THE INTRODUCTION OF THE JUDICIAL MANAGEMENT SCHEME

CHOO BENG SOO

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THE INTRODUCTION OF THE JUDICIAL MANAGEMENT SCHEME

BY

CHOO BENG SOO

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Abstrak

Kertas projek ini memberi tumpuan kepada satu soalan utama, iaitu adakah ini masa untuk meminda Akta Syarikat 1965 untuk mengalu-alukan skim ‘judicial management’, sebagai alternatif lain untuk pembubaran, selain daripada ‘scheme of arrangement’ di bawah S.176 Akta Syarikat 1965? Untuk menjawab soalan ini, ‘scheme of arrangement’ di bawah S.176 Akta perlu diperiksa dan dikaji dengan teliti.

Objektif kertas projek ini adalah untuk mengenal pasti manfaat dan kekurangan daripada S.176 Akta Syarikat 1965, iaitu ‘scheme of arrangment’. Selain itu, ‘judicial management’ yang dicadangkan oleh Corporate Law Reform Committee dan Syarikat Bill 2013 juga akan diperiksa. Ia juga melibatkan kajian perbandingan dengan bidang kuasa yang lain iaitu dengan Republik Singapura dan bagi mencadangkan mana-mana penambahbaikan yang perlu atau pindaan kepada undang-undang semasa.

Kajian mendapati bahawa walaupun jelas kekurangan s 176 Akta Syarikat 1965, iaitu ‘scheme of arrangement , pengenalan Syarikat Bill 2013 tiada apa-apa yang lebih dalam meningkatkan ia . Oleh itu, adalah penting untuk memperkenalkan ‘judicial management scheme’ di Malaysia, sebagai prima facie , ia dapat menyembuhkan isu klasifikasi pemiutang lama wujud dalam ‘scheme of arrangement’. Setelah menyemak peruntukan ‘judicial management scheme’ di Republik Singapura, ia seolah-olah bahawa Syarikat Bill 2013 telah diterima pakai sebahagian besar , tetapi masih terdapat ruang untuk penambahbaikan, sebagai contoh, dalam tempoh moratorium itu, mahkamah diberi kuasa untuk memecat petisyen dan menganggap bahawa perintah ‘judicial management’ telah dibentangkan sembrono , ia boleh membuat apa-apa perintah sebagaimana yang difikirkannya adil dan saksama untuk menangani sebarang ketidakadilan yang mungkin disebabkan , sebagaimana yang diperuntukkan di bawah s 227B (9) Akta Syarikat Singapura. Dan ini perlu diguna pakai oleh Rang Undang-undang Syarikat 2013 kerana ia dapat mengelakkan sebarang ketidakadilan yang disebabkan .

Abstract

This project paper will focus on one key question, viz. is it time to amend the Companies Act 1965 in order to welcome the judicial management scheme, as an another alternative to liquidation, other than the existing scheme of arrangement under s 176 of the Companies Act 1965? In order to answer this question, the existing scheme of arrangement provided under s 176 of the Act has to be examined and studied carefully.

The objectives of this project paper are to identify the benefits and shortfalls of s 176 of the Companies Act 1965, i.e. scheme of arrangement as well as to examine the judicial management scheme that proposed by the Corporate Law Reform Committee and the Companies Bill 2013. It also involves comparative study with other jurisdiction namely with the Republic of Singapore and to suggest any necessary improvements or amendments on the current law.

The study found that the despite the obvious lacking of s 176 of the Companies Act 1965, i.e. scheme of arrangement, the introduction of the Companies Bill 2013 did nothing much in improving it. Thus, it is important to introduce the judicial management scheme in Malaysia, as prima facie, it able to cure the issue of classification of creditors that long existed in the scheme of arrangement. Upon reviewing the judicial management provisions in the Republic of Singapore, it seems that our Companies Bill 2013 had adopted most of it, but there are still room for improvement, for example, during the moratorium period, the court is given the power to dismiss the petition and considers that the judicial management order was presented frivolously, it may make such orders as it thinks just and equitable to redress any injustice that may have been caused, as provided under **s 227B(9) of the Singaporean Companies Act**. And this should be adopted by the Companies Bill 2013 as it able to avoid any injustice being caused.

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CHAPTER ONE

BACKGROUND

1.1 Introduction

When a corporate business falls into financial difficulty, an application may be made to the court for winding up. **S.211 of the Companies Act 1965** recognizes two modes of winding up, viz. voluntary winding up, either by members' or creditors' and winding up by the order of the court, also referred to as compulsory winding up. In addition, there exists the possibility of using a scheme of arrangement for the reconstruction of companies.

The term 'winding up' basically means the process of collecting and realizing the assets of a company, discharging its debts and liabilities and distributing the balance, if any, among its members according to their entitlements or as the constitution of the company directs. After a company is wound up, it is dissolved and its legal and corporate existence comes to an end. Winding up and insolvency of companies in Malaysia is governed by the **Companies Act 1965 (Revised 1973)**. A judgment creditor may petition the court to wind up the corporate judgment debtor on the ground that the company is unable to pay its debts, as stated under **s 218(1)(e) of the Companies Act 1965**.[1] In ***Teck Yow Brothers Hand-Bag Trading Co v Maharani Supermarket Sdn Bhd***[2], the court granted a winding up petition on the ground that the company was unable to pay its debts.

The main objectives of winding up proceeding are to ensure a fair distribution of the assets of an insolvent company amongst creditors and to identify the causes of failure and holding those guilty of mismanagement or misconduct responsible for their acts.

1 Lee Mei Pheng and Ivan Jeron Detta, *Business Law* (Selangor Darul Ehsan: Oxford Fajar Sdn. Bhd., 1999), p.509
2 [1989] 1 MLJ 101

Despite that, it was widely believed that winding up is a very painful process for all the parties involved. For example, a winding up order, whether voluntarily or compulsorily, would certainly have adverse effects on existing employees of the affected company, as their continuity of service would be at stake. In addition, in Malaysia, when a corporate employer becomes insolvent, only certain statutory entitlements of the unpaid employee, for example, wages, salary, retirement benefits, provident fund and workman's compensation are given statutory priority over the other secured or unsecured creditors of the company. However, other statutory benefits such as monetary compensation for retrenchment benefits, unfair dismissal, maternity benefits and indemnity in lieu of notice are not accorded preferential entitlements.

In ***Glaspec (M) Sdn Bhd v Azman bin Ujang and Ors***[3], the Chairman of the Industrial Court, **Dato' Tan Yeak Hui** held that 'the rights of workers should rank ahead in priority to secured creditors, if not at least pari pasu, in the distribution of assets when the company is in liquidation. There is no good reason why the financial institutions (e.g. bank) should always have the right to the first bite just because of their financial muscle. The workers who are instrumental in creating the wealth with the help of the capital provided by the financial institutions should be recognised as having performed a role on par if not more significant than these financial institutions.' [4]

Thus, liquidation or winding up should not be regarded as being the final measure and inevitable result for a company, instead the preservation of a company should be the desirable end for the insolvency process.

[3] Industrial Court Award No. 1746 of 2006 (unreported)

[4] Ashgar Ali Mohamed and Farheen Baig Sardar Baig, "Insolvent Corporate Employer: Whether Workers' Claim Arising Out of Employment Adequately Protected?" Current Law Journal (2007)

Under **s 176 of the Companies Act 1965**, the scheme of arrangement (SOA) provides an opportunity for the business to reconsolidate. The development under s 176 provides a procedure to rescue troubled companies from being liquidated. In addition to s 176, the Corporate Law Reform Committee (CLRC for short) operated under the Companies Commission of Malaysia ('CCM')[5] as well as the Bar Council[6] recommend the introduction of a judicial management scheme into Malaysia in order to complement the existing scheme of arrangement provided for under s 176 of the Companies Act 1965.

'Judicial management' provisions are found in the companies legislation of the United Kingdom[7] and Singapore[8], and were introduced by way of amendment to their legislation. The proposed new scheme is intended to enable a financially distress company to restructure where there is a business case for it to continue its business. In other words, the CLRC and the Bar Council are of the opinion that it would be more appropriate to amend the Companies Act 1965 to provide the making of judicial management orders, in lieu of liquidation/ winding up, to rescue companies given the current economic down turn, i.e. many companies hit by cash flow problems and financial difficulties as well as to give viable companies which are in financial trouble a more even chance to rehabilitate themselves and be restored to profitability. Like in the United Kingdom, a judicial management order should only be made in cases where notwithstanding the inability of the companies to settle its debts, the court is satisfied that the company could be kept alive as a going

[5] "Corporate Insolvency, Rehabilitation And Charges," accessed May 2nd, 2014, http://www.ssm.com.my/en/clrc/consultation-document/cd10
[6] "Judicial Management Scheme," accessed May 30th, 1998, http://www.malaysianbar.org.my/press_statements/judicial_management_scheme.html
[7] The Companies Act 1985 is an Act of the Parliament of the United Kingdom of Great Britain, which enable companies to be formed by registration. It has largely been superseded by the Companies Act 2006.
[8] All companies in Singapore are governed by the Singapore Companies Act (Cap 50 of the 1994 Revised Edition of the Singapore Statutes).

concern and be able to implement a scheme of arrangement to settle its debts, and that overall it would be more advantageous to do so than wind up the company.

