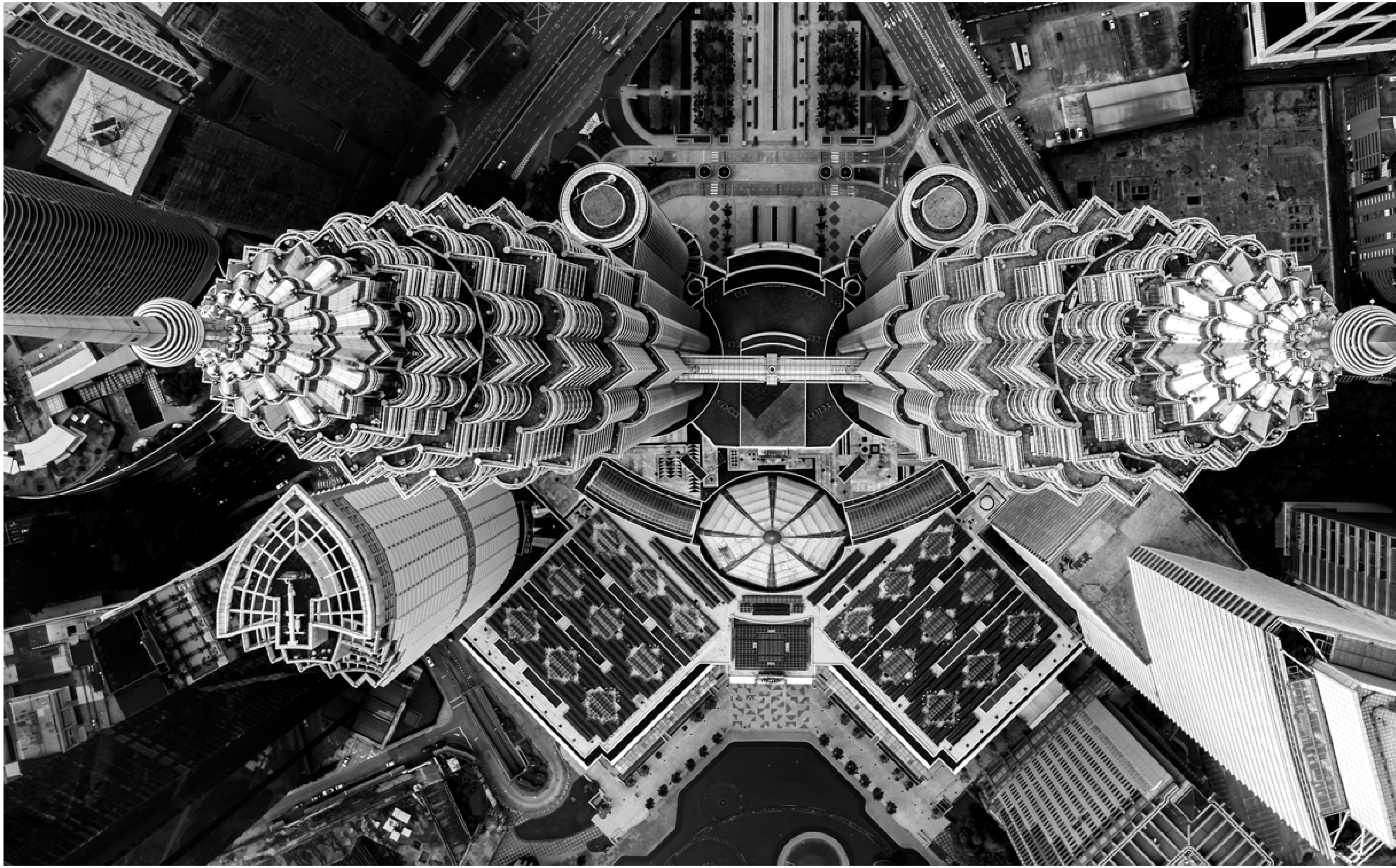
Restructuring across borders
Malaysia

CORPORATE RESTRUCTURING AND INSOLVENCY PROCEDURES | MARCH 2025



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Introduction

There are five principal restructuring and insolvency procedures available for companies under Malaysian law:

- receivership
- schemes of arrangement;
- liquidation;
- corporate voluntary arrangement; and judicial management

