

### **FAQs on Corporate Restructuring and Liquidation**

1. Due to the Covid-19 pandemic, our company is unable to pay its debts when due, but we still believe that our company's business can recover if it is restructured. What types of restructuring are available under Malaysian law?

The Companies Act 2016 provides three different restructuring methods: Scheme of Arrangement (SoA), Company Voluntary Arrangement (CVA), and Judicial Management.

2. What are the benefits of restructuring?

The aim of restructuring is to place the company in a stronger financial footing, such that it can carry on the business as a going concern after restructuring. The restructuring process often entails a period of statutory protection (moratorium), while the company resolves its debts issues.

3. What is the scheme of arrangement?

When the company is not able to pay its debt, a company can resort to a scheme of arrangement. The management of the company continues to rest with the board of directors. The board of directors would call for a meeting of creditors, convened pursuant to a court order, to propose and agree on the restructuring scheme. It requires 75% of the creditors in value to agree to the scheme. If the creditors vote in favour of the proposed scheme with at least 75% majority in value, it binds all creditors or class of creditors.

When applying to the court to convene a creditors' meeting, the company often resorts to applying for a restraining order at the same time. The law allows for a moratorium of 3 months and this period can be extended for 9 months. In order for the court to grant the restraining order, the applicant (the company) must meet stringent criteria.

4. What is the CVA

This mode of restructuring is similar to SoA, in that the management continues to be in the hands of the board of directors. The key difference is that the restructuring scheme may be

proposed and accepted by the creditors without the need to apply to the court to convene a creditors' meeting.

The process requires the company to appoint an insolvency practitioner (referred to as nominee in the *CA 2016*) to provide an opinion on whether the proposed scheme is viable and whether it is likely to be accepted by the creditors. If the nominee is of the view that the scheme should be tabled for consideration by the creditors, the nominee would provide a written opinion on it and file the paper, together with other documents in court. While the paper is filed in court, the court acts as a "depository" of documents but does not hear the case.

Upon filing the requisite papers in court, an automatic moratorium of 28 days sets in. A meeting of creditors shall be called within this moratorium period to consider whether to accept or reject the proposal by the company. If the proposal is voted in favour by 75% of the creditors, it binds all parties (unsecured creditors). Corporate Voluntary Arrangement is not applicable where a company has any secured creditor.

5. What is Judicial Management?
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This mode of restructuring involves the court process and an insolvency practitioner takes control of the management of the company. While the insolvency practitioner manages the affairs of the company, his duties include coming up with a proposal for consideration by creditors, both secured and unsecured.

Upon application to the court to place a company in judicial management, moratorium sets in immediately upon application. That is, all legal proceedings against the company must come to a stop. If the Court decides to appoint a judicial manager, the company enjoys a 6 months moratorium from the date of the appointment. This can be extended for another 6 months. During this period, it gives the company "breathing space" to manage the affairs and restructure its debts while litigation is kept in abeyance. While it may be possible for a creditor to continue with its legal action, leave of court must first be first obtained.

If the proposal is accepted by 75% of the majority of creditors, it binds all parties.

Normally, after the approval, the management of the company reverts to the directors. The company must observe the terms of the restructuring agreement.

6. Which of the restructuring methods is most popular in terms of cost-effectiveness and time-efficiency?

For Corporate Voluntary Arrangement, it is an out-of-court process. It is cheaper and quicker. This mode of restructuring is not available for a public company or a company with any secured creditor.

Restructuring under Scheme of Arrangement involves a court process. The management of the company continues to remain with the board of directors.

On the other hand, if a company is placed in judicial management, the powers of management rest with the judicial manager. Where trust in the management is not an issue or the management of the company is best kept with the board of director, Corporate Voluntary Arrangement or Scheme of Arrangement is a better option.

7. What are some of the practical considerations when selecting and carrying out restructuring?

Start early when there are signs that the company may potentially face solvency issues. There are nuances to restructuring and technical rules that only a restructuring specialist would be familiar with. Seek out the right team of restructuring advisors. Consider the needs and demands of the stakeholders (for example - lenders, trade creditors, buyers, employees, shareholders). Discuss with your advisors on how to handle the stakeholders; their support is essential to a successful restructuring. Develop a plan on how to turn it around, with buy-in from the stakeholders.

