CORPORATE VOLUNTARY ARRANGEMENT

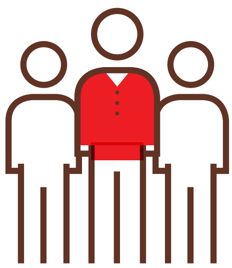
Time to 'Sweet Talk' the Creditors

Under the existing Companies Act 1965 ("1965 Act"), a company facing financial difficulty may enter into a scheme of arrangement or compromise with its creditors or any class of them. A scheme of arrangement is an option available to a financially distressed company, to propose rearrangement of the rights of creditors and to find a compromise for the debts owing to these creditors. The scheme of arrangement requires the approval of the shareholders at a meeting, creditors in creditors' meeting and the sanction of the Court. Once the proposed arrangement is sanctioned by the Court, the arrangement is binding on all shareholders of the company.[i]

With the introduction of Corporate Voluntary Arrangement ("CVA") under the Companies Act 2016,[ii] the company may enter into a binding compromise or arrangement with its creditors without the need for the compromise or arrangement to be approved by the Court.

i Section 176 of the Companies Act 1965
ii Section 395 – 402 of the Companies Act 2016

Under the new 2016 Act a private company can enter into a binding compromise with creditors without the need of a court sanction.



Initiated by company's directors who propose a CVA to the creditors

75%

of the creditors must be in agreement of the proposal the before they appoint a trustee or nominee who will notify the court by the filing of an application for the CVA before implementing it.

"A CVA moratorium generally provides a company additional time to defer repayment and to carry on its business to facilitate the recovery from debts owed."

A moratorium suspends the power of creditors to take action against a company.

But only for Private companies

This CVA only applies to private companies. It does NOT extend to companies regulated under the purview of the Central Bank of Malaysia or that of the Capital Markets and Services Act 2007 or a company with its property or undertaking charged to a secured creditor.

A CVA can be initiated by the directors of the company who will make a proposal for CVA to the creditors, and to appoint a nominee to act as trustee or supervisor for the implementation of the CVA. Once the CVA is approved by the creditors, the nominee shall notify the Court and the company shall be able to implement the CVA.

Moratorium period

Upon filing of the application to the Court for the CVA, the company is entitled to delay performing some of its legal obligations or to effect payment for 28 days or up to a maximum of 60 days, subject to the consent of the nominee, members of the company and 75% in value of the creditors.

Effect of Moratorium in a CVA

A moratorium suspends the power of creditors to take action against a company. The moratorium in a CVA is to prevent the company from being wound up or placed into administration, forebear legal actions or stay any legal proceedings and prevents distress being levied on the property of the company. This allows the financially distressed company some breathing space.

Prohibited actions

- This Court approved CVA will legally bind all creditors, whether or not they attended or voted at the creditors meeting. All creditors are then prevented from taking any steps against the company. This corporate rescue mechanism aids the company from being pressured by aggressive creditors.

- A company who has subjected itself to a CVA shall not during the moratorium period, appoint a judicial manager or make an application to the Court for the company to be placed under judicial management, call or requisite any meeting except with the consent of the nominee or the leave of the Court and subject to such terms as may be imposed by the Court.

- The directors or shareholders shall not during this period pass any resolution for the winding up of the company nor take any steps to transfer any share of the company nor alter the status of any member of the company except with the leave of the Court and the company is bound by the terms and conditions imposed by the Court for the leave granted.

- If the company defaults on the rental or fails to comply with any term or condition of the tenancy agreement during the moratorium period, the landlord or any other person who is entitled to the rental is unable to exercise any right of forfeiture by re-entry to the demised premises tenanted to the company, unless with the leave of the Court.

- As regards to hire purchase goods, hirers may not take any steps to impose on any security over the company's property, or to repossess goods in the company's possession except with the leave of the Court.

- When a CVA moratorium commences, a secured creditor cannot enforce their security during the moratorium period except with the consent of the court. However, the secured creditor may appoint a receiver to deal with the charged property.

Conclusion

A CVA moratorium generally provides a company additional time to defer repayment and to carry on its business to facilitate the recovery from debts owed, rather than to go into liquidation directly. CVA is useful to companies where time is needed to negotiate with its creditors or to find a white knight to save the company from being wound up.