ASIA-PACIFIC
RESTRUCTURING REVIEW
2022

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Asia-Pacific Restructuring Review 2022

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This article was first published in September 2021
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Published in the United Kingdom
by Global Restructuring Review
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL
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www.globalrestructuringreview.com

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© 2021 Law Business Research Limited

ISBN: 978-1-83862-600-6

Printed and distributed by Encompass Print Solutions
Tel: 0844 2480 112

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Preface

Welcome to *The Asia-Pacific Restructuring Review 2022*, one of Global Restructuring Review's special, yearbook-style reports. GRR, for the uninitiated, is the online home for professionals who specialise in high-stakes, international restructuring and insolvency, telling them all they need to know about everything that matters.

Throughout the year, GRR delivers pitch-perfect daily news, surveys and features; organises the liveliest events ('GRR Live') – covid-19 allowing; and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a series of regional reviews – online and in print – that go deeper into local developments than the exigencies of journalism allow. *The Asia-Pacific Restructuring Review*, which you are reading, is part of that series.

This edition contains insight and thought leadership from 19 pre-eminent figures in the region.

Across seven chapters and 110 pages, they provide an invaluable retrospective on the year just gone. All contributors are vetted for their standing and knowledge before being invited to take part. Together, they capture and interpret the most substantial developments, complete with footnotes, relevant charts and statistics.

This edition covers China, Hong Kong, India, Japan, Malaysia, Singapore and South Korea.

As always with these annual reviews, a close read yields many gems. With covid, that is doubly true; this book has never been so helpful. Among the nuggets mentally filed away by this reader:

- China's highest court has clarified that arbitration clauses remain valid post-bankruptcy;
- it has been a year of innovation in Hong Kong's courts (see page 17 onwards for an analysis of the biggest rulings);

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- India's new insolvency regime is viewed as a pretty huge success, despite a few teething problems;
- Japan's government cannot impose lockdowns on the public – even during a state of emergency;
- proposed reforms in Malaysia 'do not go far enough' to quote our authors; and
- South Korea has three established ways of restructuring businesses and the key differences between them are adumbrated in two helpful charts.

Plus much, much more. We hope you enjoy the review. If you have any suggestions for future editions, or want to take part in this annual project, my colleagues and I would love to hear from you. Please write to insight@globalrestructuringreview.com. My thanks to all of our authors and to GRR editorial board member Look Chan Ho, review editor, for steering us so well.

David Samuels
Publisher
August 2021

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The Path to Corporate Rescue Reform in Malaysia

Rabindra S Nathan
Shearn Delamore & Co

IN SUMMARY

Corporate voluntary arrangement (CVA) and judicial management were corporate rescue mechanisms that were introduced with the Companies Act 2016. These mechanisms complemented the existing scheme of arrangement procedure as corporate restructuring processes. The CVA take-up rate was low, while enhanced statutory tools were needed to boost the effectiveness of judicial management and schemes of arrangement. In 2020, important reforms modelled on equivalent reforms in Singapore were proposed. However, Parliament was not able to sit for most of 2021; thus, the much-needed reforms have not become law.

DISCUSSION POINTS

- Existing corporate rescue mechanisms under Malaysian law
- Inadequacies of the existing corporate rescue mechanisms
- Proposed Malaysian corporate rescue enhancements and intended effects
- Discussion of the proposed reforms

REFERENCED IN THIS ARTICLE

- *AirAsia X Berhad v BOC Aviation Ltd & Ors*
- Companies Act 2016
- Singapore Companies Act
- Singapore Insolvency, Restructuring and Dissolution Act
- UK Enterprise Act 2002
- *Re Design Studio Group Ltd & other matters*
- *Re Attilan Group Ltd*
- Australian Treasury Laws (Amendment) (2017 Enterprise Incentives No 2) Act 2017 (Commonwealth)
- Companies Commission Malaysia

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Introduction

August 2016 saw two significant milestones in company law reform in Malaysia. The first was the enactment of the Companies Act 2016 to replace the Companies Act 1965, which was outdated and in need of a comprehensive overhaul. The Companies Act 2016 received the Royal Assent on 31 August 2016, and most parts of the new statute came into force on 31 January 2017.