In general, judicial management allows the aggrieved party to apply to the court to place the management of the company in the hands of a qualified independent person with the necessary skill and knowledge known as judicial manager. Once appointed by the court, the judicial manager, will prepare a workable restructuring plan which must be acceptable to the majority of the creditors. The plan will be implemented once approved by the creditors and sanctioned by the court. A judicial management scheme is generally beneficial to all parties concerned. It able to benefit the shareholders who would otherwise lose their investment in the companies as well as the employees of the company who would have the possibility of retaining their jobs; and the unpaid creditors who will have the chance of being paid their debts.[9]

The CLRC recommends the application for judicial management be made by the company or its directors. The grounds for appointment of judicial manager is when the company is or will not be able pay its debts, the approval of a resolution by members of the board of directors or the creditors of the company and a more advantageous realization of the company's assets than could be affected on a winding up. The effect of filing an application for judicial management is the commencement of a moratorium. During this period of time, no winding up order can be made or any petition for winding up will be dismissed, receiver and manager shall vacate their office and no new appointment of a receiver and manager is permitted, legal proceedings against the company cannot be commenced unless with prior leave of court and etc. The moratorium shall end upon the appointment of the

[9] "Judicial Management Scheme," accessed May 30th, 1998, http://www.malaysianbar.org.my/press_statements/judicial_management_scheme.html

judicial manager. The CLRC recommends that the judicial manager should be given 180 days to prepare a workable restructuring plan which must be acceptable to the majority of the creditors. The plan once approved by creditors shall be binding on all creditors of the company whether or not they have voted in favour of the plan.

Essentially, the government has been urged by the CLRC and the bar council to consider introducing judicial management provisions in our Companies Act 1965.

As a result, on 2 July 2013, the Companies Commission of Malaysia published a draft of the new **Companies Bill** for public consultation. The Bill sets out the legal framework that will replace the current Malaysian Companies Act 1965 and aims to introduce a modernized corporate legal framework for Malaysia; in line with current international standards.

1.2 Problem statement

In order to stave off liquidation or winding up, an ailing corporate business may present a scheme of arrangement which seeks to implement a compromise or other arrangement with creditors. A scheme of arrangement is what is put in place to bind the company's creditors and/or other members to some form of rearrangement of their rights and obligations. The scheme of arrangement must be sanctioned/ approved by the court as well as by creditors and/or members of a company, or any class or classes of them, in accordance with s 176 of the Companies Act 1965.

However, according to s **176(3) of the Companies Act 1965**: -

'If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting or adjourned meeting agrees to any compromise or arrangement the compromise or arrangement shall, if approved by order of the Court,

be binding on all creditors or class of creditors or on the members or class of members (as the case may be) and also on the company, or in the case of a company in the course of being wound up, on the liquidator and contributories of the company.'

Thus, one of the difficulties or problems imposed by s 176(3) is that if any significant creditor does not agree to the compromise and enforces its debts in full ('the Act requires at least 75% of the creditors present and voting at the meeting agrees to any arrangement'), an internal compromise will probably fail.

On a side note, if the scheme is agreed by the three-fourth of the creditors and/ or members and approved by the court, it will bind the dissenting creditors and/or members, i.e. it allows the company to bind a dissenting minority of up to 25% in value and 50% in number. In other words, the scheme once approved by 75% of the creditors shall be binding on all creditors of the company whether or not they have voted in favour of the plan.

Beside that, the company must identify and divide the creditors into separate classes as held by **s 176(1) of the Companies Act 1965** in which it provides that 'where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them Court may, on the application in a summary way of the company or of any creditor or member of the company, or in the case of a company being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the Court directs.' In other words, where different classes of creditors and members exist, class meeting should be convened, the court may refuse to approve a scheme if it considers that the creditors have not been properly classified.

Moreover, prior to the enforcement of s 176(10A) of the Companies Act 1965, the moratorium against creditors that was granted by the courts was often applied for ex parte and had an undefined duration. As a result, it gives rise to serious issues of non-performing loans (NPL) being unrecoverable or creatively destructed. This is due to difficulty in interpreting the term ‘proceedings’ under s 176(10), i.e. power of court to restrain proceedings.

S 176(10) of the Companies Act 1965 states: -

‘Where no order has been made or resolution passed for the winding up of a company and any such compromise or arrangement has been proposed between the company and its creditors or any class of those creditors, the Court may, in addition to any of its powers, on the application in a summary way of the company or any member or creditor of the company restrain further proceedings in any action or proceeding against the company except by leave of the Court and subject to such terms as the Court imposes.’

The current trend is to let the court to interpret the word on a case to case basis. There should be obligations imposed on the parties to list down all anticipated proceeding so as to allow clarity and full disclosure in the order. The lack of clarity has caused a lot of intervener proceedings and greatly increased the costs.

Also, it should be noted that notwithstanding the enforcement of **s 176(10A) of the Companies Act 1965,** i.e. ‘the court may grant a restraining order under s 176(10) to a company for a period of not more than 90 days or such longer period as the Court may for good reason allow if fulfilled the requirements stated under s 176(10A)(a)-s 176 (10A)(d)’. In other words, it is possible for the creditors to be restrained from enforcing their security for unduly long periods due to the existence of restraining

order for a maximum period of 90 days and the court may further extend the period provided the company has fulfilled the requirements under s 176 (10A) of the Companies Act 1965.

Thus the Corporate Law Reform Committee had urged the introduction of a judicial management scheme into Malaysia in order to complement the existing scheme of arrangement provided for under s 176 of the Companies Act 1965. This is because the scheme under s 176 is still seen as cumbersome and slow in its procedure and implementation specifically if it is used for corporate rehabilitation or rescue purposes.

1.3 Research questions

(a) What is scheme of arrangement? What are the benefits and shortfalls identified under the s 176 of the Companies Act 1965? Will the Companies Bill 2013 able to cure any shortfalls that existed in our current s 176?

(b) Whether the judicial management scheme under the recommendation of the Corporate Law Reform Committee able to cure the shortfalls in the current s 176 of the Companies Act 1965?

(c) What can the Malaysians learn from the application of the judicial management scheme in the Republic of Singapore?

(d) Is there any recommendations, suggestions or amendments that need to be made?

1.4 Research objectives

The objectives of this paper are as follows: -

(a) To examine the current insolvency regime in Malaysia, specifically s 176 of the Companies Act 1965;

(b) To identify the benefits and shortfalls of s 176 of the Companies Act 1965, i.e. scheme of arrangement and to determine as to whether the Companies Bill 2013 able to solve the problems that existed in s 176;

(c) To examine the judicial management scheme that proposed by the Corporate Law Reform Committee as well as the Companies Bill 2013;

(d) To make a comparative analysis of the judicial management scheme implemented in the Republic of Singapore with the recommendations made by the Corporate Law Reform Committee and Companies Bill 2013;

(e) To suggest improvements in the recommendations made by the Corporate Law Reform Committee.

1.5 Significance of the study

This paper will provide an overview of the effects of rehabilitation and winding up/liquidation proceedings upon a corporate business. Comparison will be drawn between the corporate rehabilitation framework, i.e. scheme of arrangement under s 176 of the Companies Act 1965 and the drastic approach of liquidation under s 211 of the Companies Act 1965, in order to decide which one will be beneficial for all the parties concerned in the event the corporate falls into financial difficulty.

In addition, this paper will also engage in in-depth discussion on the advantages and disadvantages of scheme of arrangement in order to decide its usefulness. Beside that, this paper will give an insight of the judicial management scheme recommended by the Corporate Law Reform Committee and to study its strengths and weaknesses based on the comparative analysis of the judicial management scheme that was implemented in the Republic of Singapore.

This paper is an attempt to give consolidated reasons as to why judicial management scheme should be implemented in our Companies Act 1965.

1.6 Research methodology

Research for this paper will be undertaken by using primary sources namely statute mainly Companies Act from Malaysia, Republic of Singapore and judicial interpretations in the form of case laws. The research also uses secondary sources such as journals, articles, textbook, documents from websites. This is a qualitative research. In other words, it requires thorough analysis and evaluate of both the primary and secondary data that is accumulated from library based archives, such as textbooks as well as articles, journals, documents from websites.