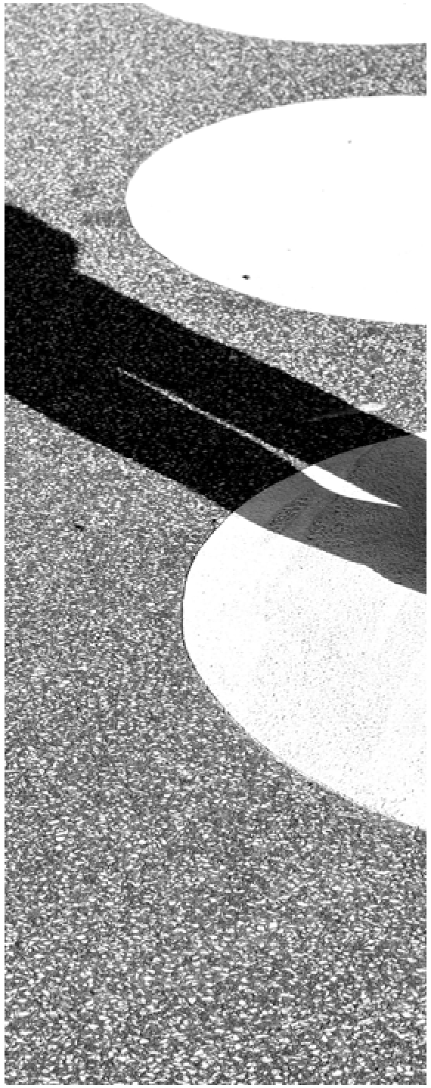
These procedures are all governed by the Malaysian Companies Act 2016 (the **Companies Act**) (which has repealed the previous Companies Act 1965) and the rules thereunder.

From a creditor's perspective, the choice of procedure will depend on whether the debtor has granted security. If security has been granted and either a debenture allows a receiver to be appointed or the secured creditor applies for a receiver to be appointed by the court, receivership may be the most appropriate option for the creditor to recover the debt owed.

It is important to note that not all restructuring and corporate insolvency procedures are governed by the Companies Act. There are other specialised regimes which apply to specific entities in Malaysia, such as the following:

- the regime of Financial Services Act 2013 and the Malaysia Deposit Insurance Corporation Act 2011 which deals with the insolvency of licensed financial institutions in Malaysia;
- the Malaysian Airline System Berhad (Administration) Act 2015 which provides for an entity-specific restructuring statute to facilitate the administration and restructuring of the national carrier, Malaysia Airlines; and
- the Pengurusan Danaharta Nasional Berhad Act 1998 (the **PDNB Act**) which provides special administration to the distressed borrower companies that are unable to service their loans as a result of the Asian financial crisis in 1997. Pengurusan Danaharta Nasional Berhad is statutorily vested under the PDNB Act to purchase non-performing loans of the distressed borrower companies from the selling financial institutions. A special administrator will then be appointed by Pengurusan Danaharta Nasional Berhad to manage the affairs of the distressed borrower companies as well as to assist in preserving the value of each company's assets, allowing them to remain as a going concern to prevent the companies from being liquidated. However, Pengurusan Danaharta Nasional Berhad ceased operation in 2005 and its residual assets are now managed by Prokhas Sdn Bhd, an entity set up by the government of Malaysia.

For the purposes of this article, only the Companies Act regime will be considered.



Enforcement of security

The most commonly employed forms of security are:

- charges over land (registered under the National Land Code (the **NLC**));
- mortgages over shares;
- charges over contracts, receivables, bank accounts, plant and machinery, and intellectual property; and
- fixed and floating charges over land together with movable or personal property contained in debentures.

Malaysian law recognises the concept of trusts.

In the west of Malaysia, where land ownership is based on a land registration system under the NLC, any charge over land must be registered under the NLC, although, ordinarily, land may be included in a fixed or floating charge under a debenture. Upon a breach of the debtor's obligations under the security instrument, the secured creditor has the right to take possession of the secured land either through direct occupation of the land or, in the case of land which is subject to a lease or a tenancy, by the receipt of rental income, and this must be in accordance with the provisions of the NLC. Separately, the secured creditor may apply to the court for an order of sale of land in accordance with the NLC.

If a valid power of attorney has been granted by the security provider to a receiver under a debenture or a separate instrument, the receiver (acting as agent of the debtor pursuant to the power of attorney) can sell the charged property by way of a private treaty sale and it need not be by way of an order of sale of land under the NLC. However, under the provisions of the NLC, a foreclosure order must be obtained by the secured creditor from the court prior to a private treaty sale taking place, notwithstanding the appointment of a receiver and the power of sale under the security instrument.

The secured creditor, prior to seeking an order for the sale of the secured land, shall first serve a notice of default with respect to the charge of the debtor requiring the debtor to remedy the breach within one month of the date on which the notice is served. If the breach is not remedied within one month, then the secured creditor may proceed to apply for an order for sale under the NLC. The procedures for an order for sale vary depending on the type of land title. The types of land titles that are commonly known in Malaysia are land held under 'registry title' and 'land office title'. Land held under 'registry title' includes town or village land, any lot of country land exceeding four hectares in area and any part of the foreshore or seabed. In the case of any lot of country land not exceeding four hectares in area, it shall be deemed as land held under 'land office title'.