The second milestone was the formal introduction of two corporate rescue mechanisms through the Companies Act 2016. Until then, none had existed under Malaysian law. The corporate rescue mechanisms are corporate voluntary arrangement (CVA) and judicial management. Both mechanisms came into force on 1 March 2018, more than a year after the Companies Act 2016 came into force. The introduction of those two processes was a major development in itself.

Despite being new processes with good intentions, the CVA and judicial management have been plagued by inadequacies in the legislative framework. The eligibility criteria for companies that could use the CVA process had been narrowly drawn in section 395. First, it was restricted to private companies only; second, the CVA process could only be utilised by companies that had not granted any security by way of a charge over their assets. Those criteria reduced the pool of eligible companies; thus, the take-up rate for the CVA has not been as high as the legislators might have hoped.

The judicial management mechanism, on the other hand, was imported from legislative provisions first introduced in Singapore in 1987, but without the benefit of the proposed reforms that Singapore was in the process of introducing following the Final Report of the Singapore Insolvency Law Reform Committee in October 2013[1] and the Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring in April 2016.[2] In 2017, the Singapore judicial management framework was updated and improved with amendments to the Singapore Companies Act (SCA), thereby enacting most of the recommendations of the two committees.

In mid-2020, with Malaysian corporates beset by operating restrictions because of movement control orders issued by the government's health authorities owing to the covid-19 pandemic, as well as attendant cash flow problems and survival concerns, the Companies Commission of Malaysia (CCM) initiated a private consultation with various specialist professional bodies and regulatory agencies on reform measures that

1 Singapore Ministry of Law, Insolvency Law Review Committee, Report of the Insolvency Law Review Committee: Final Report 2013.

2 Singapore Ministry of Law, Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (20 April 2016).

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would make the CVA and judicial management processes more rescue-orientated and accessible to a wider range of eligible corporates in Malaysia. A formal public consultation followed.

The CCM issued a public consultation document: the Consultative Document on The Proposed Companies (Amendment) Bill 2020.[3] The document contains a number of policy statements and guiding principles aimed at amending not only the corporate restructuring and insolvency provisions but also various other parts of the Companies Act 2016. The policy statements that are relevant to corporate rescue and insolvency will be described in greater detail in this article.

Before the introduction of the CVA and judicial management, the sole corporate rescue tool had been the scheme of arrangement process that was contained in the Companies Act 1965 and re-enacted, with some limited improvements, in the Companies Act 2016. As has been the case in Singapore and elsewhere, the scheme of arrangement process has become a valuable debtor-in-possession restructuring tool, despite the fact that the scheme of arrangement process is not a true collective insolvency proceeding or a unique corporate rescue mechanism in its own right.[4]

The CCM public consultation document also contained proposals for major reforms to the scheme of arrangement procedure in the Companies Act 2016. The policy statements relating to those proposed reforms to the scheme of arrangement process will be outlined in more detail below.

Existing corporate rescue mechanisms under Malaysian law

There are three main corporate rescue processes under Malaysian law: schemes of arrangement, CVAs and judicial management.

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3 Companies Commission of Malaysia, Consultative Document on the Proposed Companies (Amendment) Bill 2020.

4 See Christian Pilkington, *Schemes of Arrangement in Corporate Restructuring*, 2nd ed, Sweet & Maxwell, 2017, paragraphs 2-002 to 2-004. Nevertheless, in a recent decision involving AAX, the long-haul carrier arm of Asia's largest low-cost carrier, AirAsia, the Malaysian High Court held, after considering expert testimony from eminent English insolvency lawyers (given that the interests involved were governed by English law) that where a scheme of arrangement is formulated on the basis of insolvency, it is capable of constituting an 'insolvency-related event' for the purposes of the Cape Town Convention on International Interests in Mobile Equipment and the Protocol on Matters Specific to Aircraft Equipment. This was on the basis that the extent to which the assets and affairs of the debtor were involved sufficiently made it a collective proceeding, and although the management of the debtor remained in control, the process was subject to the control or supervision of the Court. See *AirAsia X Berhad v BOC Aviation Ltd & Ors* [2021] MLJU 189 [278] to [280] per Ong Chee Kwan JC.