This study will also utilize a comparative research method with other jurisdiction namely Republic of Singapore. The underlying purpose of this comparison is to search for similarity and variance to understand the issues better. In any comparative legal study, the researcher may find the similarities and dissimilarities between two situations existing within the same legal system.

In general terms any research process involves a meticulous procedure of investigation, examining, evaluate, explore, explain and distinguish particular problem in detail by the assistance of specific methodology or approach employed in the intermediate stage of data collection to the final stage of presenting the research findings.

1.6.1 Types of data

In so far as this project paper is concerned, two types of data will be used, viz. primary sources and secondary sources. Primary data refers to statutes mainly Companies Act from Malaysia, Republic of Singapore and judicial interpretations in the form of case laws be it reported in journals or otherwise. The research also uses secondary sources such as textbooks, articles, journals, documents from websites and other library based information.

1.6.2 Data collection method

The study in this research will be purely doctrinal legal research involving data collection style of both primary and secondary sources. The data will be derived from various sources such as website and library based materials such as books,

journals, articles, legal doctrines, statutes, reports, previous thesis and dissertations and other relevant and related materials. The so collected data will be than evaluated critically and analysed to extract the reliable information.

1.6.3 Analysis of data

In this study, the research applies analytical and critical analysis.

An analytical approach involves careful examination and evaluation of the materials involved so as to understand, explain and draw a conclusion.

Critical approach is different from analytical approach in that in critical approach, the researcher will examine and evaluate the materials meticulously, list down the shortfalls and gives own opinion as to why the researcher agrees or otherwise based rational grounds and supported by evidence and justifications.

In this research both methods employed to examine the strengths and discrepancies of scheme of arrangement. That being the case, the relevant provisions under the statute be it in Malaysia and other jurisdictions are analyzed and criticized.

It must also be emphasised here that this project will be a comparison between the provision for judicial management scheme implemented in the Republic of Singapore as well as recommendations made by the Corporate Law Reform Committee and Companies Bill 2013.

Conventional method will be employed in analysing the sources both primary and secondary as it relates closely to legal study that identifies the related regulations and principles through meticulous examination of the relevant materials such as journals, articles, report and precedence.

1.6.4 Scope of the study and limitation of the study

Scope of the study focuses on the recommendations made by the Corporate Law Reform Committee as well as the Bar Council regarding the introduction of the judicial management scheme in our Companies Act 1965. The position is compared with other jurisdiction namely the Republic of Singapore. In order to appreciate and understand the research as a whole it is important to know the effects of the rehabilitation and winding up proceedings that will have upon a corporate business. By doing so, it able to give a clear vision as to which one will be beneficial to all the parties involved. The paper will then proceed to discuss the pros and cons of the scheme of arrangement, through this, a conclusion will be reached as to whether judicial management scheme is in need in order to complement the lacking of the scheme of arrangement under s 176 of the Companies Act 1965. Towards the end, recommendations and suggestions will be made in the hope that it able to overcome the problems that existed in our corporate insolvency regime.

In the process of conducting this research, the researcher had faced certain limitations. Amongst the problems encountered whilst writing this research paper is difficulty in finding related local materials such as articles, journals, books, reports or precedence in the form of earlier thesis or dissertation on judicial management as this scheme has yet to be introduced in Malaysia. The other problem encountered centre around collection of data namely statutes, provisions and articles from other jurisdiction, i.e. the Republic of Singapore.

1.7 Literature Review

The main question here would be is it time to amend the Companies Act 1965 in order to welcome judicial management scheme, as an another alternative to liquidation, other than the existing scheme of arrangement under s 176 of the Companies Act 1965.

The appellation 'judicial management' was borrowed from South African legislation, but it is in fact based on the administration regime in the United Kingdom.[10]

The principal aim of a judicial management order is to place a moratorium on claims against a debtor company that qualifies for the order to give it a brief respite to rehabilitate itself under a scheme to settle its debts.

The Corporate Law Reform Committee as well as the Bar Council had repeatedly urged the government for the adoption of a provision for judicial management in the Companies Act 1965 as a viable alternative to s 176 of the Companies Act 1965 as it had worked successfully in the Republic of Singapore and the United Kingdom.

It is strongly believed that judicial management order able to provide objectivity which is lacking in s 176, in which under s 176 it allows the court to restrain proceedings where a scheme of arrangement has been proposed. The idea of the judicial management scheme is to have the court appoint a manager, usually a professional accountant, to oversee the troubled companies which would enjoy a moratorium on claims by creditors. At the same time, the troubled companies would have to work out an arrangement to settle the debts, which has to be approved by the courts and the creditors. Either the debtor company or creditors can initiate the court proceeding for a judicial management order. Thus, judicial management order will

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[10] Lee Eng Beng, "Recent Developments In Insolvency Law And Business Rehabilitations- National And Cross Border Issues," http://www.aseanlawassociation.org/docs/w6_sing.pdf

take into account the interests of both debtor and creditor and this is undertaken under the supervision of an independent person known as the judicial manager and this ensures against abuse.

1.8 Organization of the paper

This project paper consists of five chapters.

Chapter one is to provide an overview on the corporate insolvency regimes in Malaysia and to explain the effects of liquidation and rehabilitation proceedings that will have upon a company.

Second chapter is to discuss the pros and cons of s 176 of the Companies Act 1976, i.e. scheme of arrangement .

While, the **third chapter** will elaborate the Corporate Law Reform Committee's recommendations on judicial management and to study its strength and weakness.

Chapter four would be comparative study and analysis with other country namely the Republic of Singapore.

And last but not least, **chapter five** would be recommendations and conclusion.

CHAPTER TWO

SCHEME OF ARRANGEMENT

2.1 Introduction

An ailing company in Malaysia may work out a restructuring process through the s 176 of the Companies Act 1965, i.e. scheme of arrangement with a view to rehabilitation (**Clause 431 until Clause 437 of the Companies Bill 2013** deal with scheme of arrangement).

In other words, the main or common use of such a scheme is the restructuring of the financial affairs of a company heavily burdened with debts. Where a company is heavily burdened with debts, but there is a possibility the business may be viable, the company may persuade its creditors that it is their interests to accept a compromise where their debts are concerned. Thus, instead of enforcing their debts or winding up the company, the creditors will accept less than the full amount in final satisfaction of their debts.

2.2 Scheme of arrangement procedures[11]

The scheme of arrangement takes place over four steps.

The first step is an application will be made to the court for a meeting of affected creditors and/ or members to some form of rearrangement of their rights and obligations. Where there are different classes of members or creditors, class meetings may have to be held, as stated by **s 176(1) of the Companies Act 1965**. [this is provided under **clause 431 of the Companies Bill 2013**]

[11] "Usefulness Of Scheme Of Arrangement," accessed September 28th, 2009, http://www.theedgemalaysia.com/commentary/151890-counsel-usefulness-of-schemes-ofarrangement.html

The second step is creditors and/or members must approve the scheme. According to **s 176(3) of the Companies Act 1965**, the required majority is a majority in number representing three-quarters (75%) in value of who actually vote. [this is provided under **clause 433(1) of the Companies Bill 2013**]

While the third step, as provided by **s 176(4) of the Companies Act 1965**, involves an order made by the court approving the scheme of arrangement. But before that, the court must be satisfied of three matters, namely (1) the provisions of s 176 have been complied with, e.g. as to whether the creditors and/or members have been properly divided into classes; (2) those who attended the meeting were fairly representative of the class of creditors and that the statutory majority did not coerce the minority; and (3) the scheme is one in which a man of business or an intelligent and honest man, being a member of the class concerned, would reasonably approve.

And last but not least, as per **s 176(5) of the Companies Act 1965**, a copy of the court order is lodged with the Companies Commission of Malaysia, from which time the scheme takes effect. [this is provided under **clause 433(4) of the Companies Bill 2013**]

2.3 Issues surrounding scheme of arrangement

2.3.1 Classification of creditors[12]

As mentioned above, the first judicial stage in a compromise or arrangement is the application to the High Court for an order pursuant to s 176(1) of the Companies Act 1965 that meetings of the company's creditors or class of creditors or of the members

[12] Mohamad Illiayas, "Schemes of arrangement under S.176 of the Companies Act 1965: The Criticalness Of Correct Classification Of Creditors And The Lot of Providers Of Islamic Credit," Malaysia Law Journal Articles (1999)

of the company or class of members be called for the scheme to be voted on.[13] Separate meetings of creditors and members should be called upon. Although s 176(1) vests the court with the power to order the meetings, the responsibility for determining what creditors to be summoned to any meeting as constituting a class rests with the applicant ('company'). The question of what constitutes a 'creditor' and a 'class of creditors' is not an easy one. The fact that the Companies Act does not define the terms compounds the difficulty as improper classification will stymie or hinder the scheme for that will be a ground upon which the court may refuse to grant approval for the scheme which it is empowered to do under s 174(4) of the Companies Act 1965.[14] In other words, if the meetings are incorrectly convened or constituted, or an objection is taken to the presence of particular creditors as having interests competing with those of the others, then the necessary agreement is not obtained, and the court has no jurisdiction to sanction the scheme of arrangement.

