

## CORPORATE RESCUE MECHANISMS

There are three main generally applicable corporate rescue mechanisms under Malaysian law, namely:-

1. Schemes of Arrangement
2. Corporate Voluntary Arrangements (CVA)
3. Judicial Management

### **1** *Schemes of Arrangement*

It applies to all companies and is used by insolvent companies for purposes of restructuring, while having the benefit of moratorium restraining or restricting various forms of recovery and enforcement actions against the company. The applicant initiates the scheme by filing an application in the High Court to seek an order of court to convene meetings of the members and various classes of creditors of the company to consider and approve the scheme.

#### *Who can apply?*

The applicant can be the company, a creditor of the company, a liquidator (if the company is in the process of being wound up), or a judicial manager (if a company is in judicial management).

#### *Power of the Court to appoint liquidator to assess viability of scheme of arrangement*

The Court may appoint an approved liquidator to assess the viability of the proposed scheme and to prepare a report for submission to the applicant and to be tabled at the court-convened class meetings for the members and creditors to consider prior to voting.





## *Notice summoning Meeting*

A notice summoning such meeting is to be sent to every creditor or member of the company, accompanied with explanatory statement of the effect of the arrangement and any material interests of the directors and the effect of the arrangement (if it has different effect on different class of creditors or members) and by advertisement of the notice.

## *Voting Threshold*

The statutory voting threshold that is necessary to achieve agreement to the terms of a scheme is 75% of the total value of

creditors or class of creditors and members, or class of members present and voting at the court-convened class meeting, either in person or by proxy.

Upon obtaining the requisite approval, a further order of court is to be obtained to sanction the scheme of arrangement as the scheme derives its binding effect from the court order.

## *Restraining orders*

Subject to the fulfilment of all the following requirements, the court may grant restraining order of an initial period of 3 months and a further 9 months:-

- (a) satisfied that there is a proposal between the company and one-half in value of all creditors;
- (b) satisfied that restraining order is necessary;
- (c) a statement of affairs of the company be prepared up to 3 days before lodging of such application has been filed; and
- (d) a nomination of a person by majority creditors to be director of the company.

While a restraining order is in force, any disposal or acquisition of property other than in the ordinary course of its business shall be void unless the court orders otherwise.

## *Challenges – Viability of the Scheme*

The challenge is to obtain the 75% approval from creditors and/or members. Thus, the company has to play its role to ensure that its proposed scheme is viable. Effective communication and negotiation with the creditors will enhance the chance of getting the scheme approved so that the company can get back on its feet again.

## 2 *Corporate Voluntary Arrangement (CVA)*

CVA is a newly introduced under the Companies Act 2016. It is only available to private companies. A private company with a charge created over its asset is not eligible. This will no doubt significantly reduce the availability of CVA to private companies. CVA enables company experiencing financial difficulties to enter into a plan or an arrangement with the creditors without the need to have the plan or arrangement being approved by Court.

### *Who Can Propose?*

The directors of the company, Judicial Manager (if under judicial management), or liquidator or Official Receiver (if under liquidation) may make a proposal.

### *The Nominee*

The CVA process starts with the appointment of a nominee, who must be a licensed insolvency practitioner. Where a judicial manager or a liquidator initiates a CVA, he or she may also take on the role of the nominee. If the liquidator is the Official Receiver, a nominee (an insolvency practitioner) has to be appointed.

### *The Proposal*

It is a requirement that the proposed CVA and a statement of affairs must be submitted to the nominee. The nominee is required to form an opinion as to whether (1) the proposed arrangement has a reasonable prospect of being approved and implemented, (2) the company will have sufficient funds during the moratorium to enable it to carry on business and (3) the meeting of the company and creditors should be summoned to consider the proposal.

### *Lodgement*

The documents to be filed at the High Court are:-

- (a) the proposal;
- (b) a statement of company's affairs;
- (c) a statement that the company is eligible for a moratorium; a statement that nominee has given consent to act;
- (d) a statement from the nominee; and
- (e) a statement disclosing full details on previous application and results, if any.

## *Moratorium*

A moratorium commences automatically when the directors of a company, judicial manager, Official Receiver or liquidator files the relevant documents to the Court. The moratorium shall remain in force for twenty-eight days. The period may be extended for up to a maximum of sixty days counted from the commencement of the moratorium. For avoidance of doubt, the extended moratorium shall not exceed thirty-two days.