8. Our company is thinking about closing down the business. What option is available under Malaysian law?

Liquidation is the available option. The liquidation of a company may take the form of solvent liquidation or insolvent liquidation. Solvent liquidation takes the form of members' voluntary liquidation. Insolvent liquidation takes the form of creditors' voluntary liquidation or court liquidation.

9. What is the members' voluntary liquidation?
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Typical reasons - As business circumstances change, a company may find that it is no longer viable to carry on.

Commencement - The liquidation commences with the directors passing a declaration of solvency, that is the company is able to pay its debts as and when it falls due within the next 12 months. After the declaration of solvency is filed with the authority, the directors will convene a meeting of members (shareholders) for them to resolve that the company be wound-up and that a liquidator is appointed.

Liquidation process - The liquidator's task is to manage the business operations, sell the assets, pay all the liabilities and obtain clearance from the tax authority before taking steps to proceed with the completion of the liquidation. The liquidator should ensure that all liabilities are fully paid. The balance of the money, if any, will be distributed to the shareholders in the form of dividends (return of capital).

Completion of liquidation – After completing the above, the liquidator would call for a final meeting of members to report on the liquidation. The liquidator would also ask for a resolution to be passed to proceed with the dissolution of the company.

10. What is the creditors voluntary liquidation?
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Typical reasons – When the company is no longer able to pay its debts as and when they fall due.

Commencement – The liquidation commences when the directors make a statutory declaration that the company cannot by reason of its liabilities continue its business and such declaration is lodged with the Registrar. The directors shall at the same time appoint an interim liquidator to take charge of the affairs of the company. The powers of directors cease upon the appointment of the interim liquidator. The interim liquidator shall carry out

a meeting of members and creditors within one month to resolve that the company be placed in liquidation and the choice of liquidator.

Liquidation process - The liquidator's task is to manage the business operations, sell the assets and pay all the liabilities. Prior to paying the creditors, the liquidator would call for proof of debt – that is inviting creditors to prove the debts owing to them. Creditors who fail to prove their debt would be disqualified from payment (dividend).

Completion of liquidation - After completing the above, he would call for a final meeting of creditors to report on the liquidation process. He would also ask for a resolution to be passed to proceed with the dissolution of the company.

11. What is court liquidation?
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Typical reasons – A creditor's petition to wind-up the company when it fails to meet the demand for payment of monies owing to them – that is the company fails to pay the amount owing to the creditor. The other common reason is the consequence of a shareholders' dispute and a petition is presented to wind-up the company – that is to bring the business to a close, sell the assets and pay the liabilities.

Commencement – The commencement of the liquidation is from the date the court appoints the liquidator. There are circumstances in which the CA would deem the commencement of liquidation to take place from the date of the petition.

Liquidation process – It is similar to other modes of liquidation. The liquidator's task is to manage the business operations, sell the assets and pay all the liabilities. Prior to paying the creditors, the liquidator will call for proof of debt – that is inviting creditors to prove the debts owing to them. Creditors who fail to prove their debt would be disqualified from payment (dividend).

Completion of liquidation - After completing the above, the liquidator would call for a final meeting of creditors to report on the liquidation process. The liquidator would then report to the court and ask for a dissolution order.

12. What are some of the practical considerations when carrying out a liquidation?

In the case of solvent liquidation (members' voluntary liquidation), advance planning is required. The goal is to bring the business to an orderly cessation; this often entails looking into existing contracts with buyers and suppliers. This must be managed, to avoid liabilities from arising if there is a failure to fulfil contractual obligations. In some cases, the management may have to negotiate to bring a contract to an early end. There is also a need to review balance sheet items and plan for the orderly disposal of assets.

If it involves insolvent liquidation (creditors voluntary liquidation or court liquidation), commence early. A director may be held personally liable for insolvent trading; seek early advice from a restructuring specialist.