In the case of ***Sovereign Life Assurance v Dodd***[15], holders of life insurance policies which had matured at the time of the meeting of creditors were held to form a distinct class from those whose policies had not then matured. In other words, **Bowen LJ** held that classes are viewed as separate if their rights are so different that they will not be able to consult together with a view to their common interest. In other words, creditors whose rights are so dissimilar to each other's that they cannot sensibly consult together with a view to their common interest must vote in different classes. What is the reason for such a course? **Lord Esher MR** in the same case stated that '...it is because creditors composing the different classes have different

[13] S 176 (1) of the Companies Act 1965 held that 'where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them Court may, on the application in a summary way of the company or of any creditor or member of the company, or in the case of a company being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the Court directs.

[14] S 176(4) of the Companies Act 1965 held that 'the court may grant its approval to a compromise or arrangement subject to such alterations or conditions as it thinks just.'

[15] [1892] 2 QB 573

interests; and therefore, if we find a different state of facts existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes.'

The Federal Court recently in the case of ***Francis a/l Augustine Pereira v Dataran Mantin Sdn Bhd & 6 others***[16] has set out the definitive test on what constitutes a class of creditors within the meaning of S.176 of the Companies Act 1965. What happen in this case was Dataran Mantin Sdn Bhd ("Dataran Mantin") was a property development company involved in a joint venture luxury condominium project ("Project") with its wholly-owned subsidiary, Mico Vionic Sdn Bhd ("Mico Vionic"). Mico Vionic was the registered proprietor of the land on which the Project was being built ("Project Land"). OCBC Bank had extended credit facilities to Dataran Mantin which were secured by a charge over the Project Land and a fixed and floating charge over the assets of Dataran Mantin.

Construction of the Project commenced in December 2004 but was abandoned in April 2007 when it was approximately 35% completed.

An unsecured creditor, Perkhidmatan Keselamatan Laksamana (M) Sdn Bhd, filed a winding up petition against Dataran Mantin in 2009 and Provisional Liquidators were appointed. While these winding up proceedings were still on foot, several purchasers of the condominium units in the Project formulated a scheme of arrangement for Dataran Mantin pursuant to section 176 of the Act.

The scheme provided for a white knight company to acquire the Project and the Project Land from OCBC Bank. The white knight would complete the development of the Project and use a portion of the profits to satisfy the debts of the Project

[16] [2013] 6 MLRA

creditors, which was defined as the secured creditor of the Project, namely OCBC Bank, the unsecured creditors of the Project and the purchasers of the condominium units of the Project. The scheme excluded all the other secured and unsecured creditors of Dataran Mantin. The scheme was supported by the Provisional Liquidators of Dataran Mantin.

In June 2011, these purchasers obtained a Court Order under section 176 of the Act sanctioning this scheme ("Sanction Order"). Subsequently, several unsecured creditors who were excluded from the scheme filed an application to set aside the Sanction Order.

In November 2011, the High Court allowed the setting aside application and on the same day, ordered the winding up of Dataran Mantin. The appeal by the Provisional Liquidators and the purchasers who initiated the scheme was allowed by the Court of Appeal and the Sanction Order was reinstated.

Leave was granted to the unsecured creditors of Dataran Mantin who were excluded from the scheme to appeal to the Federal Court on two questions of law.

The first question of law before the Federal Court was as follows:-

"Who in law would constitute a class of creditors within the meaning of section 176 of the Act?"

The Federal Court expressly adopted the established principle in Sovereign Life Assurance Co v Dodd and answered that a class of creditors would be "all creditors of a company whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest".

Notwithstanding that, the common interest approach must not be permitted to overshadow the principal basis of the classification — namely, the similarity of rights — while creditors with similar rights may meet together to consider whether an arrangement should be accepted, their interests may be dissimilar. The existence of an interest not arising from the legal rights of a creditor may be relevant in ascertaining whether the creditor has acted in good faith vis-a-vis the interest of the class. However, it should not provide the basis for the holding of different class meetings to consider the arrangement. If the determining factor for the classification is to be the interest of the creditor without proper regard to his rights, it could inter alia lead to a greater number of meetings than are necessary to determine their views and wishes.

In summary, the rights and interests arising from a creditor's claim as well as any facts exist with respect to different creditors, which may clearly affect their minds and judgments differently, should be taken into consideration in determining a class.

* **Clause 433(2) of the Companies Bill 2013** provides that 'the compromise or arrangement shall be binding on…if the compromise or arrangement is agreed by a majority of seventy five per cent of the total value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting or the adjourned meeting and has been approved by order of the Court.'

It seems that the requirement to classify creditors according to their interest still exist in the Companies Bill 2013.

2.3.2 Approval of at least 75% in value for the scheme of arrangement?

S.176 of the Companies Act 1965 provides a mechanism to facilitate a formal compromise which binds dissenting participants so long as agreement by the statutory majority had achieved, and subject to the approval of the Court.[17] It is believed that it will help to overcome the impossibility or impracticability of obtaining unanimous consent of all the creditors to implement a debt restructuring scheme. Also as the scheme requires the approval of the Court, it able to ensure that the scheme is 'fair and reasonable' as the court will consider the issue of procedural fairness as well as hear objections from the dissenters.

Notwithstanding the reasoning, S.176 is known as a double edge sword. This is because if any significant creditor does not agree to the compromise and enforces its debts in full ('requires at least 75% of the creditors present and voting at the meeting agrees to any arrangement'), an internal compromise will probably fail. In addition, if the scheme is agreed by three-fourth of the creditors and/ or members and approved by the court, it will bind the dissenting creditors and/or members, i.e. it allows the company to bind a dissenting minority of up to 25% in value and 50% in number. In other words, the scheme once approved by 75% of the creditors shall be binding on all creditors of the company whether or not they have voted in favor of the plan.

***Clause 433(2) of the Companies Bill 2013** provides that '<u>the compromise or arrangement shall be binding on</u>—

(a) <u>all the creditors or class of creditors; or</u>

[17] S.176(3) of the Companies Act 1965 held that 'if a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting or the adjourned meeting agrees to any compromise or arrangement the compromise or arrangement shall, if approved by order of the Court, be binding on all the creditors or class of creditors or on the members or class of members (as the case may be) and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(b) the members or class of members; and

(c) the company; or

(d) the liquidator and contributories, if the company is being wound up,

if the compromise or arrangement is agreed by a majority of seventy five per cent of the total value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting or the adjourned meeting and has been approved by order of the Court.

In other words, under the Companies Bill, once the scheme of arrangement is agreed by three-fourth of the creditors or members and approved by the court, it will bind the dissenting creditors and/or members as well, whether or not they have voted in favor of the plan.

2.3.4 Restraining order[18]

In the interim period between the proposal of a scheme (the details of which may not completely finalized) and its approval by the court, a company would be vulnerable to its creditors who may move to wind up a company or institute execution proceedings on the assets of the company.

Under **s 176(10) of the Companies Act 1965**, the company or any member or creditor of the company may apply to the court to restrain further proceedings in any action or proceeding against the company, except by leave of the company.[19] Such an order to restrain 'any action or proceeding' would extend to restraining legal suits,

[18] "Scheme Of Arrangement- Restructuring The Debts Of A Financially Distressed Companies," accessed December 4th, 2009, http://klbar.blogspot.com/2009/12/relevan-online.html

[19] S.176 (10) of the Companies Act 1965 held that 'where no order has been made or resolution passed for the winding up of a company and any such compromise or arrangement has been proposed between the company and its creditors or any class of those creditors, the Court may, in addition to any of its powers, on the application in a summary way of the company or any member or creditor of the company restrain further proceedings in any action or proceeding against the company except by leave of the Court and subject to such terms as the Court imposes.

execution proceedings or winding up petitions filed against the company. The current trend is to let the court to interpret the word on a case to case basis. There should be obligations imposed on the parties to list down all anticipated proceeding so as to allow clarity and full disclosure in the order. The lack of clarity has caused a lot of intervener proceedings and greatly increased the costs.

Thus, it was heavily criticized as the use of a restraining order as a means for 'buying time' is possibly made by debtor companies. Therefore amendments were introduced in 1998 which aimed at enhancing creditors' protection during this interim period.

