

Corporate Restructuring and Rescue Options for Companies

Many companies and businesses are facing solvency crisis following the Covid-19 pandemic. What corporate rescue options do companies have under the Companies Act, 2016?

Corporate Voluntary Arrangement

The Corporate Voluntary Arrangement (“CVA”) is a binding arrangement made between the company and its creditors without involving the approval from Court whilst the directors remain to hold management control over the company.

The criteria for a company to propose for CVA are as follows:

- the company is a private limited company (i.e. Sdn Bhd).
- the company is not a licensed institution or operator of a designated payment system regulated under the laws enforced by the Central Bank of Malaysia.
- the company is not a financial market institution under the Capital Markets and Services Act, 2007.
- the company has not created a charge over its property or any of its undertaking. However, it is worthwhile to note that if the company has provided a third party charge, or the directors/shareholders have provided a personal guarantee as financing security/undertaking, the company is eligible to propose for CVA.

The Board of Directors will appoint a nominee (who is a qualified insolvency practitioner) and submit to the

nominee relevant documents and proposal setting the terms of the CVA. Upon review and approval, the nominee will make the necessary lodgment with the Court and moratorium on actions by creditors will commence automatically for 28 days upon the said lodgment.

A meeting of the creditors must then be summoned and convened by the nominee within 28 days. The proposed CVA must be approved by creditors of 75% in value and a simple majority of the members, both presents and voting. Once approval has been obtained from the required majority, the nominee shall inform the Court and subsequently, the CVA shall take effect and it shall be binding on all creditors of the company. However, should more time is required to consider the proposed CVA, the moratorium may be extended up to a maximum of 60 days subject to the approval conditions stated earlier.

The CVA process is a useful mechanism for companies to obtain a small window to defer some payments and restructure its debts (negotiate with creditors) and/or secure a white knight to avoid a liquidation of the company.

JUDICIAL MANAGEMENT



Judicial Management

The Judicial Management procedure ("JM") will allow distressed company or its creditors to apply to the Court for an Order to place the management power of the company in the hands of a qualified insolvency practitioner, known as the Judicial Manager. However, the company must not be a licensed institution or operator of a designated payment system regulated under the laws enforced by the Central Bank of Malaysia and not a financial market institution under the Capital Markets and Services Act, 2007.

An application for JM may be filed when:

- the company is or will be unable to pay its debts.
- 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 a winding up.

Upon filling of the application for JM, moratorium on existing and future actions by creditors will commence automatically, unless with the leave of Court.

The Court will grant the JM Order when it is satisfied that:

- the company is or will be unable to pay its debts.
- survival of the company as a going concern.
- approval of the debts settlement arrangement obtained from creditors of 75% in value.
- more advantageous realization of the company as compared to a winding up scenario.

Upon obtaining the JM Order, the power to manage the affairs and the assets of the company will be vested with the Judicial Manager. A 6 months moratorium will take effect from the date of the Court Order and the said moratorium period may be extended for a period up to 6 months, should the Judicial Manager has reasonable grounds to apply for the extension.



Notwithstanding to the above, the Debenture Holder has a veto rights to oppose the JM application.

The JM process differs from the CVA as it allows companies which have charged their assets for financial facilities to enjoy the moratorium and enable them to restructure their debts. However, the directors would no longer be in control of the company and the Judicial Manager would be in charge of driving the process as well as managing the company.

Scheme of Arrangement

The Scheme of Arrangement ("SOA") is a Court approved arrangement made between the company and its various classes of creditors and members through a formal Court process. During this process, directors will remain their management control over the company.

Unlike the restriction imposed on CVA and JM, any company, creditor, member of the company, the liquidator or the Judicial Manager may initiate the SOA.

In a normal circumstance, SOA involves three stages:

Stage 1:

The company will make an application to the Court for an Order to convene meetings with its scheme creditors. The scheme creditors must be classified into different classes in accordance to their legal rights stipulated in the Companies Act, 2016 (i.e. secured creditors, preferential creditors and unsecured creditors).

It is also at this stage that the company may apply for a Restraining Order ("RO") to restrain creditors from initiating and continuing legal proceedings against the company for debt recovery (moratorium). The RO is valid for 3 months with extensions of up to a further 6 months. However, unlike the CVA and JM, the RO is not granted automatically. Pre-conditions under Section 368 of the Companies Act, 2016 must be satisfied for the Court to grant the RO. Section 368 provides that:

- (1) If no order has been made or resolution passed for the winding up of a company and a compromise or arrangement has been proposed between the company and its creditors or any class of those creditors, the Court may, in addition to any of its powers, on the application in a summary way of the company or any member or creditor of the company, restrain further proceedings in any action or proceeding against the company except by leave of the Court and subject to any terms as the Court may impose.

- (2) the Court may grant a RO under subsection (1) to a company for a period of not more than three months and the Court may on the application of the company, extend this period for not more than nine months if –
 - (a) the Court is satisfied that there is a proposal for a SOA between the company and its creditors or any class of creditors representing at least 50% in value of all the creditors;
 - (b) the Court is satisfied that the RO is necessary to enable the company and its creditors to formalize the SOA for the approval of the creditors or members;
 - (c) a statement of affairs of the company made up to a date not more than three days before the application is lodged together with the application;
 - (d) the Court approves the person nominated by a majority of the creditors in the application by the company under subsection (1) to act as a director or if that person is not already a director, appoints that person to act as a director notwithstanding the provisions of this Act or the constitution of the company.

Stage 2

Upon the Court granting the Order to convene meetings, the company will send out notice summoning the meetings to every scheme creditor. The notice will be accompanied by an Explanatory Statement detailing the proposed SOA. The company will have to obtain approval from at least 75% in value for each class of creditors to file for application for Court to sanction the SOA.

Stage 3

The company will apply to the Court to sanction the SOA. Once the sanction has been granted, the SOA will become binding on all scheme creditors, including the dissenting creditors.

The SOA is largely a Court driven process and can prove to be a more costly approach to restructure the company.

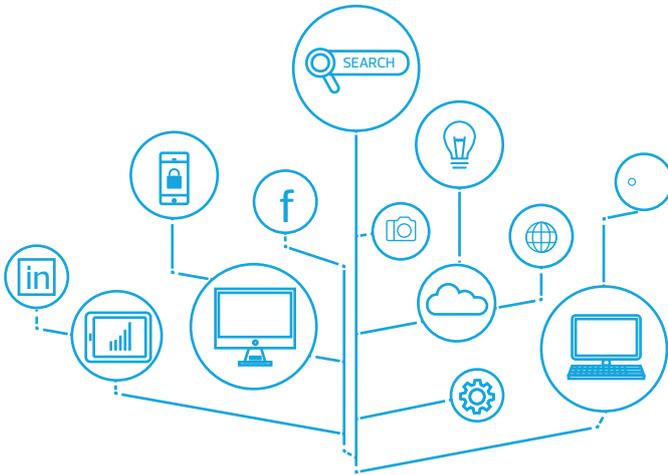
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