# MALAYSIA'S NEW INSOLVENCY REGIME

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**Singapore Restructuring & Insolvency Alert**

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Earlier this year, both the lower and upper houses of Malaysia's parliament, passed the Companies Bill 2015 ("**the Bill**") which will harmonise Malaysia's insolvency laws and bring them more in line with modern international standards. Once the Bill comes into effect (it is currently awaiting Royal Assent), it will replace Malaysia's existing Companies Act 1965.

One of the key features of the Bill is the introduction of two new corporate rescue mechanisms to try to assist financially distressed companies avoid being wound-up in insolvency. Currently the Companies Act only allows an insolvent Malaysian company to wind itself up, undertake a Scheme of Arrangement under Section 176 of the Companies Act, or appoint a receiver. The Bill introduces the concepts of Judicial Management and Corporate Voluntary Arrangement.

## JUDICIAL MANAGEMENT

The Judicial Management process has been introduced to allow the directors, shareholders or creditors of a company, where there is a reasonable probability of rehabilitating the company, to apply to Court to appoint an independent and qualified Judicial Manager to take charge of the management of the company. The Judicial Management process under the Bill is modelled on the existing Singaporean judicial management regime. Pursuant to the new law, the Court may grant a Judicial Management order if:

1. it is satisfied that the company is or will be unable to pay its debts; and
2. it considers that the making of the order would be likely to achieve one or more of the following purposes:

the survival of the company, or the whole or part of its undertaking as a going concern

the approval of a compromise or arrangement between the company and its creditors;

a more advantageous realisation of the company's assets would be effected than on a winding up.

If a Judicial Management order is made by the Court, a statutory moratorium of 180 days commences during which the company cannot be wound-up. Further, during the moratorium without leave of the Court no receiver can be appointed, no security can be enforced, no shares can be transferred and no proceedings can be commenced against the company. The effect on counterparties of a company under Judicial Management will vary. For example, other than with leave of the Court no landlord or other person to whom rent is payable may exercise any right of forfeiture in relation to premises let to the company. On the other hand, if (as expected) the Malaysian courts follow the application of Singaporean judicial management laws, then *ipso facto* clauses which entitle an innocent contracting party to terminate the agreement and/or exercise certain remedies upon the commencement of Judicial Management will be effective.

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During the 180-day moratorium, the Judicial Manager is charged with preparing a restructuring plan for the company for approval by the creditors of the company. The moratorium may be extended on the application of the Judicial Manager for another 180 days.

In order for the Judicial Manager's restructuring plan to be approved by the creditors, at least 75% in value of the creditors must approve the plan. If the restructuring plan is approved by the creditors, the Judicial Manager then applies to Court to sanction the plan following which the plan will be implemented.

## CORPORATE VOLUNTARY ARRANGEMENT

The second of these mechanisms is a new Corporate Voluntary Arrangement ("**CVA**") process, which is based on similar legislation in the UK. Under the CVA, the directors of a private company can propose a debt restructuring proposal to revive the fortunes of the company.

Unlike the existing Scheme of Arrangement process, the Bill requires a qualified insolvency practitioner (known as the "nominee") to conduct an initial assessment of the viability of the proposed CVA. Once the nominee has considered the proposed CVA, he will then submit to the directors a statement indicating whether or not in his opinion:

3. the proposed CVA has a reasonable prospect of being approved and implemented;
4. the company is likely to have sufficient funds available for it during the proposed moratorium to enable the company to carry on its business; and
5. that meetings of the company and creditors should be summoned to consider the proposed CVA.

If the nominee provides a positive statement regarding the proposed CVA, the directors file with the Court a document setting out the terms of the proposed CVA and other necessary documents.

In order for the proposed CVA to be approved at a specially convened meeting of creditors:

6. a simple majority of creditors present and voting must approve the scheme; and
7. at least 75% in value of the creditors present and voting must approve the scheme.

If a CVA is approved, the company can apply for a moratorium of between 28 and 60 days during which the company cannot be wound-up, no Judicial Manager can be appointed, no shares can be transferred etc.. It is important to note that under the CVA, a secured creditor is not prevented from appointing a receiver over its secured property during the moratorium.

Although the CVA proposal is initially proposed by the directors of a company, it is the nominee insolvency practitioner who is responsible for supervising and implementing the proposal. The nominee can apply to Court for directions in relation to any particular matter arising under the CVA.

## CONCLUSION

The introduction of the Judicial Management and CVA mechanisms is a move towards bringing Malaysia's insolvency laws up to the same international standards as many other countries in the region. It provides directors in particular with more flexibility to deal with a company facing financial distress such that the company

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might remain as a going concern and avoid a winding-up scenario.  In doing so, Malaysia's new insolvency laws continue the international trend towards focusing on the preservation of value for the benefit of all stakeholders.

## KEY CONTACTS



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