For land held under 'registry title', an application for an order for sale must be made to the court. Every order for sale made by the court shall contain the terms of the sale which includes, amongst others, specifying the date on which the sale is to be held and the total amount due to the secured creditor. The registrar of the court shall also serve a copy of such an order for sale to the debtor and ensure that the sale is publicly advertised in accordance with the rules of the court. A certificate of sale by the court will then be issued to the successful purchaser under such an order for sale.

For land held under the 'land office title', an application for an order for sale of land must be made to the land administrator via the prescribed form under the NLC.
The land administrator will hold an enquiry with the debtor and the secured creditors. Prior to the enquiry, a summons will be served on the debtor, requiring the debtor to appear at the enquiry to show cause as to why the order for sale should not be made, failing which, the land administrator will proceed to order the sale of the charged land. Every order for sale made by the land administrator shall contain the terms of the sale which includes, amongst others, specifying the date on which the sale is to be held and the total amount due to the secured creditor. The land administrator shall also serve a copy of such an order for sale to the debtor and give public notice of the sale. A certificate of sale by the land administrator will then be issued to the successful purchaser under such an order for sale.

Generally, the order for sale of the land would typically be granted (as long as the procedures as set out under the NLC are observed) unless cause to the contrary is proven by the debtor.

It is also important to note that the receiver's power to deal with the land under a power of attorney remains valid even after a winding-up order has been made but such power ceases once the debtor company is dissolved. In the absence of a power of attorney, the receiver cannot sell the land without an order for sale from the court, as strict compliance with the statutory provisions of the NLC is necessary.

Receivership

Corporate receivership is covered by Part III, Division 7, Subdivision 3 (sections 372 to 393) of the Companies Act. A receiver or a receiver and manager may be appointed by a secured creditor pursuant to the terms of a debenture, security instrument or by the court. Unless the terms of the debenture provide otherwise, a receiver or a receiver and manager appointed under the debenture will be the agent of the company and will be able to contract on behalf of the company or to do any act as an agent of the company to enable them to carry out their function.

Receivership under a debenture or security instrument with a power of attorney essentially provides a secured creditor with a self-help remedy to enforce its security, realise the assets secured and obtain repayment. Once the receiver or receiver and manager is appointed, they will act principally in the interests of the secured creditor that appointed them and the company, but not for the general body of creditors. However, in selling any secured property, the receiver or receiver and manager has a duty to ensure that the property is sold at fair market value. A receiver shall only have the powers of a receiver in respect of property or assets secured under the debenture or security instrument appointing the receiver, for example, receiving incomes or receivables and paying necessary outgoings. A receiver who has been conferred with additional power to carry on the business of the company shall be deemed to be a receiver and manager.

In the case of a receiver or receiver and manager appointed by a secured creditor under a security instrument, the process of appointment, together with the scope of the receiver or receiver and manager's powers, will be set out under the specific terms of the security instrument. In most cases, a security instrument will specify that a receiver or receiver and manager may be appointed following the company defaulting on its obligations as contained in the security instrument.

The court may also appoint a receiver or receiver and manager under three circumstances. First, when the company has failed to pay a debt due to the debenture holder or has otherwise failed to meet any obligation to the debenture holder or the company is in arrears for interest or any principal money owed to the debenture holder. Second, when the company proposes to sell or dispose of secured property and this would amount to a breach of the terms of any instrument creating the charge or security. Third, when the appointment is necessary to ensure the preservation of the secured property for the benefit of the debenture holder.

The scope of a receiver or receiver and manager's powers will depend upon the terms of the security instrument or, in the case of a court-appointed receiver or receiver and manager, on the directions of the court. The Companies Act has also codified a list of the powers exercisable by the receiver or receiver and manager. In each case, these are subject to the security instrument or an order of the court. The powers as set out in the Companies Act include, amongst others, taking possession and disposing of the property of the company.

The Companies Act provides that a receiver or a receiver and manager may seek directions of the court. In the case of a receiver or a receiver and manager appointed by a debenture holder, the receivership will cease once the receiver or the receiver and manager satisfies the object of its appointment, namely the collection of secured assets in order to satisfy the secured debt so as to discharge the security. Conversely, where a receiver or a receiver and manager is appointed by the court, their receivership will end at the court's discretion or when it has achieved its purpose of appointment.

Schemes of arrangement

A scheme of arrangement is a procedure under Malaysian law which facilitates corporate rescue for a distressed company. Where a company is essentially profitable but its debt burden is too great, it may be able to persuade its creditors to allow the company to continue its business by restructuring its debt obligations (eg via a debt for equity swap or further external funding) through a scheme of arrangement as opposed to initiating the company's winding-up. The main motivation for opting for a scheme of arrangement is the higher recovery rate that is likely to be achieved by the company compared with recovery by creditors on a liquidation.

