may be made by a debtor or the trustee of his estate, or the official receiver or in any other case, by the debtor. It is submitted that since IVA may be applied by both debtor and a debtor who is an undischarged bankrupt, it is usually done as a means of avoiding bankruptcy but it is also possible for a debtor who aims for discharge.

Once an application for an interim order has been made but is still pending, section 254 of IA 1986 grant the moratorium effect in which it provides that:

(a) no landlord or other person to whom rent is payable may exercise any right of forfeiture by peaceable re-entry in relation to premises let to the debtor in respect of a failure by the debtor to comply with any term or condition of his tenancy of such premises, except with the leave of the court, and
(b) the court may forbid the levying of any distress on the debtor's property or its subsequent sale, or both, and] stay any action, execution or other legal process against the property or person of the debtor.

In Thomas v Ken Thomas Limited, Neuberger LJ (as he then was) stated that rent falling due after the approval of a voluntary arrangement should by no means necessarily be expected to be caught by the terms of the arrangement, even if capable of being caught. His Lordship further stated that in normal situations, it would seem wrong in principle for a tenant to be able to trade under a voluntary arrangement for the benefit of its past creditors at the present and future expense of the landlord. If the tenant were to continue occupying the landlord's property for the purposes of trading under the voluntary arrangement, it should normally expect to pay the full rent to which the landlord was contractually entitled. His Lordship considered that a voluntary arrangement should so provide and, if it did not, in the absence of special circumstances, the landlord might well be entitled to object to the proposal as unreasonable. In contrary a proposal for IVA without application for an interim order falls under section 256A of 'IA 1986'. The reason for removing the requirement for an interim order is to reduce the cost of IVA and expedite the process. Section 256A (3) of IA 1986 requires a nominee to state whether the debtor is an undischarged bankrupt or a person who is able to petition for his own bankruptcy. Moreover, the nominee must, after considering the debtor's proposed voluntary arrangement, details of his creditors, his debts and

other liabilities, his assets and other information as prescribed, shall prepare a report for the benefit of the creditors. The report must state:

(a) whether, in the opinion of the nominee, the proposed voluntary arrangement has a reasonable prospect of being approved and implemented;
(b) whether, a meeting of creditors should be summoned to consider the debtor's proposal, and
(c) if a meeting should be summoned, the date, time and place of the meeting.

Subsequently, the court may, direct that the nominee shall be replaced as such by another person qualified to act as an insolvency practitioner, or authorized to act as nominee, in relation to the voluntary arrangement in the following manners:

(a) on an application made by the debtor in a case where the nominee has failed to submit the report required by this section or has died, or
(b) on an application made by the debtor or the nominee in a case where it is impracticable or inappropriate for the nominee to continue to act as such.

In United Kingdom such an interim order if granted shall has an effect of the period of 14 days beginning with the day after the making of the order. The application of this measure not only applicable for the insolvent debtor but also extended to the undischarged bankrupt. Consequently, as provided under section 252 of IA 1986, while an interim order was grantedthe application for any petition for bankruptcy and other related proceeding during the period of an interim order cannot be made without the leave of the court.:

However, in both applications, the IVA and VA will be terminated in the event where a debtor failed to fulfilled all the requirements as stated in the arrangement that has been agreed by at least three-fourth majority.

3.2 Country Court Administration Order

In United Kingdom, other than VA, the rescue mechanism also include Country Court Administration Order (AO) is only applicable for a debtor or individual whose amounts of debts do not exceed £5,000. However, before application for AO is made a debtor must prove that he is unable to pay the amount of a judgment obtained by a creditor against him as provided under section 112(1) of Country Courts Act 1984('CCA'). Further, the court shall send a notice to notify those creditors whose name is notified in the order. The debtor upon application for AO must state the amount which he is able to pay to his creditor and the court will further making an order for a debtor to pay such an amount agreed by installment. It means that an administration order allows the person in debt to make a single monthly payment to the court, which the court distributes to creditors on a pro rata basis. This order is however is subjected to future earnings or income by a debtor where the court may vary the order based on it. In order to give a debtor a maximize enjoyment of the AO enforcement, once the AO is in force no application for bankruptcy against the debtor can be made by the notified creditor without the leave of court. Further any remedy made against person or property of the debtors after AO had been granted was considered as a breach of section 114 of CCA 1984. In Nolan v Stoke on Trent City Council where the court had granted an AO including £1691.45 council tax arrears, the council had no right to claim remedy against person or property of the debtors and any claim made on it was against section 114 of Country Court Act 1984.

