COMPANY LAW

ENHANCEMENTS TO CORPORATE GOVERNANCE AND RESCUE MECHANISMS: COMPANIES (AMENDMENT) ACT 2024

*NOTE: *This is Part 2 of our two part series analyzing the Companies (Amendment) Act 2024. To read Part 1 on Bolstering Corporate Integrity, please click HERE*

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INTRODUCTION & RATIONALE

Notably, the purposes behind the 2024 Amendment in relation to corporate rescue mechanism are to extend the application of the mechanism to a broader category of companies and to reinforce the rehabilitation mechanism,[1] in keeping with the development of legal framework at international level[2] i.e., United Kingdom, Singapore, and United States.[3]

Furthermore, the revision of legislation pertaining to Scheme of Arrangement ("**SOA**") and Restraining Order ("**RO**") serves as a stimulation for companies with the potential to stay solvent, enabling them to avoid winding-up proceedings,[4] particularly during the COVID-19 pandemic recovery phase. Consequently, winding-up proceedings should only be considered as a final resort after the company has exhausted all available corporate rescue mechanisms.[5]

Similarly, it is noteworthy that s68, s395, s576, and s612A of the 2024 Amendment shall come into force on a later date fixed by the Minister of Domestic Trade and Cost of Living.[6]

COURT-APPOINTED INSOLVENCY PRACTITIONER ("APPOINTEE")

By virtue of s366 (2A),[7] the law stipulates that all meetings held under s366 (1) shall be presided by either (i) an insolvency practitioner appointed under s367 (3),[8] or (ii) a person elected by the majority in value of the creditors or class of creditors or members or class of members. Prior to the 2024 Amendment, the neutrality of the appointee remains doubtful because the appointee is often appointed by the applicant scheme company itself. However, this issue has ceased to be relevant post the 2024 Amendment as the court is empowered to appoint an external appointee.

[1] Malaysia, Parliamentary Debates, *Representative*, Fifteen Parliament, Second Session, 28 November 2024, pg 93 (Puan Hajah Fuziah binti Salleh).
[2] *Ibid*, pg 94.
[3] *Ibid*, pg 95.
[4] FMT Reporters. (2024). Companies (Amendment) Act 2024 will give more transparency, says minister. *FMT*. Retrieved from < https://www.freemalaysiatoday.com/category/nation/2024/03/27/companies-amendment-act-2024-will-give-more-transparency-says-minister/ >. Site accessed on 4 April 2024.
[5] *Ibid*, pg 96.
[6] See footnote 4 above.
[7] Companies (Amendment) Act 2024 (Act 1701) (Malaysia) s 366(2A).
[8] *Ibid*, s 367(3).

Further, the 2024 Amendment is aimed at increasing the success rate of the scheme.[9] Currently, the appointee may not only assess the viability of the SOA[10] and table the viability report at the meetings held under s366,[11] but the appointee also enjoys some other rights,[12] amongst other, right of access to all the records of the company at all reasonable times.[13]

As highlighted above, by virtue of s367 (3), the appointment of the insolvency practitioner for the company shall be **mandatory** upon (i) the application of restraining order by a related company under s368A[14] or (ii) the application by the company in the events listed below:[15] -

a) super priority rescue financing;[16]
b) cross-class cram down;[17] or
c) approval of proposed scheme without creditor's meeting i.e., pre-pack SOA.[18]

SUPER PRIORITY RESCUE FINANCING

With the introduction of the novel notion of super priority rescue financing, it allows the company to survive through its financial distress by securing further financing via capital injection during the rehabilitation period.[19] This further serves as an incentive cum financial protection to the rescue financiers by placing them in a superior ranking over the other creditors for their efforts in rescuing an economically distress company. As an illustration, the rescue financiers are accorded a better priority or security over all the preferential debts and all other unsecured debts in the event of winding up.

To enable a smooth rescue financing process, the court may order the following 3 types of priority in favour of the rescue financiers: -

a) the debt incurred from any rescue financing obtained by the company shall be paid immediately after the costs and expenses of the winding up is cleared;[20]
b) to secure a debt incurred by any rescue financier through the creation of security over unsecured assets;[21] and
c) to secure a debt incurred by any rescue financier by the creation of security interest of the same priority or even higher priority over existing security[22] conditional upon the interests of existing security interest holder is not jeopardized.[23]

CROSS-CLASS CRAMDOWN

With the introduction of the new s368D, upon the application of the company or the creditor, the court is empowered to approve the compromise or arrangement by ordering the company and all classes of creditors to be bound by such scheme[24] provided that the following threshold are satisfied:

[9] Malaysia, Parliamentary Debates, *Representative*, Fifteen Parliament, Second Session, 28 November 2024, pg 95 (Puan Hajah Fuziah binti Salleh).
[10] Companies (Amendment) Act 2024 (Act 1701) (Malaysia) s 367(1).
[11] *Ibid*, s 367(2).
[12] *Ibid*, s 367(4).
[13] *Ibid*, s 367(4)(a).
[14] *Ibid*, s 367(3)(b).
[15] *Ibid*, s 367(3)(a).
[16] *Ibid*, s 368B.
[17] *Ibid*, s 368D.
[18] *Ibid*, s 369C.
[19] Malaysia, Parliamentary Debates, *Representative*, Fifteen Parliament, Second Session, 28 November 2024, pg 96 (Puan Hajah Fuziah binti Salleh).
[20] Companies (Amendment) Act 2024 (Act 1701) (Malaysia) s 368B (1)(a) & 415A (1)(a).
[21] *Ibid*, s 368B (1)(b)(i) & 415A (1)(b).
[22] *Ibid*, s 368B (1)(c) & 415A (1)(c).
[23] *Ibid*, s 368B (1)(c)(ii).
[24] *Ibid*, s 368D (2).

a) there is at least one class of creditors who voted in favour of the scheme;[25]
b) there is a majority of 75% of the total value of creditors present and voted in person or by proxy at the relevant meeting;[26]
c) creditors to be bound by this scheme have been placed into at least two classes of creditors;[27] and
d) such scheme is fair and equitable to every dissenting class without any unfair discrimination between two or more classes of creditors[28] after considering the factors laid down in s368D (4).[29]

PRE-PACK SCHEME OF ARRANGEMENT

By virtue of s369C (1),[30] when a scheme is proposed between a company and its creditors, the court may to the satisfaction of the factors inscribed under s369C (3),[31] approve a scheme company's application without convening creditor's meeting which shall then be binding on the company and the creditors.[32] Also, the court may approve any such proposed scheme subject to any alterations or conditions as the court deems just.[33] Ideally, the bypassing of creditor's meeting does increase the likelihood of recovery because the company may now expedite the implementation of the scheme.

EXPANSION OF SCOPE OF APPLICATION OF CORPORATE VOLUNTARY ARRANGEMENT

The CA 2016 explicitly excluded the application of corporate voluntary arrangement to the public company as well as the companies with a charge created over its property or any of its undertaking.[34] However, this position does not hold water anymore by virtue of the substitution with the new s395.[35] Thus, with such a visionary amendment, the utilization of the mechanism may be optimized and the nature of this out-of-court negotiation could potentially save the time and cost of rehabilitating companies encountering financial distress.[36]

FILING OF PROOF OF DEBT

Prior to the 2024 Amendment, there is no provision that specifically provides for the procedures to prove debt. Nevertheless, with the current s369B (2),[37] if the creditor doesn't file the creditor proof of debt in the manner and within the period stated in the notice issued under s369B (1),[38] the creditor is not allowed to vote at the meeting, be it in person or by proxy.

Notwithstanding the above, the court may still grant an order extending the period stated in the notice summoning the meeting for the proof of debt to be filed, on an application made by the company or the creditor.[39]

Moreover, a creditor who has filed the proof of debt is entitled to inspect either whole or part of the proof of debt filed by other creditors except for the parts which are subjected to any obligation of secrecy or restriction against disclosure of information.[40]

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[25] *Ibid*, s 368D (1).
[26] *Ibid*, s 368D (3)(a).
[27] *Ibid*, s 368D (1)(b).
[28] *Ibid*, s 368D (3)(b).
[29] *Ibid*, s 368D (4).
[30] *Ibid*, s 369C (1).
[31] *Ibid*, s 369C (3).
[32] *Ibid*, s 369C (2).
[33] *Ibid*, s 369C (5).
[34] Companies Act 2016 (Act 777) (Malaysia) s395.
[35] Companies (Amendment) Act 2024 (Act 1701) (Malaysia) s 395.
[36] Malaysia, Parliamentary Debates, *Representative*, Fifteen Parliament, Second Session, 28 November 2024, pg 94 (Puan Hajah Fuziah binti Salleh).
[37] Companies (Amendment) Act 2024 (Act 1701) (Malaysia) s 369B (2).
[38] *Ibid*, s 369B (1).
[39] *Ibid*, s 369B (3).
[40] *Ibid*, s 369B (6).