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Scheme of arrangement

A scheme of arrangement is not a true corporate rescue mechanism. Scheme of arrangement proceedings are not exclusively intended for insolvent companies and are widely used by solvent entities to achieve solvent corporate restructurings and transfers of undertakings. Nevertheless, companies experiencing cash flow problems and with a debt burden, frequently utilise the scheme of arrangement process.

The process has become adapted over time to the needs of corporate rescue. It is a debtor-in-possession type process that does not require the appointment of an insolvency official or practitioner who might displace management. It allows for a court-approved restructuring scheme that has been approved by all classes of creditors with the necessary voting majorities to be imposed on dissenting creditors and members.

The scheme of arrangement process also allows an applicant company to seek restraining orders that restrain creditor action and security enforcement while a scheme is pending; however, problems with the statutory requirements that must be satisfied before a restraining order can be granted have led to problems with achieving a proper space for a company to successfully restructure its debt.

The reforms that are proposed by the CCM through the public consultation aim to overcome these drawbacks with the process and to simplify the process of securing interim protection while a scheme is being formulated, proposed, voted on and approved.

CVA

The CVA is the newly introduced corporate rescue mechanism under the Companies Act 2016. It provides a consensual statutory restructuring tool that is available to private companies only. The CVA process permits a proposed voluntary arrangement to be imposed on and, thereby, bind all creditors, provided the statutory voting threshold is achieved but without any significant court involvement.

Judicial management

Judicial management is another of the new corporate rescue mechanisms under the Companies Act 2016. It allows for the appointment by the Malaysian High Court of a judicial manager over an insolvent corporate debtor, provided it can be shown that there is a reasonable prospect of, among other things, preserving all or part of the company as a going concern, and that interests of creditors would be better served than on a winding-up.

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The inadequacies of the existing corporate rescue mechanisms

Malaysia's existing rescue mechanisms proved to be barely adequate in the three years prior to the start of the covid-19 pandemic. The weaknesses of those mechanisms and processes were amplified and problems were exacerbated with the onset of the pandemic. The shortcomings of each of the processes will be briefly described below.

CVA

The CVA process was intended to be a relatively streamlined procedure that did not require the involvement of a court, except for certain statutory filing requirements. It was intended to enable a company to expeditiously reach an arrangement voluntarily with its unsecured creditors.

A company experiencing cash flow problems or financial difficulties could approach all its creditors with a proposal for a voluntary arrangement. It could do so with the aid of a moratorium of up to 60 days to protect it from creditor action, or one or possibly two insolvency practitioners who would provide oversight.

Despite these good intentions, as a corporate rescue mechanism, the CVA process had a number of inadequacies and drawbacks.

- It is limited to private companies; therefore, public companies cannot use the CVA procedure. This is unnecessarily limiting.
- Any company that has granted security over its assets cannot undertake a CVA. This eliminates many eligible private companies.
- The CVA cannot be used in the case of any company that is subject to the Capital Markets and Services Act 2007.
- There is no provision for securing new money or for rescue financing or super priority.
- There is presently no provision ensuring the continuity of essential supply contracts or protecting the company from the exercise of termination rights under ipso facto clauses in contracts while the CVA negotiations are ongoing, despite the benefit of an automatic moratorium that comes into effect on commencement of a CVA.

Judicial management

The judicial management process is a process that allows a creditor or the company to apply for a judicial management order that enables the appointment of an insolvency practitioner as the judicial manager of the company. The appointee is empowered to take control of a company and to come up with a rescue proposal for the company. It comes with the benefit of a wide-ranging statutory moratorium.

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As a practical and effective corporate rescue mechanism, the pre-reform judicial management framework has a number of inadequacies.

- Unlike Singapore, public listed companies in Malaysia cannot use judicial management as a rescue process.
- Judicial management is not available to any company that is subject to the Capital Markets and Services Act 2007.
- A judicial management application is subject to a secured creditor veto, which is antithetical to the notion of corporate rescue.
- As with CVA, there is no provision for rescue financing or super priority or any provision to protect new money.
- The judicial management framework does not provide for the continuity of essential supply contracts, nor does it protect the company from the exercise of termination rights under ipso facto clauses in contracts notwithstanding the moratorium that comes into effect.

