



PERSONAL INSIGHT

The Introduction of the “Two Rescuers” for Distressed Companies in Malaysia

The New Companies Act 2016 came into force at the beginning of this year which brought together with it many new provisions. Amongst the world of distressed companies in Malaysia, the more pertinent inclusion was the introduction of the two corporate rescue mechanisms, namely, corporate voluntary arrangement (CVA) and judicial management (JM) which I like to refer to as the “Two Rescuers”.

The two different mechanisms will basically allow financially distressed companies to restructure its debts and to continue on with its business in a more effective and efficient manner. Under the old regime, there were limited options to allow financially distressed companies to rehabilitate. The most commonly used were the old Scheme of Arrangements and Liquidations.

As you would expect, the new provisions of the Companies Act have attracted many comments and views not only amongst us accountants but also amongst the legal fraternity which has been quoted as saying “borrower companies may not gain much benefit and lenders may face some pain under these new laws”. I will try and explain why this is so by looking at these Two Rescuers in more detail below.



JUDICIAL MANAGEMENT

Clause 392 of the Companies Act 2016

Judicial Management (JM) will allow the director of the company or a creditor to apply for a court order to place the management of a company in the hands of a qualified insolvency practitioner which will be known as the Judicial Manager. Upon granting of the said court order, a moratorium is put in place which prevents the company from being wound up and also prevent any legal proceedings to initiate against the company. This will allow the Judicial Manager to assist in the rehabilitation of the financially distressed company without any intervention from the creditors of the company.

However, the court order will only be granted if certain conditions are met which include:

- the company is or will be unable to pay its debts;
- the survival of the company as a going concern;
- the approval of a compromise between the company and the creditor; and a more advantageous realisation of the company's assets would be effected than on a winding up.

Once the court order is granted, the Judicial Manager will then manage the affairs, business and property of the company for 6 months which can be extended for another 6 months upon application. During this period, the Judicial manager will have to prepare a restructuring plan for the creditors' approval. Once approved, the Judicial Manager will submit the plan to the Court to sanction and the plan will be implemented and binding on all creditors.

The process of JM is generally beneficial to all parties concerned. It will benefit the shareholders as their investment is not totally lost, the employees are benefited as they are still employed, and the unpaid creditors will be able to recover some, if not all of their debts.

CORPORATE VOLUNTARY ARRANGEMENT

Clause 422 of the Companies Act 2016

Corporate Voluntary Agreements (CVA) requires a qualified insolvency practitioner, also known as the nominee, to conduct the assessment of the viability of the proposal with minimal court intervention. This will allow a company to put up a debt restructuring proposal directly to its unsecured creditors for a voluntary arrangement. As no court order is required to be sought, this option is usually more efficient in terms of both costs and timing.

Under this arrangement, the nominee will need to provide a positive statement on whether the proposal has reasonable prospect of being approved and whether the company has sufficient funds to carry on its business during the proposed moratorium. The company will then file the court papers and a 28-days moratorium will automatic be implemented.

Within this period, the shareholders and the creditors of the company shall be summoned for a meeting to vote on the proposal which requires a simple majority of the shareholders and a 75% of the total value of the creditors to approve the proposal. Once approved, the proposal will be implemented and it is binding on all creditors under the supervision of the nominee. However, if a longer period of time is required for all stakeholders to decide, the moratorium can be extended for not more than 60 days.

It must be noted that CVA cannot be applied to public listed companies or companies that have a charge over its properties. Therefore, the application of this arrangement is limited as most companies in distress would have loans which carries with it a charge over a property. In addition, CVA does not prevent secured creditors from exercising its rights over its secured property which could mean there is no much left to distribute amongst the unsecured creditors.



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