Part III, Division 7, Subdivision 2 of the Companies Act sets out the statutory framework for schemes of arrangement. The Companies Act allows for the reorganisation of the rights and liabilities of members and creditors according to prescribed schemes of arrangement, if it is not possible to achieve a corporate reorganisation on a contractual basis. To ensure a higher success rate of the scheme, the Companies Act's recent amendments have also introduced a more comprehensive framework to the scheme of arrangement, which now includes (i) super priority rescue financing under section 368B of the Companies Act; (ii) cross-class cramdown under section 368D of the Companies Act; and (iii) approval of proposed schemes without a creditor's meeting, i.e. a pre-packed scheme of arrangement, under section 369C of the Companies Act.

The concept of super priority rescue financing allows the company in distress to attract rescue financiers by offering these rescue financiers better priority or security over other creditors of the company so that these rescue financiers can provide further financing to the distressed company to enable it to survive through its financial distress period. The distressed company may make an application to court and the court may grant the following orders: (i) an order that, in the event the company is wound up, the debt arising from any rescue financing shall be paid immediately after the costs and expenses of the winding-up is paid. In another words, this priority sits above preferential debts; (ii) an order to secure a debt arising from any rescue financing by way of creation of security over unsecured assets; and (iii) an order to secure a debt arising from any rescue financing by way of creation of security interest of the same priority or higher over existing security, provided that the interests of the existing security interest holder are adequately protected.

As for cross-class cramdown, it provides for a mechanism for the court to impose a compromise scheme on dissenting creditors whereby it grants the court discretion to approve a proposed scheme and order all classes of creditors to be bound by it. Generally, the scheme of arrangement must be approved by the creditors and members of the company, then sanctioned by the court. Before a scheme of arrangement can be presented to the court for its approval, a majority in number representing three-quarters (75%) in total value of the creditors or class of creditors or members or class of members ("75% Threshold") (see section 366 of the Companies Act) must approve the scheme. After court approval is attained, the scheme will become binding upon the company, its members, its creditors and/or the insolvency practitioner/elected person and contributories (if the company is being wound up). However, with the introduction of cross-class cramdown, as long as there is at least one class of creditors who have voted in favour of the scheme, an application can be made by the company or the creditor to the court to bind all other dissenting classes of creditors of the scheme, provided that the 75% Threshold is met and the court is satisfied that the scheme does not discriminate unfairly between two or more classes of creditors and is fair and equitable to each dissenting class.

In connection with the pre-pack scheme of arrangement, this essentially empowers the court to sanction a scheme of arrangement without a scheme meeting upon application to the court, provided that the scheme company makes all necessary disclosures on the proposed scheme to the affected creditors and that the court is satisfied that there has been a meeting of the creditors or that the class of creditors was summoned and approved by the requisite majority, among others.

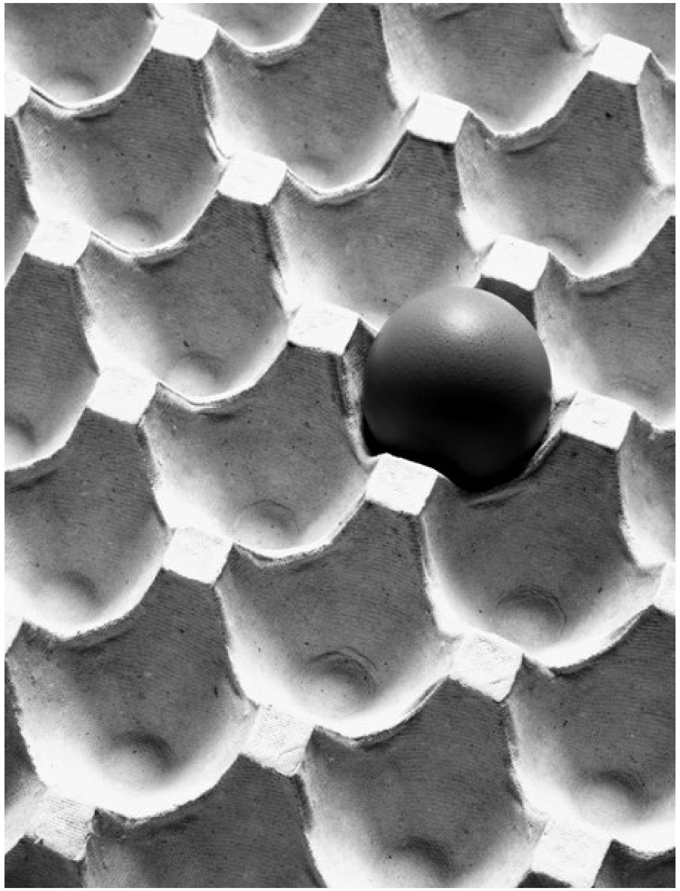
Schemes of arrangement (Cont.)