The scheme of arrangement procedure

Given that it has existed for more than 50 years, the scheme of arrangement procedure under the Companies Act 1965 and re-enacted in the Companies Act 2016 is the oldest procedure in Malaysia for corporate rescues. It is not exclusively meant for corporate rescue, and it is widely used for non-insolvency-related purposes, after being adapted by insolvency practitioners to suit the needs of distressed companies.

The scheme of arrangement process is a debtor-in-possession restructuring process, so management continues in office and remains in control of the process. In its existing form, there is no role for an external insolvency practitioner's appointment.

While a distressed company taps the scheme process, it can obtain protection against creditor enforcement through a restraining order granted by the High Court on application. If a restraining order is granted, it protects the company pending the passage of the scheme of arrangement through class meetings and up to final court sanction.

Nevertheless, the existing framework for schemes of arrangements has a number of shortcomings.

- The Malaysian courts have restrictively interpreted the restraining order provisions in section 368(2) of the Companies Act 2016 to extend to only existing proceedings against a company, as opposed to future proceedings – a result that is incongruous and illogical.

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- The operative provision empowering a court to grant restraining orders is unclear in respect of when and how it is to be fulfilled. One of the requirements is for the nomination of a director who will represent the creditors. Fulfilling this requirement is a prerequisite to the court's ability to grant a restraining order. The statute requires the nomination to achieve at least 50 per cent creditor support. Failure to meet this hard number for the nomination of a director to represent creditors during the passage of the scheme of arrangement process has effectively given creditors an indirect way of negating a restraining order before it can even be sought.
- A further issue is the problem of interpreting exactly what sort of matters fall within the term 'proceedings'. Section 368(2) empowers a court to restrain 'proceedings', but there is doubt over whether that includes extra judicial proceedings, such as the appointment of a receiver, the repossession of chattels and equipment, and enforcement of security.
- Owing to the phrasing of the empowering provision in section 368(2), there are issues about whether the four prerequisites contained therein must be fulfilled at the time of the company's initial application for a restraining order of three months' or only at the stage when a scheme company seeks a further extension of the initial restraining order.
- In its current form, the legislation provides for a maximum period of nine months in total for any restraining order. The impact of lockdowns resulting from measures to combat the covid-19 pandemic makes a longer period of protection a necessity in Malaysia.
- The current framework does not allow a court to restrain proceedings and other enforcement action against guarantors that have guaranteed debts of the applicant company.
- There is presently no protection for companies that are related to the applicant company, such as the holding company or a subsidiary or related group companies, against creditor enforcement, while the applicant company's scheme proposals are pending.
- The existing provisions in the Companies Act 2016 do not contain any cross-class cramdown provisions that could enable a court to approve a scheme of arrangement at the final sanction stage where there is overwhelming support for a scheme but one dissenting class of creditors.

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- As with judicial management and the CVA, there is currently no provision for the continuity of essential supply contracts or the protection of the company from the exercise of termination rights under ipso facto clauses in contracts while the scheme of arrangement is pending.

The level of use of the corporate rescue mechanisms

Statistics relating to the use of each of the three processes[5] are as follows.

Year	Restraining orders in scheme of arrangement (as at May 2021)	CVA (as at April 2021)	Judicial management (as at April 2021)
2018	32	3	16
2019	5	1	9
2020	14	1	36
2021	28	1	10

The figures make for interesting reading. First, in the first two years after coming into force, the numbers were relatively low for both CVA and judicial management. Second, the numbers confirm the low take-up rate for the CVA, despite it being the simplest corporate rescue mechanism in terms of process and timeline. Finally, at least in 2021, schemes of arrangement seem to be used more compared with judicial management.

The proposed adoption in Malaysia of corporate rescue reforms

In August 2020, the CCM issued a formal public consultation document. The proposed reforms were expressed as a series of policy statements and guiding principles. The policy statements cover areas outside corporate restructuring and insolvency.