## *Summoning of Meetings*

A meeting of the company's creditors and a meeting of the company will be summoned by the nominee within 28 days of filing. Notice of meeting is to be given at least 14 days before scheduled meeting. No modification on the proposal is allowed in a meeting.



## *Voting*

At the company's meeting, a simple majority of 50% is required to approve the proposal while at the creditors' meeting, the required majority is 75% of the total value of the creditors present and vote. With such approval, the CVA takes effect and binds all creditors. After conclusion of each meeting, nominee shall report to Court and notify the result to the Registrar.

If more time is required for the stakeholders to decide on a proposal, the moratorium period can be extended for a further period not exceeding 60 days with the approval of 75% majority in value of the creditors at a meeting and with the consent of the nominee and the members of the company.

The nominee is required to monitor the company's affairs during the moratorium.



### **3** *Judicial Management (JM)*

JM is a Court supervised rescue plan that: (a) places the management of a company under a judicial manager (insolvency practitioner) appointed by the Court; (b) the judicial manager shall prepare a workable proposal to achieve the proposed objectives; and (c) the plan shall be implemented after being approved by seventy-five per centum of the total value of the creditors. The judicial management order shall remain in force for six (6) months and may be extended for another period of not more than six (6) months.

#### *Eligibility*

Although most companies are eligible, companies holding licences under the purview of Central Bank of Malaysia and a company subject to Capital Markets and Services Act 2007 are ineligible for judicial management. This latter category appears to exclude any public-listed companies from applying for judicial management.

#### *Who can apply?*

The application for JM may be made by a company or its directors, under a resolution of its members or the board of directors, or a creditor, including any contingent or prospective creditor, or all or any of those parties. Application is by way originating summons (Ex-Partes) to be filed in High Court

## *Requirements for the Grant of a Judicial Management Order*

The Court is empowered to grant a judicial management order if and only if :-

- (a) it is satisfied that the company is or will be unable to pay its debts; and
- (b) it considers that the making of the order is likely to achieve one or more of the following purposes:
  - (i) the survival of the company or the whole or part of its undertaking as a going concern;
  - (ii) the approval of a compromise or arrangement between the company and its creditors;
  - (iii) a more advantageous realisation of the company's assets would be effected than on a winding up.

A debenture holder may object to the application, and if it signals that it intends to appoint a receiver, or receiver and manager, the court must dismiss the application unless public interest requires that the court should override the debenture holder's objection.

The judicial management order shall, unless discharged, remain in force for 6 months and may be extended on the application of the judicial manager for another 6 months.

### *The effects after the application for the judicial management order is filed but before the order is granted*

Upon the application of the judicial management order but before the making of such order, the following shall take effect:

- (a) No resolution shall be passed or order made for the winding up of the company;
- (b) No steps shall be taken to enforce any charge on or security over the company's property or to repossess any goods in the company's possession under any hire purchase agreement, chattels leasing agreement or retention of title agreement, except with leave of the Court and subject to such terms as the Court may impose; and
- (c) No other proceedings and no execution or other legal process shall be commenced or continued, and no distress may be levied against the company or its property except with leave of the Court and subject to such terms as the Court may impose.

Once the judicial management order is granted, it extends to include:

- (a) No receiver or receiver and manager of the kind referred to in section 374 shall be appointed; and
- (b) No steps shall be taken to transfer any share of the company or to alter the status of any member of the company except with the leave of the Court and, if the Court grants leave, subject to such terms as the Court may impose.

## *Approval of Judicial Manager's Proposal*

The judicial manager has 60 days (or such longer period as the Court may allow) to send to the Registrar, members and creditors of the company a statement of his proposal for the restructuring and to lay a copy before the creditors' meeting.

The approval threshold required is 75% in value of the creditors' claims which have been accepted by the judicial manager. Once approved by the required majority, the proposal binds all creditors of the company, whether or not they had voted in favour of the proposal. The judicial manager shall oversee the implementation of the proposal. Once the purpose of judicial management has been achieved, he or she may apply to discharge the order.

### *Note:-*

Before a proposal for a voluntary arrangement or an application for a judicial management order can be made, the applicant must ensure that:

- (a) there is no pending query with the Registrar (query status is available at [http://www.ssm.com.my/Pages/Quick\\_Link/e-Query.aspx](http://www.ssm.com.my/Pages/Quick_Link/e-Query.aspx)); and
- (b) all of the company's information with the Registrar are up-to-date.

Our Corporate Restructuring Group will continue to keep you updated on the latest developments.

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