One of the advantages of a scheme of arrangement is that while the scheme is being formulated, the company and/or any of its members or creditors may apply to the court for a restraining order against all proceedings against the company (including a stay on enforcement of security). Companies may now obtain an automatic restraining order, which will take effect upon the filing of an application for a restraining order for a period of two (2) months or until the application for a restraining order is decided by the court, whichever is earlier. Restraining orders can now be extended to a related company (i.e. a company which is a subsidiary, holding company or an ultimate holding company of a scheme company, provided that the court is satisfied that, among others, the related company plays an integral role in the scheme. Notwithstanding the automatic restraining order granted under the new Section 368(1A), the court may grant a restraining order to a company for a period of not more than three months or extend the period to up to nine months if the court is satisfied that the conditions under section 368(2) of the Companies Act are satisfied. These conditions are, namely, (i) the court is satisfied that there is a proposal for a scheme of compromise or arrangement between the company and its creditors representing at least one-half in value of all the creditors; (ii) the court is satisfied that the restraining order is necessary to enable the company and its creditors to formalise the scheme of compromise or arrangement for the approval of the creditors or members; (iii) a statement of particulars as to the affairs of the company made up to a date not more than three days before the application is lodged together with the application; and (iv) the Court approves the person nominated by a majority of the creditors to act as a director of that company or if that person is not already a director, appoints that person to act as a director notwithstanding the provisions of the Companies Act or the constitution of the company.

Schemes of arrangement have been used in Malaysia to effect:

- moratoria;
- debt for equity swaps; and
- compromise agreements.

However, it is important to note that where a winding-up order has been made against the company, the scheme of arrangement under section 366 of the Companies Act cannot be used. Also, all scheme of arrangement meetings shall now be presided by either an insolvency practitioner or a person elected by the majority in value of the creditors or class of creditors or members or class of members (if no insolvency practitioner is appointed). Notwithstanding this, the appointment of insolvency practitioner by the court is mandatory in cases involving (i) an application of restraining order by a related company (section 368A); (ii) super priority financing; (iii) a pre-packed scheme of arrangement; and (iv) cross-class cramdown.



Liquidation

Liquidation (or winding-up) under the Companies Act can take one of two forms, either:

(1) a voluntary liquidation; or

(2) a compulsory liquidation.

The voluntary liquidation commences with the passing of the members' resolution to wind up the company. On the other hand, the compulsory liquidation is court-based and is typically initiated by the creditor of the company.

After the commencement of the winding-up of a company, a receiver or receiver and manager may continue to act as a receiver and exercise all the powers of a receiver in respect of the property or assets secured under the debenture appointing the receiver or receiver and manager. A receiver and manager may also exercise all the powers as a receiver and manager for the purposes of carrying on the business of a company provided that such receiver and manager has obtained the requisite consent of the liquidator or, in the event the liquidator withholds their consent, the consent of the court.

Voluntary liquidation

There are two types of voluntary liquidation: (i) members' voluntary liquidation (where the company is solvent), and (ii) creditors' voluntary liquidation (where the company is insolvent). In each case, proceedings for voluntary liquidation are initiated by the company.

A members' voluntary liquidation requires a special resolution of the members of the company in which the members resolve that the company is to be wound up voluntarily, together with a written declaration of solvency by the directors or the majority of the directors (when dealing with a company which has more than two directors). A liquidator will then be appointed at the members' meeting. Once the liquidator is appointed, the company shall cease to carry on its business, except so far as is, in the opinion of the liquidator, required for the beneficial winding-up of the company; and any transfer of shares, not being a transfer made to or with the sanction of the liquidator, and any alteration in the status of the members made after the commencement of the winding-up, shall be void.