2.3.5 Restraining order for a period not more than 90 days

An application for a restraining order can now only be made upon additional conditions provided under the additional **subs (10A) of S.176** are met afresh. The subsection reads:

The Court may grant a restraining order under subsection (10) to a company for a period of not more than ninety days or such longer period as the Court may for good reason allow if and only if: -

(a) it is satisfied that there is a proposal for a scheme of compromise or arrangement between the company and its creditors or any class of creditors representing at least one-half in value of all the creditors;

(b) the restraining order is necessary to enable the company and its creditors to formalize the scheme of compromise or arrangement for the approval of the creditors or members pursuant to subsection (1);

(c) a statement in the prescribed form as to the affairs of the company made up to a date not more than three days before the application is lodged together with the application; and

(d) it approves the person nominated by a majority of the creditors in the application by the company under subsection (10) to act as a director or if that person is not already a director, notwithstanding the provisions of this Act or the memorandum and articles of the company, appoints the person to act as a director.[20]

An application to extend the restraining order may be sought by the company. The court is expected to strike a fine balance whether to allow the extension of restraining order so that the company can work out it rescue plan or not to be based on "good reason" under subs 10A of S.176. The subsection provides that a restraining order may be extended for such a longer period only for "good reasons" and "if and only if" conditions (a)–(d) of S.176(10A) have been satisfied.

The meaning of "good reason" is subject to the court's interpretation. Its meaning may be drawn from case law prior to the 1998 amendments. The "good reason" requirement may be fulfilled once a feasible plan of rescue is presented, as illustrated in ***Re Kuala Lumpur Industries***.[21] In that case, the court was satisfied that a bona fide scheme of arrangement was proposed and presented, which gave more than a general layout but with sufficient details provided to the creditors to enable them to make informed decisions as to its feasibility and merits. An application by the plaintiff to set aside the restraining order by arguing that the application was to obstruct the winding-up of a hopelessly insolvent company was dismissed. VC George J in the final paragraph of his judgment said that:

[20] Companies Act 1965
[21] [1990] 2 MLJ 253

'….[T]he whole point of section 176 is to provide a statutory remedy to sort out the problems of ailing companies without letting them go under.'

On the other hand, in ***Twenty First Century Oils Sdn Bhd v Bank of Commerce (M) Bhd. (No 2)***[22], it was held that the scheme of arrangement proposed and presented must not be such that it is bound to fail. In this case, **Abdul Malek J** found that the proposed scheme was ''not viable, feasible, workable or intelligible", and he found from the facts which showed that more than three-fourths majority of the creditors indicated their objections.

Several more safeguards for creditors are also provided under subss (10B), (10C), (10D) and (10E) of the amended s 176. They are:

(10B) The person approved or appointed by the Court to act as a director of the company under subsection (10A) shall have a right of access at all reasonable times to the accounting and other records (including registers) of the company, and is entitled to require from any officer of the company such information and explanation as he may require for the purposes of his duty.

(10C) Any disposition of the property of the company, including things in action and any acquisition of property by the company, other than those made in the ordinary course of business, made after the grant of the restraining order by the Court shall, unless the Court otherwise orders, be void.

(10D) Where a company disposes or acquires any property, other than in the ordinary course of its business, without leave of the Court, every officer of the company who is in default shall be guilty of an offence against this Act. Penalty: Imprisonment for five years or one million ringgit or both.

(10E) Where an order is made under subsection (10), every company in relation to which the order is made shall, within seven days–

[22] [1993] 2 MLJ 353

(a) lodge an office copy of the order with the Registrar; and

(b) publish a notice of the order in a daily newspaper circulating generally throughout Malaysia, and every company which makes default in complying with this subsection and every officer of the company who is in default shall be guilty of an offence against this Act. Penalty: One hundred thousand ringgit.

The striking features of the amendments are particularly noticeable under subss (10C) and (10D) where the leave of the court is required before any disposal of the company's property is made. Courts may declare that such a disposal which is not in the ordinary course of business is void. The amendments promote full disclosure at the earliest possible stage of the scheme. The amendments also reinforce creditor protection through possible criminal sanctions against the officers. The changes therefore reduce the prospect of abuses of the provisions and prevent an ailing company from merely obtaining a moratorium to hold off claims by its legitimate claimants.

However, it should be noted that despite the 1998 amendments, as shown above, the creditors' fear remains when s 176 is invoked. In the case of ***Re Kai Peng Berhad***[23], an issue arose as to the requirement under para (a) of subs (10A) which states that:

'…[T]here is a proposal for a scheme of compromise or arrangement between the company and its creditors or any class of creditors representing at least one-half in value of all the creditors.'

The creditors argued that the applicant had failed to show that the scheme would obtain the approval of the statutory majority required of at least half of its creditors. The facts showed that those who have agreed to the scheme merely represent just slightly over 30 per cent of the total creditors, including one which was a wholly

[23] [2007] 8 CLJ 703

owned subsidiary of the applicant company. The opposing creditors argued they should not be taken to represent the views of the general body of creditors of the application. They argued that s 176 (10A)(a) requires the applicant to show proof that more than 50 per cent of its creditors have approved the proposed scheme of arrangement. **Ramli Ali J**, however, disagreed with the opposing creditors and held that their view was an erroneous construction of the said subsection. He said:

If such approval of the creditors is required (at that stage of the scheme) why then the requirement in s 176(3) of the Act for the proposed scheme to be approved at the creditors' meeting. Approval of the creditors is only relevant at the stage of the creditors meeting ordered by the court under s 176(3) of the Act, but not at the stage of asking for an extension of the restraining order under s 176(10A). A proper construction of s 176 (10A)(a) will show that all the applicant needs to show is that the scheme as proposed, involves more than 50% of its creditors. As long as 50% of its creditors can avail themselves of the proposed scheme, the statutory requirement under s 176(10A)(a) would be fulfilled.

The opposing creditors also argued that there is no useful purpose of sanctioning a creditors' meeting as the scheme is likely to fail for failure to obtain the approval of the statutory majority required under subs (3) of s 176. Ramli J however said that:

The court could not anticipate what would be the decision or resolution of the creditors meeting which had not been held yet. It is up to all the creditors or classes of creditors to deliberate on the issue at their respective meetings and to resolve the matter. Therefore, that issue would not be a reason for the court not to sanction the meeting or to extend the restraining order as requested by the applicant in the present case.

As discussed above, in Twenty First Century Oils Sdn. Bhd. v Bank of Commerce (M) Bhd (No 2) an overwhelming rejection indicated by the three-fourths majority of creditors before the scheme was proposed led the court to decide that the scheme was "not viable, feasible, workable or intelligible". However, in Re Kai Peng Berhad , the fact that only 30 per cent of creditors showed their support was not enough to convince the court that the scheme may be rejected. With due respect, the Re Kai Peng Berhad (2007) case shows a judicial attitude of favoring the company to proceed with the scheme and in due course preventing some creditors from thwarting the invocation of s 176. This means, the applicant company does not have to show that there are at least 50 per cent of the creditors who support the scheme. Instead, the burden is shifted on the opposing creditors to prove that the scheme is opposed by 50 per cent of the creditors.

Thus, it is submitted, that on a plain reading of the wording of s 176 (10A)(a) of the Act, the interpretation of Re Kai Peng Berhad (2007) is to be preferred.[24]

[*see 2.4.2 page 31]

2.4 Companies Bill 2013

Thus, it should be noted that the scheme of arrangement provisions remain largely the same except for three of the more significant changes reflected in the Companies Bill 2013.

2.4.1 Additional safeguard of independent assessment

Clause 432 introduces an additional safeguard to the scheme of arrangement framework by allowing the Court, upon application, to appoint an approved

[24] Hasani Mohd Ali, "Rescue Operations For Financially Distressed Companies In Malaysia: Present Regime and Beyond," The Law Review (2010)

liquidator to assess the viability of a proposed scheme. This would enable an independent professional in the field of insolvency to determine the viability of the scheme and take into account the interests of all the stakeholders. This is not a mandatory requirement and the applicant company is not obliged to take such a step from the outset.[25]

2.4.2 Extension of the Restraining Order

For the extension of a restraining order, **clause 434(2)** provides that the Court may grant a restraining order for a period of not more than 90 days and may "extend this period for another two hundred seventy days" if certain requirements are met.

However, it is submitted that the present drafting could be made clearer as to whether each extension of the restraining order after the initial 90 days would be limited to a maximum period of 90 days, subject to the maximum extension of 270 days. A literal reading of clause 434(2) suggests that after the initial 90-day period, the Court may extend the restraining order for a further 270 days. As it is in the interest of all stakeholders that a scheme of arrangement should be finalized without undue delay, it is hoped that this issue will be clarified in the final Bill.

2.4.3 Restraining Order Will Not Extend to Regulators

Clause 434(7) makes it clear that a restraining order which restrains further proceedings against the company will not apply to any proceeding taken by the Registrar of Companies or the securities market regulator.

Further, **clause 434(8)** states that a restraining order will not have the effect of restraining further proceedings against any person other than the applicant company.