In the public consultation paper, SSM proposed the following reforms that are relevant to corporate rescue and restructuring:

- enhancement of the scheme of arrangements framework, including:
  - empowering the Court to grant an automatic moratorium upon an application of a restraining order under section 368;
  - empowering the Court to restrain proceedings against a subsidiary or holding company;
  - empowering the Court to order a meeting for a revote of the proposed compromise or arrangement;

5 The CVA and judicial management processes came into force on 1 March 2018.

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  - empowering the Court to approve a compromise or an arrangement without having the meeting of creditors;
  - empowering the creditor to apply to the Court for a review of the decisions made by the company during the moratorium;
  - allowing super priority for rescue financing;
  - introducing cross-class cramdown provisions; and
  - permitting creditors to apply to restrain dispositions of a debtor's assets during moratorium;
- enhancement of the corporate rescue mechanisms framework by:
  - empowering secured creditors to recover certain categories of properties during moratorium, and
  - allowing super priority for rescue financing; and
- introducing provisions to deal with contractual termination clauses to ensure continuous supply of essential goods and services by:
  - restricting ipso facto clauses; and
  - ensuring continuity of supplies.

Singapore 2018 reforms as foundation for proposed Malaysian reforms

Singapore undertook a corporate rescue reform process between 2010 and 2018. The reform process culminated in the enactment of an omnibus insolvency statute known as the Insolvency, Restructuring and Dissolution Act (IRDA) in 2018.

In Malaysia, a public consultation paper of the CCM used the Singapore reforms as a basis for reforming the Malaysian corporate rescue provisions. Many of the proposed reforms under the various policy statements have been taken from Singapore's reforms in 2017 to the judicial management provisions in the SCA.

Some reforms in Singapore, such as the introduction of an out-of-court pathway towards a company placing itself in judicial management (similar to the out-of-court administration process under the UK Insolvency Act 1986) are not part of Malaysia's proposed reforms.

Proposed Malaysian corporate rescue enhancements and intended effects

Wider access to CVA and judicial management

One of the more pressing areas for reform is access to the CVA and judicial management. The Malaysian proposals, specifically policy statements 10 and 12, broaden access to those rescue mechanisms.

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Under policy statement 10, all companies – whether private or public and whether listed or not – can now avail themselves of the CVA process, except in the case of two narrow exceptions.

The policy statement 12 still excludes publicly listed companies. In this regard, the contrast with Singapore remains, and listed companies will not be able to rescue themselves through judicial management. It is unclear why this should continue to be the case.

Introduction of rescue financing

The availability of rescue financing, in particular under proposed policy statement 3, has the potential to be significantly impactful in ensuring the prospects of success in schemes of arrangement and judicial management. Local Malaysian practitioners, companies and their specialist advisers will undoubtedly have a steep learning curve in familiarising themselves with this new tool.

Given that it is likely that the proposed rescue financing reforms in Malaysia will mirror the equivalent Singapore provisions, section 211E of the SCA and section 67 of the IRDA will provide the template for any new Malaysian provisions. As such, it is expected that the same ground covered in Singapore court decisions on rescue financing since 2017, such as *Re Design Studio Group Ltd & other matters*[6] and *Re Attilan Group Ltd*,[7] will need to be tread afresh in Malaysia. The proposed introduction of rescue financing has been exciting for specialist providers in this field.

Cross-class cramdown in schemes of arrangement

Proposed policy statement 5 in the Malaysian public consultation document envisages the introduction of a power, possibly similar to that in section 211H of the SCA and section 70 of the IRDA, that would enable a court to order a cross-class cramdown in the event that the scheme fails to obtain approval from all classes of creditors. This power would confer on a Malaysian court the power to order a cross-class cramdown to override the lack of approval by a specific class and the failure to achieve the overall requisite statutory majority.

Any such power is also likely to have to provide for the application of the absolute priority rule, whether as a whole or in a modified form, given that the Singapore provisions have imported most of the equivalent provisions in the US Bankruptcy

6 *Re Design Studio Group Ltd & other matters* [2020] SGHC 148.

7 *Re Attilan Group Ltd* [2018] 3 SLR 898.

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Code, 11 USC sections 1126 and 1129. If enacted, then in practice the complexities of satisfying the absolute priority rule when ordering a cross-class cramdown will prove to be a major challenge.

Ordering a revote in a scheme of arrangement

Proposed policy statement 6 concerns a power enabling the court before which a scheme of arrangement is pending to order a revote in the class meetings, without having the entire process be restarted from scratch. This is essentially based on section 211G of the SCA and section 69 of the IRDA.