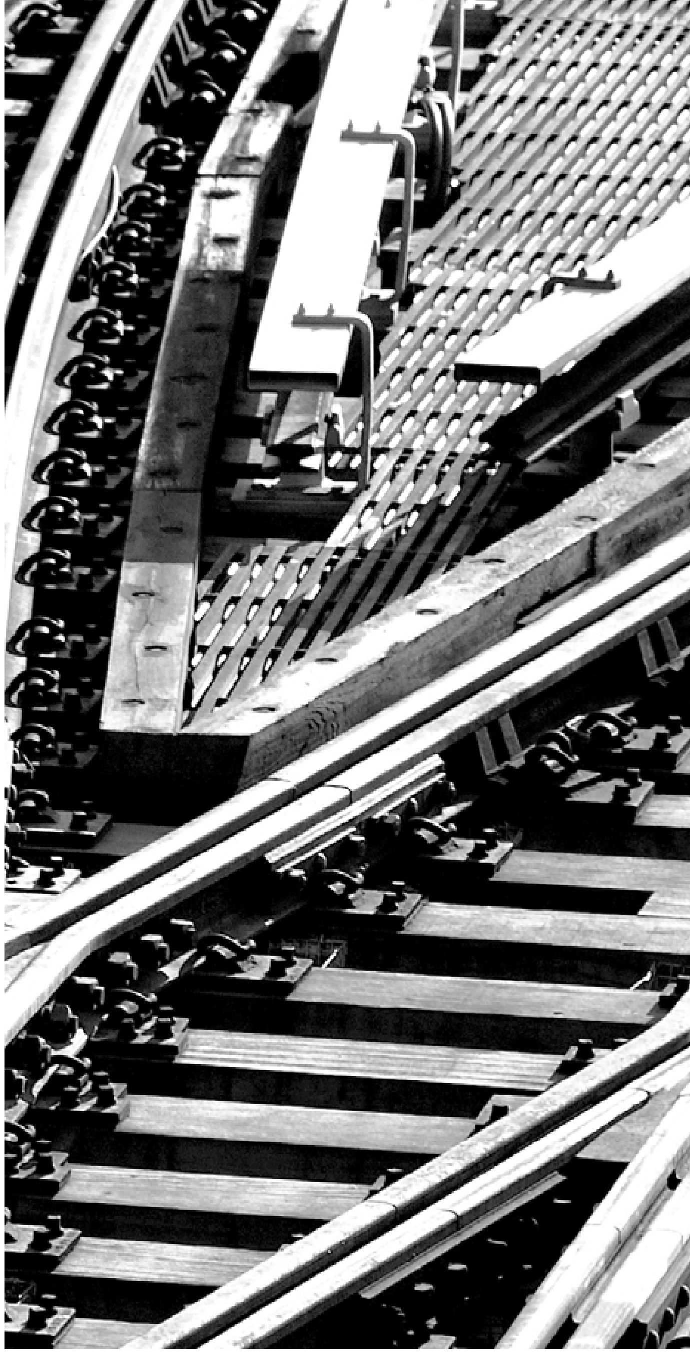
A creditors' voluntary liquidation can be initiated by an insolvent company if its directors make a statutory declaration stating that the company is insolvent and they resolve to appoint an interim liquidator. A meeting of the members of the company will then be called, followed by a meeting of the company's creditors to confirm the liquidation and the appointed liquidator.

Compulsory liquidation

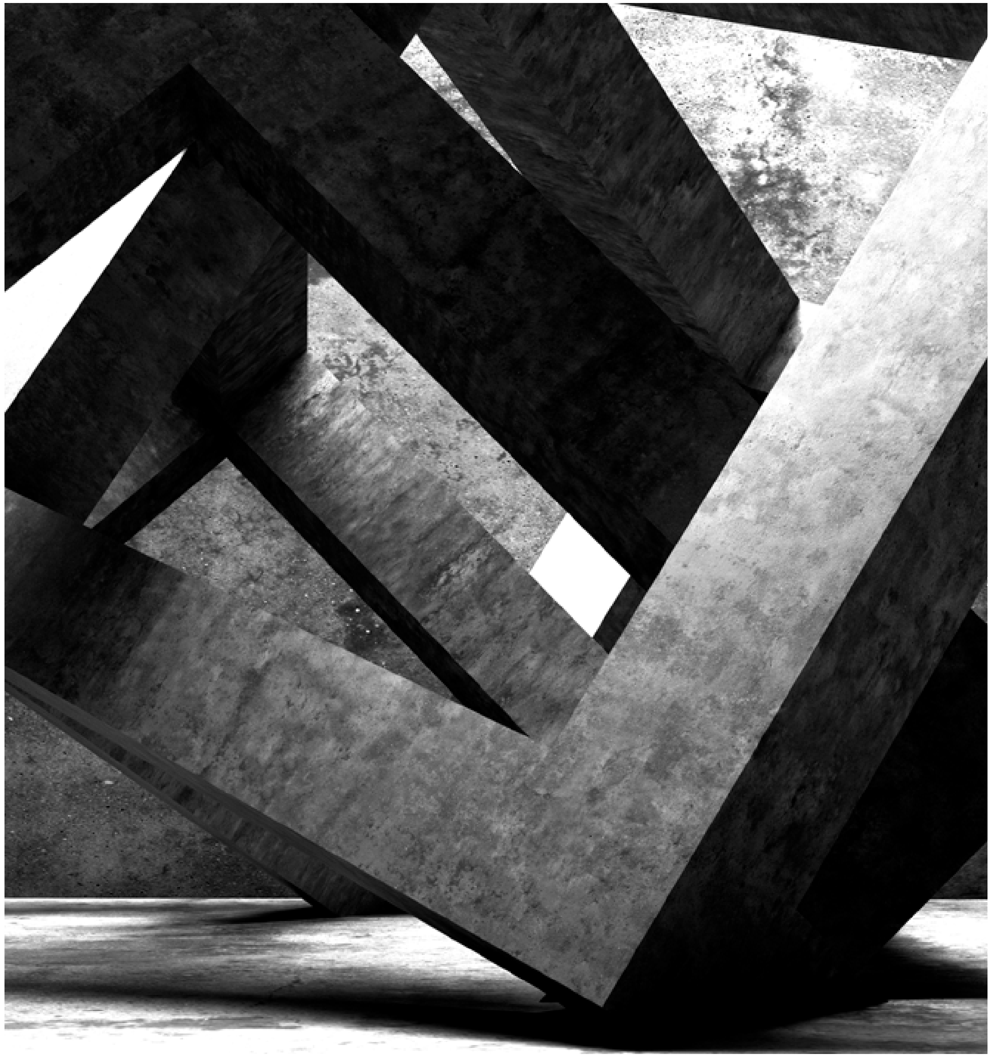
The court can wind up a company on a number of grounds as set out under section 465 of the Companies Act. The most common ground is that "the company is unable to pay its debts" under section 465(1)(e). There are 3 situations where the company shall be deemed to be unable to pay its debts. Firstly, the company has been served with a statutory demand exceeding RM50,000 and failed to pay such sum within 21 days after the service of the statutory demand. Secondly, where the execution or other process issued on a judgement, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part. Thirdly, where the court is satisfied that the company is unable to pay its debts taking into account the contingent and prospective liabilities of the company. A compulsory winding-up shall be deemed to have commenced at the date of the winding-up order.