[25] Clause 432 of the Companies Bill 2013 provides that 'the Court may, on application under this Subdivision, appoint an approved liquidator to assess the viability of the scheme proposed for the compromise orarrangement.

So for instance, the directors of a company who are subject to legal proceedings on a guarantee given by them for the applicant company's debts will not be able to rely on the restraining order granted in respect of the company.[26]

2.5 Conclusion

It may come as no surprise that more and more companies in distress are taking cover under s 176 of the Companies Act 1965. In the turbulent and tempestuous economic seas in which captains of industry now find themselves shipwrecked, schemes of compromise and arrangement — particularly the ubiquitous order of stay of proceedings under s 176(10) of the Companies Act 1965 to stall and frustrate belligerent creditors — must surely be a godsend.

Despite that, the issues that existed under s 176 of the Companies Act 1965, e.g. the classification of creditors, approval of at least 75% in value for the scheme of arrangement as well as the extension of the restraining order, have to be taken seriously. And given the fact that the introduction of the Companies Bill 2013 does not help much in curing the shortfalls, as it is clear that the issues still remain in existence under the Bill. Thus, the question here is, is it time to introduce the judicial management scheme into Malaysia in order to complement the existing scheme of arrangement provided for under S.176 of the Companies Act 1965 and Companies Bill 2013?

[26] Lee Shih, "The Companies Bill 2013 (Part 2): New Corporate Rehabilitation Provisions," accessed March 3rd, 2014, http://www.loyarburok.com/2014/03/03/companies-bill-2013-part-2-corporate-rehabilitation-provisions/

CHAPTER THREE

JUDICIAL MANAGEMENT

3.1 Introduction

As mentioned under Chapter 2 of this project paper, given the lacking of s 176 of the Companies Act 1965 as well as the Companies Bill 2013 in governing the scheme of arrangement, it is thus, of paramount importance to decide as to whether it is now the proper time to introduce the judicial management scheme into Malaysia in order to complement the scheme of arrangement.

Modeled after Singapore's judicial management system, the Corporate Law Reform Committee ('CLRC') operated under the Companies Commission of Malaysia ('CCM') recommends the introduction of a statutory scheme to be known as judicial management. The objectives of the judicial management scheme should be to consider rescuing or rehabilitating the company's business as a going concern. However, if this is not possible, the objective should then be to ensure that there is a better realization of the company's assets to enable creditors to be paid.

Under the judicial management scheme, the aggrieved party may apply to the court to place the management of the company in the hands of a qualified independent person with the necessary skill and experience known as a judicial manager. The proposed statutory scheme requires the approval of the creditors. A workable restructuring plan will be prepared which must be acceptable by the majority of the creditors and the plan will be implemented once sanctioned by the court. However, any secured creditor may oppose the petition for the judicial management order before it is approved in the creditors' meeting.

Prima facie, this looks like a better deal than the existing scheme of arrangement under the Companies Act 1965.

3.2 Recommendations made by the Corporate Law Reform Committee

3.2.1 Initiating the process

The CLRC recommends the following:-

(i) the application for judicial management may be made if the company is or will be unable to pay its debts;

(ii) the court should only make the order if this would be likely to achieve the survival of the company as a going concern, the approval of the scheme or a more advantageous realization of assets than a winding up; and

(iii) the application for the company to be put under judicial management shall be made by the company or its directors pursuant to a resolution by members of the board of directors or the creditors of the company (including prospective and contingent creditors).

However, it should be noted that the court shall not make the order if:

(i) a receiver and manager has been or will be appointed or the making of the order is opposed by a person who is entitled to appoint a receiver and manager e.g. a debenture holder; and

(ii) the company is in liquidation or the company is a bank or a finance company or an insurance company licensed under the relevant Act.

3.2.2 Moratorium

The CLRC recommends that:-

(i) an interim judicial manager may be appointed by the court upon the filing of the petition.

(ii) a moratorium shall commence from the filing of the petition for judicial management and shall end upon the appointment of the judicial manager;

(iii) once a judicial management order is in force:-

(a) no winding up order can be made or any petition for winding up will be dismissed;

(b) receiver and manager shall vacate their office and no new appointment of a receiver and manager is permitted;

(c) no enforcement of any charge or security or repossession of hire purchase goods;

(d) no other legal proceedings except with leave of the court;

(e) any transfer of shares or any alteration in the status of members are also void unless the court so orders.

(iv) the judicial management order and the moratorium period should terminate after the expiration of the 180-days unless it has been earlier discharged. However, it should be possible to extend this period with a court order on application by the judicial manager.

Hence, as judicial management is intended to provide a breathing space for the company, one important feature is the moratorium period which will enable the company to prepare a proposal and to implement it without the threat of a winding up

petition or any action by the creditors of the company that will frustrate the purpose of the judicial management process.

Nonetheless, it is not disputed that there is a potential for the abuse of the moratorium since the moratorium may be used to prevent creditors from enforcing their contractual rights and thus, enabling the company to delay in complying with its contractual obligations to creditors. Therefore, the main concern is drawing a balance between protecting the interest of the relevant parties and providing sufficient time for the person entrusted with the task of rehabilitating the company to do so. The CLRC is of the view that the time of commencement of the moratorium and the length of the moratorium period are crucial to enable a viable proposal to be drawn up and implemented. An appropriate time frame can be an incentive for the efficient administration and implementation of the proposal

3.2.3 Creditors' right and voting by creditors

The CLRC recommends that:-

(i) the judicial manager should be given 180 days to prepare the proposal and have it approved by creditors at the creditors' meetings.

(ii) the proposal must be approved by a majority in value of the creditors who are present and voting at the meeting. At the creditors meeting, only creditors who have had their proof of debts accepted by the judicial manager, may vote.

One difficulty of the existing procedure under the Companies Act 1965 that is used to rehabilitate a company is the fact that, under section 176 (1) of the Companies Act 1965, i.e. scheme of arrangement, the different classes of creditors must be identified and these classes who must vote separately as a class in favor of the proposal. If the

person in control of the process is required to identify the separate classes of creditors and obtain the respective classes' approval, it is possible that the proposal could not be prepared and implemented within the specified time frame. Thus, in stark contrast with the S.176 requirement, the CLRC recommends that there should not be any need to identify separate classes of creditors in relation to the judicial management process.

There are different approaches in relation to the voting percentage at the creditors' meeting required to approve the proposal. The CLRC noted that Singapore specifies the voting percentage as “creditors with majority in number and value.”

Australia on the other hand, specifies that there must be a majority in number and value and in cases where a majority in value of the creditors supports the proposal but not a majority in number, the judicial manager has the casting vote.

The UK Insolvency Act 1986, on the other hand, provides that the approval of a simple majority of creditors by value is required.

In Hong Kong, the Law Reform Commission proposed that for any resolution to pass at a meeting of creditors approving a proposal or modified proposal there should be a majority in number and in excess of two thirds in value of the creditors present in person or by proxy and voting on the resolution. Initially, the Law Commission of Hong Kong considered recommending that the majority in value should be three-quarters but in its Report recommended following the Canadian provisions by adopting a two-thirds majority. The Law Commission of Hong Kong did not favor a bare majority as the procedure contemplates altering the rights of creditors and there must be a convincing level of acceptance by creditors. The Law Commission was

also of the view that a requirement for acceptance by three-quarters in value could discourage a provisional supervisor and could also encourage creditors to hold out in some situations.

The New Zealand Law Commission recommended that the voting percentage for creditors' meeting should be 75 per centum of creditors present and voting at the creditors meeting.

In ascertaining what is the voting percentage, the CLRC noted the concern that there could be one secured creditor holding a charge over all of the company's asset (by way of a floating charge) who can decide the outcome of the voting process merely by having a majority in value although not in number. On the other hand, there could be a case where creditors of the company who are in the majority due to their number but not the value of the debts owed by the company to them will be able to defeat the corporate rescue exercise. The CLRC's recommendation is that the proposal must be approved by a majority in value of the creditors who are present and voting at the meeting. At the creditors meeting, only creditors who have had their proof of debts accepted by the judicial manager, may vote.

It is to be noted that whilst the voting is to be carried out only by the creditors whose proof of debts has been accepted, the statement of proposal must be sent to all creditors. Where the creditors' meeting is concerned, there should be clear procedures in relation to the convening and holding of the creditors' meetings as well as provisions to deal with the proof of debts.

In addition, the creditors should also be allowed to approve the proposal with modifications, if any. However in most cases, the judicial manager's consent to the modifications is required. This is to ensure that the judicial manager will be able to

achieve the objectives of the judicial management. The creditors are also allowed to bring an action to court against oppressive conduct of the company.

3.2.4 Effect of creditors' approval or rejection of the proposal

The CLRC recommends that:-

(i) any secured creditors may oppose the petition for the judicial management order. However, once the judicial management order has been made, the secured creditors cannot realize their security and the judicial manager has the power to deal with the charged property of the company as if the property was not subjected to the security.