Furthermore, under s369D (1),[41] the court is empowered to clarify any terms of the scheme after receiving the company or creditor's application. Additionally, should the company commit any acts or omissions that breach the terms of the compromise or arrangement, the court may reverse or modify the company's act or omission[42] or alternatively give any direction to rectify the act or omission of the company.[43]

RESTRAINING ORDER UNDER SOA

In laymen term, a RO basically mean no insolvency-related suits may be taken against the company during the RO period.

Pursuant to s368 (1),[44] the court may grant a RO up to 3 months from the date of RO being granted, when (i) there has been no order made to wind up the company; and (ii) a scheme has been proposed between the company and its creditors. This is further supplemented by s368 (1A)[45] which provides for an interim/automatic RO to take effect for 2 months from the date of application for SOA or until the application for a RO is decided, whichever is earlier. On top of the 3 months of initial RO,[46] the court may extend this period up to 9 months, with or without any terms & conditions attached to such extension.[47]

It is equally remarkable that s368 (3B)[48] added another layer of safeguard against the abuse of RO application by depriving the company's right of re-applying for RO should a RO has been granted to the company or its related company in the past 12 months.

Additionally, the Parliament has revised s365[49] to incorporate a new definition of "related company" which means a subsidiary company, holding company or an ultimate holding company, of a subject company. Further to that, upon the related company's application, the court may extend the RO to a related company if similar order has been granted in the subject company's favour, for a period not more than the period of RO granted to the subject company.[50] Notably, it is equally feasible for the related company to apply for an extension of the RO period[51] provided that such extension shall not exceed the period of RO granted to the subject company under s368.

EXTENSION PERIOD OF JUDICIAL MANAGEMENT

Judicial management is a corporate rescue mechanism that may be applied for by a company, creditor, or resolution authority to the court to have a judicial manager appointed to implement a rehabilitation plan to rescue the company.

The first remarkable amendment pertaining to judicial management is that the court may, on the application of a judicial manager, extend the period of judicial management which by default shall initially last for only 6 months.[52]

Secondly, judicial management is made applicable to even listed companies through the removal of s403 (b) of CA 2016[53] but it shall not apply to the following companies:[54]

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[41] *Ibid*, s 369D (1).
[42] *Ibid*, s 369D (1)(a).
[43] *Ibid*, s 369D (1)(b).
[44] *Ibid*, s 368(1).
[45] *Ibid*, s 369D (1A).
[46] *Ibid*, s 368 (1).
[47] *Ibid*, s 368 (2).
[48] *Ibid*, s 368 (3B).
[49] *Ibid*, s365.
[50] *Ibid*, s 368A (1).
[51] *Ibid*, s 368A (5).
[52] *Ibid*, s 406 (1).
[53] Companies Act 2016 (Act 777) (Malaysia) s403(b)
[54] *Ibid*, s 403.

a) a company which is a licensed institution, or an operator of a designated payment system regulated under the laws enforced by the Central Bank of Malaysia;
b) 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
c) a company which is approved under Part II of the Securities Industry (Central Depositories) Act 1991.

It is pertinent to note that the non-application of judicial management to the above companies is because these companies must comply with the reporting procedures and specific financial policies that are fully regulated by Bank Negara Malaysia or the Securities Commission when the companies encounter financial problems.[55]

KEY TAKEAWAYS

- All meetings held under s366 (1) shall be presided by either an insolvency practitioner appointed under s367 (3), or a person elected by the majority in value of the creditors or class of creditors or members or class of members.
- Under s367 (3), the appointment of a court appointed insolvency practitioner is mandatory if a related company applies for a RO, or if the company applies for super priority rescue financing, cross-class cram down, or pre-pack SOA.
- The expansion of the application of corporate voluntary arrangement to even public company and the companies with a charge created over their property or any of its undertaking.
- All creditors are required to file the proof of debt in the manner and within the period stated in the notice issued under s369B (1), failing which the creditors are prohibited to vote at the meeting. Also, a creditor who filed the proof of debt is generally entitled to inspect the entire or part of the proof of debt filed by other creditors.
- An interim RO shall take effect automatically for 2 months from the date of application for SOA or until the application for a RO is decided, whichever is earlier.
- In general, the timeframe for a RO is 3 months but it may be further extended by the court for another 9 months.
- The application of RO is now extended to related companies if a similar order has been granted to the subject company.
- No re-application of RO by the subject company or its related company is allowed if an RO has been granted to the companies in the past 12 months.
- The default rule is that judicial management shall last for only 6 months, but the court may upon the application of a judicial manager, extend such period subject to any terms and conditions. Also, judicial management is now applicable to even listed companies.

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[55] Malaysia, Parliamentary Debates, *Representative*, Fifteen Parliament, Second Session, 28 November 2024, pg 95 (Puan Hajah Fuziah binti Salleh).