Upon a winding-up order being made, the court shall appoint a liquidator and any disposition of the property of the company and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding-up by the court shall, unless the court otherwise orders, be void and the property will vest with the liquidator who has the power to dispose of such property for the purposes of the winding-up. Judgments or orders obtained by creditors after the commencement of the winding-up will not be enforced unless the leave of the court has been obtained. In addition, the approval of the court is required after the commencement of the winding-up in order for a party to bring any legal proceedings against the company.

Upon their appointment, the liquidator will take control of the company and collect, realise and distribute the company's assets among the creditors. Once the liquidation process has been completed, the company is dissolved.



Corporate voluntary arrangement



A Corporate Voluntary Arrangement (**CVA**) is one of the corporate rescue mechanisms under Part III, Division 8, Subdivision 1 of the Companies Act. The CVA provides protection against the company while the directors are allowed to manage the company. It is a quick and cost-effective process as court involvement is minimal. However, it is important to note that certain types of the companies are excluded from the CVA regime, namely: (i) a company which is a licensed financial institution or an operator of a designated payment system regulated under the laws enforced by the Central Bank of Malaysia; (ii) a company which is approved or registered under Part II, licensed or registered under Part III, approved under Part IIIA or recognized under Part VIII of the Capital Markets and Services Act 2007; and (iii) a company which is approved under Part II as a central depository under the Securities Industry (Central Depositories) Act 1991.

The directors of a company other than a company which is under judicial management or being wound up may propose to utilise the CVA regime to the company and its creditors. For companies that are under judicial management or being wound up, a CVA proposal may be made through the judicial manager and liquidator respectively. The CVA process commences with the appointment of a nominee, following which the proposed CVA together with the statement of affairs shall be submitted to the appointed nominee. The appointed nominee will review and assess the CVA proposal submitted to them. If the nominee is of the opinion that the CVA proposal is viable then a list of documents including a document setting out the terms of the CVA proposal can be filed in court. Upon the filing of the CVA proposal with the court, a moratorium of 28 days automatically commences which may be extended for up to 60 additional days provided that consent is given by the nominee and members of the company, and 75% majority in value of the creditors agree to the extension.

The effects of the moratorium period, amongst others, are that (i) no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company or its property except with the leave of the court; and (ii) 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. The CVA proposal must be approved by 75% of the total value of the creditors present at the meeting and a simple majority of the members of the company. Once the CVA proposal is approved, it will be binding on all the creditors of the company. Having said this, the rights of the secured creditors will be preserved as the CVA proposal shall not contain any proposal which affects the right of the secured creditor to enforce their security unless the proposal has obtained the consent of 75% of the total value of the secured creditors.

Judicial management

Another corporate rescue mechanism introduced under the Companies Act is Judicial Management (**JM**) as provided under Part III, Division 8, Subdivision 2 of the Companies Act. JM is a court-supervised rescue mechanism with the purpose of rehabilitating a financially distressed company. A company, its directors or its creditors (including any contingent or prospective creditor) may make an application to the court for a JM. However, it is important to note that certain types of companies are excluded from the JM regime, namely: (i) a company which is a licensed financial institution or an operator of a designated payment system regulated under the laws enforced by the Central Bank of Malaysia; and (ii) a company which is approved or registered under Part II, licensed or registered under Part III, approved under Part IIIA, or recognised under Part VIII of the Capital Markets and Services Act 2007; and a company which is approved under Part II as a central depository under the Securities Industry (Central Depositories) Act 1991.
The pre-conditions to qualify under the JM regime are that the applicant must prove that the company is or will be unable to pay its debts and 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 to a winding-up.