(ii) the proposal once approved by creditors shall be binding on all creditors of the company whether or not they have voted in favor of the proposal.

A concern in relation to rescue procedures is the fact that the proposal that has been agreed to may be defeated by any creditors. There are views that once the creditors' meeting approves the proposal, it is implied that the proposal is binding on all creditors whether or not they have voted in favor of the proposal, otherwise there would be no necessity to expressly provide for the voting requirement. The CLRC noted that under the Singapore Companies Act (Chapter 50), it is unclear whether the proposal that has been approved by the necessary votes of the creditors at the creditors' meeting is binding on all creditors irrespective of whether they have voted in favor of the proposal.

The CLRC is of the view that the absence of an express statutory provision to this effect will create ambiguity. Thus, the CLRC recommends that it should be expressly provided that once the creditors approve the proposal, the proposal shall be binding

on all creditors of the company whether or not they voted in favor of the proposal. It is possible that the creditors may reject the proposal and ask for it to be re-worked, and the amended proposal is then tabled for approval. The judicial manager therefore would re-work or amend the proposal. The judicial management order will remain until he reports to the court on the outcome of the meeting and also expressed his views to the court what the next course of action should be. The judicial manager should also be obliged to report the result of the creditors' meeting to the court and the Registrar.

If the creditors' meeting rejects the proposal, the judicial manager should be obliged to report the result of the meeting to the court. In the event that the creditors' meeting rejects the proposal, the court may order a discharge of the judicial management order and make such consequential provisions as it thinks fit. The court may also adjourn the hearing conditionally or unconditionally or make an interim order or any other orders as it thinks fit.

Under the Singapore Companies Act (Chapter 50), the secured creditors have a right to oppose the petition for a judicial management order and the court shall dismiss the petition to appoint the judicial manager if a receiver and a manager has been or will be appointed or the making of the order is opposed by a person who is entitled to appoint a receiver and manager e.g. the debenture holder. Whilst this provision enables any secured creditors to oppose the petition for the judicial management order, once the judicial management order has been made the secured creditor cannot realize their security. The judicial manager is conferred the power to deal with the charged property of the company as if the property was not subject to any security but the holder of the security does not lose its priority over the proceeds of the sale.

The CLRC is of the view that the Singapore approach is better suited for the Malaysian environment and recommends to adopt S.227B (5) of the Singapore Companies Act. Although the secured creditor has a right to object to the appointment of the judicial manager, once the judicial management order has been made and has been approved by the creditors' meeting, all creditors should be bound by the proposal. A secured creditor who wishes not to be bound by the judicial management order must then take the initiative to oppose the petition. However, once the judicial management order has been made all creditors shall be bound. This will ensure that the rehabilitation plan can be implemented especially if it involves the disposal of any of the company's assets. On this point, the judicial manager should also be given the power to deal with the charged property of the company as if the property was not subjected to the security. Nonetheless, if such property was disposed, the holder of the security shall have the same priority over the proceeds of the sale.

3.2.5 Control of the process

The CLRC recommends that there should be a clear provision stating:-

(i) The judicial manager is an agent of the company.

(ii) The judicial manager has control over the affairs, business and property of the company during the judicial management period.

(iii) The powers of the other officers of the company are suspended unless written approval is obtained from the judicial manager.

In other words, to enable the judicial manager or the administrator to act on behalf of the company, most jurisdictions specify that the judicial manager or administrator is an agent of the company. Under the Singapore Companies Act (Chapter 50), the judicial manager has control over the process whilst the order is in force. The judicial manager shall manage the affairs, business and property of the company during this period.

Whilst there is merit in replacing the existing management in cases where there is proof or allegation of fraud or mismanagement, there is a possibility of the process being delayed because the new management may require additional time to familiarize itself with the business. The CLRC is of the view that a balance may be achieved by ensuring that there is the involvement of a qualified insolvency practitioner in the process who is subject to the court's supervision and that the powers of the company's officers should be suspended unless the insolvency practitioner appointed as the judicial manager approves any exercise of the powers.

3.2.6 Ending the judicial management

(i) The CLRC recommends that the judicial management order should be capable of being discharged prior to the expiry of the time frame or any longer period that the court may order.

(ii) The CLRC further recommends that the judicial management order shall end:

(a) if the proposal has not been accepted by the creditors' meeting and where the court orders the discharge of the judicial manager; or

(b) if the purpose of the judicial management has been successfully achieved; or

(c) if the judicial manager is of the view that the purpose is unachievable; or

(d) if the judicial manager applies for a discharge, is no longer qualified to be a judicial manager or is removed from office.

As a result of the moratorium, there is a possibility that some companies will rely on the judicial management procedure to delay honoring its obligations to its creditors. To ensure that the judicial management order and the consequential moratorium would not be abused and to ensure that the company is able to resume its business as a going concern as soon as possible, a time frame should be specified for the judicial manager to implement the rehabilitation of the company.

The CLRC is of the view that a judicial management order shall remain in force for 180- days from the date the order is made. The court, however, may extend the time frame upon an application by the judicial manager. It should also be possible to end the judicial management by a discharge of the order, even before the expiry of the time-frame or any longer period that the court has approved.

3.2.7 The roles and functions of a judicial manager

The CLRC recommends that:

(i) the judicial manager should be given 180 days to table the proposal for creditors' approval.

(ii) the company secretary should not be imposed with the obligation of submitting the statement of affairs to the judicial manager although the judicial manger should be given the power to request for the statement of affairs from any relevant person.

(iii) the judicial manager should be allowed to exclude personal liability in contracts so that he is personally liable unless he disclaims it;

(iv) the judicial manager should be indemnified out of the assets of the company and the indemnity to which he is entitled to is to be paid out of the asset of the company in priority to other unsecured creditors if the company is subsequently wound up.

(v) the judicial manager should be given a grace period of 28 days to decide whether or not to adopt any contract of employment and if the judicial manager caused the contract to continue after the 28 day grace period, the contract is assumed to have been adopted by him.

As mentioned under 3.2.5, a judicial manager, once appointed should become an agent of the company. His status will enable the judicial manager to act on behalf of the company. The directors' powers should be suspended and should not be exercisable unless the consent of the judicial manager has been obtained. The powers of the judicial manager should also be clearly stated in the legislation.

On this point the CLRC referred to the Singapore Companies Act (Chapter 50) and identified that the powers provided to the judicial manager/ administrator are as follows:

(i) manage the affairs, business and property of the company;

(ii) take into custody all properties which the company is or appears to be entitled to;

(iii) shall do all other things as the court may sanction;

(iv) shall have all the powers specified in the 11th Schedule;

(v) may apply to court for direction;

(vi) may issue payment for a discharge of debts if it is sanctioned by the court or it is pursuant to a compromise sanctioned or the payment is to discharge a sum secured by a security that is payable under hire purchase;

(vii) may call for a creditors' meeting at any time and shall do so if directed by the court;

(viii) may alter the memorandum and articles of associations of the company in which case the alteration shall have the same effect as if it was duly made by a resolution of the company;

(xi) to lodge a copy of the order sanctioning the alteration with the Registrar within 14 days from the making of the order.

Under the Singapore Companies Act (Chapter 50), a person dealing with the judicial manager in good faith shall be entitled to assume that the judicial manager is acting within his powers.[27]

3.3 Proposals made by the Companies Bill 2013

In order to better promote a corporate rehabilitation framework, the Companies Bill 2013 ('Bill'), introduces the new mechanism of the judicial management. The Bill which revamps the Companies Act 1965, is based on the recommendations made by the Corporate Law Reform Committee back in 2008.

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[27] "A Consultative Document: (1) Reviewing The Corporate Insolvency Regime- The Proposal For A Corporate Rehabilitation Framework; (2) Reviewing The Company Receivership Process; And (3) Company Charges And Registration Process- Improvements To The Present Registration System," accessed August, 2007, http://www.maicsa.org.my/download/technical/technical_clr_insolvency.pdf

3.3.1 Requirements for the grant of a judicial management order

The Court is empowered under **clause 392 of the Bill** to grant a judicial management order if and only if -

(a) it is satisfied that the company is or will be unable to pay its debts; and

(b) it considers that the making of the order would be likely to achieve one or more of the following purposes: -

i. the survival of the company, or the whole or part of its undertaking as a going concern;

ii. the approval of a compromise or arrangement between the company and its creditors;

iii. a more advantageous realization of the company's assets would be effected than on a winding up.

The judicial management order shall, unless discharged, remain in force for 180 days and may be extended on the application of the judicial manager for another 180 days as stated under **clause 393(1) of the Bill**.