Reforms relating to filing, inspection and adjudication of proofs of debt

There is a reform proposal under policy statement 7 that will introduce new provisions dealing with the filing, inspection and adjudication of proofs of debt in schemes of arrangement. This may take the same form as section 211F of the SCA and section 68 of the IRDA.

Approval of scheme of arrangement without holding class meetings

Empowering the Malaysian courts to approve a compromise proposed by a scheme company in a scheme without going through a meeting of the creditors of the company is a reform proposal under proposed policy statement 8. It is likely that the proposed provision conferring this power on the Malaysian courts will mirror section 211 I of the SCA and section 71 of the IRDA. Ideally it should contain all the preconditions and safeguards that are contained in the equivalent Singapore provisions.

Court review of company actions post-approval of a scheme of arrangement

Proposed policy statement 9 concerns a new power being conferred on the Malaysian courts to review any act, omission or decision of the scheme company after the scheme of arrangement has been sanctioned by the court. This is to ensure that the scheme company observes all the terms of the scheme, and that aggrieved creditors have some recourse to the courts. This is likely to be a reproduction of section 211J of the SCA and section 72 of the IRDA.

Introduction of automatic moratorium in schemes of arrangement

The proposed introduction of an automatic moratorium in schemes of arrangements is a welcome development. This is covered in proposed policy statement 1.

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Given the problems faced by scheme applicant companies with complying with the four preconditions in section 368(2) of the Companies Act 2016, the introduction of an automatic moratorium will help companies be sure there will be protection against creditor enforcement from day one, without being tangled up with satisfying the four preconditions. The automatic moratorium is a feature of Singapore law relating to schemes of arrangement under the IRDA.

Restraining creditor action against companies related to scheme applicant company

A related reform that has been proposed under proposed policy statement 2 is the introduction of an additional power to be conferred on the Malaysian courts to restrain proceedings, etc, against a subsidiary or holding company of a scheme applicant company on the basis that, among other things, the related company concerned plays a necessary and integral role in the scheme. If enacted, this would essentially comprise a reproduction of section 211C of the SCA and section 65 of the IRDA.

Restraining dispositions of scheme company property during a moratorium

Under proposed policy statement 4, there is a proposal to introduce a restraint on dispositions of property of a scheme company during the period a moratorium is in force. Depending on what the final form looks like, this could be a reproduction of section 211D of the SCA and section 66 of the IRDA.

Any such provision must take care to avoid an overlap with the existing section 368(4) of the Companies Act 2016. Section 368(4) already provides an automatic restraint on any disposition of any property other than in the ordinary course of business unless the Court orders otherwise.

Permitting secured creditor enforcement during judicial management moratorium

Proposed policy statement 13 proposes that in a judicial management, secured creditors be permitted to enforce security while a moratorium is in force, following the creation of a judicial management order. Section 227D of the SCA does not contain this particular provision in favour of secured creditors.

The Malaysian consultation document clarifies that secured creditors will be able to enforce their security in three situations:

- if the property is not required by the company during the period for which a judicial management order is in force;

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- if the period for which a judicial management order is in force poses a high risk to the existence of the property; or
- if the value of the property decreases in value owing to the judicial management order.

Therefore, the secured creditor's ability to exercise any right relating to secured property while the judicial management order is in force is tied to circumstances that either have a prejudicial effect on the value of the property or where the property is not required by the company under judicial management.

Restrictions on ipso facto clauses and ensuring continuity of supply during CVA and judicial management

Proposed policy statement 15 relates to a new provision for the protection of continuity of essential supplies and for a prohibition on the exercise of ipso facto clauses while a company is undergoing a CVA or is under judicial management. This reform will protect companies undergoing restructuring through a CVA or judicial management against both the termination of essential supplies (eg, water, electricity and telecommunication services) and other supply contracts that are crucial to the continuity of their businesses.

This reform is also likely to extend to provisions in contracts where one party can terminate the contract on the grounds that the other party has commenced or become subject to some form of restructuring. Such a restriction exists under the IRDA.