Upon filing an application for JM, the company is protected from any winding-up, enforcement of security and other legal action that may be taken against it. Once a JM order is made, it will remain in force for 6 months and it may be extended for another 6 months subject to such terms as the court may impose. A judicial manager will be appointed to manage the company. They shall present a proposal to the creditors of the company. The proposal must be approved by 75% in total value of the creditors present at meeting and the proposal will be binding on all creditors upon obtaining the approval. Upon approval of the proposal, the judicial manager will oversee the implementation of the proposal and once the purpose specified in the JM order has been achieved, the judicial manager is obliged to apply to the court for the JM order to be discharged.

It is worth noting super priority rescue financing is also provided for JM under section 415A of the Companies Act.

Cross-border issues

Malaysia has announced that it will adopt the UNCITRAL Model Law on Cross Border Insolvency and, to ensure a smooth transition, the Cross-Border Insolvency Reform Main Committee and the Cross-Border Insolvency Reform Working Committee have been formed for the purposes of setting and developing the policies to integrate UNCITRAL Model Law on Cross Border Insolvency into Malaysia's legal system. Further updates on these policies are expected to be rolled out in near future.

To date, reliance has been made on the Reciprocal Enforcement of Judgments Act 1958, which provides that a judgment of superior courts in any of Brunei Darussalam, Hong Kong, India, New Zealand, Singapore, Sri Lanka and the United Kingdom is capable of being registered in the Malaysian High Court for cross-border issues. Only judgments for a monetary sum can be registered and registration has to have been made within six years of the judgment date. A judgment, once registered, will be deemed to be a judgment of the Malaysian High Court.

While Singapore currently enjoys reciprocal recognition arrangements with Malaysia (and is the only country which to do so) the scope of such arrangements is limited solely to personal bankruptcy and does not cover corporate insolvency.

There are also provisions under section 545 of the Companies Act providing for the winding-up of a foreign company. This is assisted by provisions in the Malaysian Insolvency Act 1967 which set out reciprocal assistance provisions for matters of bankruptcy and insolvency relating to Singapore and other designated countries.

Reform

The Companies Act (which has repealed the Companies Act 1965) has for the first time introduced in Malaysia new corporate rescue mechanisms by way of the Corporation Voluntary Arrangement and Judicial Management and hence brought in significant changes to the restructuring and insolvency procedures in Malaysia.
These changes have allowed companies more options for rehabilitation if they are financially distressed, options which have long been available in other jurisdictions such as Singapore and the United Kingdom.

This is further reflected in the recent amendments to the Companies Act 2016 via the Companies (Amendment) Act 2024, which came into force on 1 April 2024 with several specific provisions coming into operation at later dates. These new amendments aim to enhance the existing provisions on schemes of arrangement and corporate rescue mechanisms by introducing measures such as a proof of debt process (section 369B), super priority rescue financing for companies seeking approval for a scheme or undergoing judicial management (sections 368B and 415A) and allowing recovery of assets by the secured creditor during a judicial management order (section 411(5)).

Key contacts

If you require advice on any of the matters raised in this document, please contact any of our partners or your usual contact at A&O Shearman, or email **rab@aoshearman.com.**

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Further information

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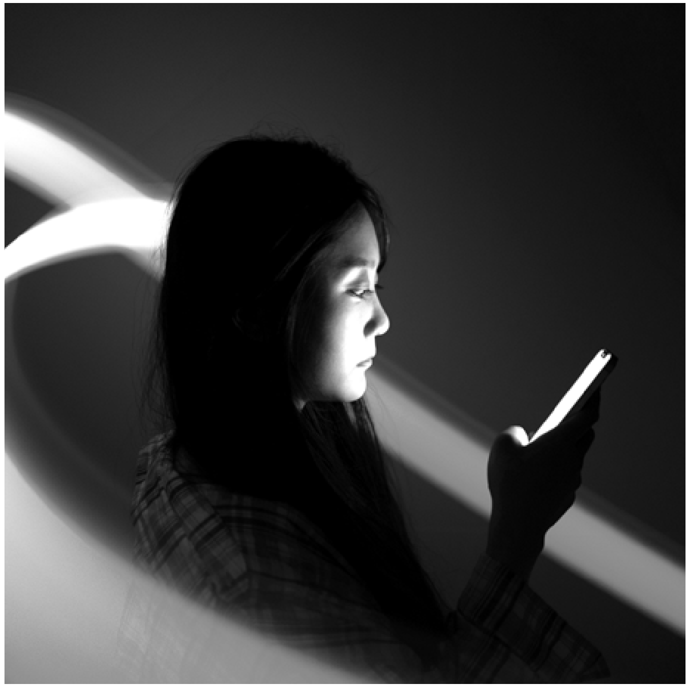

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