3.3 Debts Relief Orders (DRO)

In addition to AO a debtor in United Kingdommay also seek for bankruptcy protection in form of Debts Relief Order (DRO) from the Official Receiver ('OR'). It was introduced by the Tribunals, Courts and Enforcement Act 2007 and focus mainly on a debtor whose amounts of debts do not exceed £20,000 with a little surplus income, few assets, and total debts of less who are unable to repay their debts. Where the DRO was granted the debts include in the DRO being discharged after one year and prevent creditors taking any further action to recover the debt in that time.

An application for DRO must include:

(a) a list of the debts to which the debtor is subject at the date of the application, specifying the amount of each debt (including any interest, penalty or other sum that has become payable in relation to that debt on or before that date) and the creditor to whom it is owed;
(b) details of any security held in respect of any of those debts; and
(c) such other information about the debtor's affairs (including his creditors, debts and liabilities and his income and assets) as may be prescribed.

Once an application for DRO has been made the 'OR' may take the following action:

(a) stay consideration of the application until he has received answers to any queries raised with the debtor in relation to anything connected with the application.
(b) refuse the application;
(c) making a debt relief order in relation to the specified debts he is satisfied were qualifying debts of the debtor at the application date;

Interestingly, 'DRO' also has a moratorium effect for 1 year from the date of making an order but subject to extension and termination period. During the moratorium, the creditor to whom a specified qualifying debt is owed:

(a) has no remedy in respect of the debt, and
(b) may not commence a creditor's petition in respect of the debt, or otherwise commence any action or other legal proceedings against the debtor for the debt, except with the permission of the court and on such terms as the court may impose.

IV. DISCUSSION AND EVALUATION

It should be noted that Malaysia's IA 1967 provide four methods for the bankrupts to be discharged i.e. discharge by the certificate of the DGI (or also known as OA in Singapore), discharge of bankrupt by court order and discharge by annulment of court and automatic discharge.Unfortunately, discharge by court order, annulment or certificate of the DGI (Malaysia) were considered as complex as it involved very cumbersome procedures that caused very hard for the discharge application to be granted. The period to be discharged from bankruptcy is too long even the bankrupt has given a good cooperation during his bankruptcy and has no assets for the benefits of his estates which cause to the introduction of automatic discharge in 2017.

Like Malaysia, the UK IA 1986 also provides a bankrupt to be discharged by court order, by annulment of court and automatic discharge.Under automatic discharge applicable in UK, a bankrupt is discharged automatically after one year from the date of the bankruptcy order was made unless the bankrupt is subject to BRO or BRU in order to protect the public from culpable bankrupts. In Malaysia it will applied after from the date of submitting his statement of affairs. In relation to discharge of bankrupt by court order, in Malaysia, the discharge application can be made at any time after receiving order and adjudication order were made, whereby in United Kingdom, this only can be made after a period of 5 years-years has lapsed since the date of commencement of the bankruptcy.In relation to bankruptcy rehabilitation, the application of VA in Malaysia and IVA in United Kingdom is different in relation to its application with or without interim order. Furthermore, the application of IVA in United Kingdom can be made either is a discharged or undischarged bankrupt. In Malaysia only a bankrupt person cannot apply for VA. Interestingly, United Kingdom has provide bankruptcy pre-rehabilitation based on the amount of debts i.e. CCAO and DRO which give a debtor with a low income to choose the less cumbersome procedures in which it does not involved court's procedure.

V. CONCLUSION

In the common law jurisdictions like Malaysia and United Kingdom, the bankruptcy laws allow the bankrupts to be discharged and to have the right for rehabilitation before declared bankrupt. . Indeed these jurisdictions bankruptcy regimes are in line with the recommendation made by INSOL, UNCITRAL and World Bank that effective insolvency systems should be able to offer individual debtor a discharge from indebtedness as a method of concluding a bankruptcy procedure and promoting a fresh start principle. Bankrupts in Malaysia now have been offered for a new discharge mechanism i.e. automatic discharge as offered in United Kingdom. Malaysia and United Kingdom's provisions for discharge of a bankrupt come into force to help the bankrupt from continuously sit in his bankruptcy status with no way out. The fact that such a discharge provision is too cumbersome or less onerous is something that must be looked into to give a second chance to the bankrupt to continue with his life without ignoring to balance the interest of the bankrupt and the creditor. In relation to bankruptcy pre-rehabilitation, United Kingdom opens for more mechanism as compared to Malaysian law up the extent different mechanism for different amount of debts.

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