Similar provisions were introduced in Australia under the amendments to the Australian Corporations Act 2001 by the Treasury Laws (Amendment) (2017 Enterprise Incentives No 2) Act 2017 (Commonwealth) (introducing, among other things, the new section 451E).

Proposed reforms do not go far enough

In some respects, the reforms are not far-reaching enough to make a difference to any applicant company experiencing financial difficulties. The judicial management process in particular is in need of bolder reform.

There are areas of concern in respect of the judicial management process in its present form, as well as in its future iteration if the proposed amendments to its framework are enacted. There is a need to expressly provide that the rescuing of the company as a going concern is the primary objective of the judicial management process, as in

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the 2003[8] introduction of the same objective as the primary aim of an administrator under the UK administration regime, rather than the narrowly drawn grounds set out in section 405(1)(a) and (b) of the current Companies Act 2016.

There is also a need to consider a recalibration of the competing interests of secured creditors holding a debenture over the assets and undertaking of the company against the interests of other creditors and the interests of the company itself. The current Malaysian judicial management provisions contain a provision requiring an application for a judicial management order to be dismissed (subject to the limited power of the court to override this if the public interest requires it) if a secured creditor opposes the application or if the holder of a debenture has appointed or intends to appoint a receiver and manager over the whole or substantially the whole of the applicant company's property.[9]

In the reforms enacted in 2017, Singapore rebalanced the equivalent Singapore provision by empowering a court under section 227B(5) of the SCA to override the secured creditor veto in the case that the prejudice caused to the unsecured creditors if a judicial management order is not made is wholly disproportionate to the prejudice caused to the secured creditor if the company is placed in judicial management.[10]

Malaysia did not move to introduce any reform to the secured creditor veto power as part of the reform proposals for judicial management under the 2020 public consultation. The CCM should consider following the Singapore reform in this area under the IRDA, if not the UK reforms under the Enterprise Act 2002.

There is also no move under the Malaysian reforms to introduce a framework for cross-border insolvency. Singapore introduced the UNCITRAL Model Law on Cross-Border Insolvency under the IRDA as part of its efforts to strengthen Singapore as an international debt restructuring centre.

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8 As a result of changes made to the Insolvency Act 1986 (c45) (UK) by the Enterprise Act 2002 (c40).

9 Section 409(a) and (b) of the Companies Act 2016

10 See the description of the Singapore reforms in Rabindra S Nathan, 'Does Judicial Management in Malaysia Sufficiently Embody a Rescue Culture?', *Singapore Academy of Law Journal*, Vol. 32, No. 518, 2020, at No. 70 to 74 on pp. 558–561 and the primary sources cited in the footnotes thereto.

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Why there is a delay in introducing the new reforms

In January 2021, the Malaysian monarch, acting in his constitutional role on the advice of the government, issued a *proclamation of emergency* under article 150 of the Constitution on the grounds that the extent of the covid-19 pandemic constituted a grave emergency within the meaning of article 150.[11]

Consequently, Parliament has not been able to sit as it has been temporarily suspended as part of the measures to combat the pandemic. Although Parliament managed to pass the Temporary Measures For Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 in October 2020, the government was unable to get a bill encompassing the proposed reforms to the Companies Act 2016 presented to Parliament before the proclamation of emergency set in.

Although the state of emergency ended on 1 August 2021, and while Parliament is expected to sit from September 2021 onwards, there may not be sufficient parliamentary time for this proposed bill until later in 2021.

11 Prime Minister's Office of Malaysia, Speech Text of The Special Announcement of Emergency (12 January 2021).

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He was a consultant for Malaysia to the Asian Development Bank (1998–1999) on insolvency law reform (Asian Development Bank Regional Technical Assistance Project No. 5795).

He was engaged as a consultant to the Companies Commission of Malaysia (2015) on the winding-up provisions of the Companies Bill 2015 (eventually the Companies Act 2016).

He has been involved in many of the largest Malaysian insolvencies and restructurings. He was the lead partner for the recent multi-billion dollar Malaysia Airlines group restructuring.

He recently authored 'Does Judicial Management in Malaysia Sufficiently Embody a Rescue Culture?', Singapore Academy of Law Journal, Vol. 32, No. 518, 2020, pp. 518–562.

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ISBN 978-1-83862-600-6