

ALTERNATIVE CAPITAL REDUCTION PROCEDURE

Sanction of the Court – cumbersome much?

Under the present Companies Act 1965ⁱ, the capital of a company can be reduced upon passing a special resolution, provided that the Articles of Association so authorizes it, and the court sanctions the move. The role of the court is to ensure that the creditors' interests are protected against any dissipation of assets as well as to consider if the proposed capital reduction exercise will result in a just and equitable outcome. However, it has generally been noted that the requirement of sanction of the court creates delay and complication to such corporate exercises.

Introducing the 'solvency test' via a solvency statement

The Companies Act 2016 ("2016 Act") seeks to simplify and expedite the implementation of capital reduction procedures by providing an alternative mechanism. Whilst the option of court's confirmation and its procedural mechanism are preserved under the 2016 Act, companies may also opt for an alternative method without the court's intervention in such corporate exercise by satisfying the "solvency test"ⁱⁱ. Under the new solvency test regime, the special resolution must be supported by a solvency statementⁱⁱⁱ signed by all directors affirming that the company satisfies the solvency test in relation to the reduction of capital.

A solvency statement signed without reasonable grounds would constitute an offence. Upon conviction, directors can be liable to a fine of not more than RM500,000.00 or imprisonment of less than 5 years, or both.^{iv} Since directors are exposed to personal liability if the solvency statement is made without reasonable grounds, the 2016 Act prescribes that the directors may (1) take inquisitive measures to determine the company's state of affairs and prospect; and (2) take into account all of the liabilities of the company, including contingent liabilities, in forming an opinion of the solvency of the company. This makes the directors personally liable for the solvency statement signed.

Companies need to satisfy the solvency test in order to reduce capital. The two-step solvency test involves showing:



Onus shifts to creditors to challenge the reduction

In promoting transparency, it is mandatory that the solvency statement be made available to the shareholders of company when passing the special resolution. Once a special resolution is passed, a notice is then to be advertised as well as lodged with the Inland Revenue Board and the Companies Commission of Malaysia within 7 days. This solvency statement is to be made accessible at the company's registered office for a period of 6 weeks after the passing of the special resolution ("the stipulated timeframe"^v). During such period, creditors would be given the opportunity to challenge the reduction of capital and if no application is made by any creditors, the capital reduction shall take effect upon expiry of the stipulated timeframe.^{vi}

Conclusion

Juxtaposed against the old procedure, it is apparent that the 2016 Act seeks to reduce delay as a result of having to apply to the court when implementation could be expedited in non-contentious cases. It would also substantially reduce the cost of a company undertaking voluntary capital reduction. Thus, the modifications implemented under the 2016 Act is greatly welcomed as it marks the progression in the corporate legal landscape.

ⁱ Section 64 of the Companies Act 1965

ⁱⁱ Section 112 of the Companies Act 2016

ⁱⁱⁱ Section 113 of the Companies Act 2016

^{iv} Section 114 of the Companies Act 2016

^v Section 115 - 117 of the Companies Act 2016

^{vi} Section 118 - 120 of the Companies Act 2016