3.3.2 Protection of debenture holder's rights

The CLRC had made recommendations to protect a debenture holder's right to appoint an receiver and manager in the situation where a judicial management order is sought. Accordingly, **clause 395(1)(b) of the Bill** requires the notice of a judicial management application to be provided to any person who has appointed, or may be entitled to appoint, an receiver and manager of the whole or a substantial part of the company's property. However, clause 395(1)(b) limits the type of receiver and

manager as one appointed under the terms of a debenture secured by a floating charge or by a floating charge and one or more fixed charges. It does not seem to apply to a situation where the security is by way of a fixed charge only and is unclear as to whether it applies to a receiver as well.

This provision is significant as **clause 396 of the Bill** effectively provides a veto right to a person who is entitled to appoint a qualifying receiver and manager. **Clause 396(1)(b) of the Bill** provides that the Court shall dismiss a judicial management application if the making of the order is opposed by a person who has appointed, or is entitled to appoint, such a receiver or receiver and manager.

The reasoning behind such a veto right is that it is thought not necessary to make a judicial management order when an receiver and manager could achieve substantially the same objectives and clause 396(1)(b) preserves the right of the debenture holder to appoint an receiver and manager.

3.3.3 Approval of judicial manager's proposals

When a judicial manager is appointed, **clause 407 of the Bill** provides that he has 60 days (or such longer period as the Court may allow) to send to the Registrar, members and creditors of the company a statement of his proposals for achieving the purposes for which the order was made and to lay a copy of this statement before a meeting of the company's creditors.

As a meeting of the creditors must be summoned on not less than 14 days' notice, the judicial manager effectively only has 46 days to come up with the proposal to rehabilitate the company. Therefore, there is the view that the Bill's 60-day period

may in reality be too short unless the Court is more flexible in allowing for more time for the preparation of this statement of proposals.

Clause 408(2) of the Bill requires a judicial manager's proposals to be approved by a majority of 75% in value of the creditors present and voting either in person or in proxy whose claims have been accepted by the judicial manager. Once approved by the required majority, the proposals shall be binding on all creditors of the company whether or not they had voted in favor of the proposals.[28]

*It seems that both the scheme of arrangement as well as the judicial management, once approved by a majority of 75% in value of the credits, it shall be binding on all creditors of the company whether or not they have voted in favor of the plan.

3.4 Conclusion

In summary, it is believed that a judicial management scheme is generally beneficial to all parties concerned. It benefits the shareholders who would otherwise lose their investment in the companies. It benefits the employees of the company who would have the possibility of retaining their jobs; and the unpaid creditors who will have the chance of being paid their debts.

Thus the Corporate Law Reform Committee had repeatedly urged the introduction of a judicial management scheme into Malaysia in order to complement the lacking of the scheme of arrangement provided for under s 176 of the Companies Act 1965. **Clause 391 until Clause 417** of the Companies Bill 2013 had thus incorporated the rules of judicial management. The question of whether the judicial management scheme is better than the scheme of arrangement has yet to be decided, as this

[28] "Corporate Insolvency, Corporate Rehabilitation And Receivership," accessed May 2nd, 2014, http://www.skrine.com/corporate-insolvency-corporate-rehabilitation-and-receivership

scheme has yet to be implemented in Malaysia. But for thing for sure is that, in stark contrast with the s 176 requirement, there should not be any need to identify separate classes of creditors in relation to the judicial management process.

CHAPTER FOUR

JUDICIAL MANAGEMENT SCHEME IN THE REPUBLIC OF SINGAPORE

4.1 Introduction

In Singapore, companies are principally governed by the **Companies Act (Cap 50, 1994 Rev Ed)**. Until 1987, a company that could not pay its debts when they fell due could not prevent its creditors from appointing a receiver or commencing legal proceedings or petitioning for its liquidation.

Often, such an event caused the demise of a company which could otherwise have been nursed back to health. Placing a company in receivership in many cases amounted to signing its death warrant as creditors scrambled to enforce their securities in order to save something from the wreck. The unhappy result was a forced liquidation, even though at the end of the day the company's assets may have exceeded its liabilities.

In order to allow a fundamentally viable company some breathing space in which to reorganize or restructure, the Companies Act was amended in 1987 by incorporating a new Part VIIIA based on the administration provisions of the English Insolvency Act 1986.

Part VIIIA of the Companies Act provides for the appointment of a judicial manager by the court. The idea behind this is that there should be a moratorium while the judicial management order is in force. During that period the company has a brief respite from the unrelenting pressure of its liabilities. This moratorium period is to be

used to come up with a scheme to save the company without the necessity of a liquidation.[29]

The first such order in Singapore was made on 14 August 1987 in respect of ***Lim Seng Huat (S) Pte Ltd*** *by* ***Chan JC***.[30]

4.2 Who may petition and the pre-conditions for the making of the judicial management order

Part VIIIA of the Companies Act provides for the appointment of a judicial manager by the court upon a petition presented by the company, its directors, or a creditor. Upon such an application by the company, its directors or creditors, **s 227B(1) of the Act** provides that the court may make a judicial management order if the court is satisfied that the company is unable to pay its debts. The definition of inability to pay debts in this context is the same as for winding up application.[31]

Additionally the court must be satisfied that the order if made would be likely to achieve one or more of the following purposes, namely: - (a) the survival of the company or the whole or part of its undertaking as a going concern; (b) the approval of a compromise or arrangement between the company and its creditors; or (c) a more advantageous realisation of the company's assets than could be effected on a

[29] "Singapore-A Comparison Between Scheme Of Arrangement And Judicial Management," accessed May 28th, 2012, http://www.conventuslaw.com/singapore-a-comparison-between-scheme-of-arrangement-and-judicial-management/

[30] The Straits Times, 15 August 1987

[31] s 254(2) of the Act provides that a company shall be deemed to be unable to pay its debts if : -
(a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding $10,000 then due has served on the company by leaving at
the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorised requiring the company to pay the sum so due, and the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;
(b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company.

winding up.[32] [this is provided under **Clause 392(1)(a) and (b)of the Companies Bill 2013**]

The applicant must prove, on a balance of probabilities that a company is or will be unable to pay its debts. Proof that a company is unable to pay its debts is insufficient by itself to justify a judicial management order; the court must further be satisfied that one of the purposes set out would be achieved. Where an application is based on more than one of the above purposes, the court may make an order even if only one of the stipulated purposes is likely to be achieved.

The court has power to make a judicial management order if it considers that the public interest so requires it[33], [this is provided under **clause 394(a) of the Companies Bill 2013**] notwithstanding that it may not be satisfied that the making of the order would be likely to achieve one or more of the purposes set out in s 227B(1) of the Act.

In the case of ***Re Cosmotron Electronics (Singapore) Pte Ltd***[34], what happen was Cosmotron Electronics (Singapore) Pte Ltd (the company) filed a petition for an order that the company be placed under judicial management. The company carried on the business of manufacturing printed circuit boards in Singapore. It had a manufacturing plant which, together with its undertaking and other assets, had been charged to Indian Bank under a debenture to secure banking facilities of $900,000. The company was unable to pay its debts and its creditors, including Indian Bank and Mayertro Industrial Pte Ltd, had been pressing for payment for some time. Indian

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[32] "Singapore Commercial Law," accessed April 30th, 2009, http://www.singaporelaw.sg/sglaw/laws-of-singapore/commercial-law/chapter-16

[33] s 227B(10)(a) of the Act held that 'nothing in this section shall preclude a Court from making a judicial management order and appointing a judicial manager if it considers the public interest so requires;'

[34] [1989] 1 SLR 251

Bank had given notice of its intention to appoint receivers and managers under their debentures prior to the presentation of this petition by the company.

On 6 November 1988, the company entered into an agreement (the relocation agreement) to sell the company's plant and machinery to a third party. In its petition, the company stated that unless it was able to 'see through the relocation of its manufacturing assets and complete its outstanding contracts there was no money … now or in the future to pay off even part of its said aggregate debts …'. For this reason, the company was of the view that placing the company under judicial management would 'achieve the survival of the company on the whole or part of its undertaking as a going concern and a more advantageous realization of the company's assets would be effected than through a winding up and the interest of the creditors would be better served'. The petition was opposed by Indian Bank, Mayertro and three other unsecured creditors on the grounds that the petition was not made bona fide and that no public interest was involved in this petition. Indian Bank had, in fact, exercised their powers as debenture holders and appointed receivers and managers of the undertaking and assets of the company but the officers were unable to assume office because of this petition. In its argument on public interest, Mayertro contended that by reason of s 227B(10) of the Companies Act (the Act), a company seeking a judicial management order had to, in addition to satisfying the court of the requirements of s 227B(1), prove that the public interest so required it.

The court held, dismissing the petition: (1) The court was satisfied that the company was unable to pay its debts but it did not consider that the making of the order would be likely to achieve any of the purposes set out in s 227B(1)(b) of the Act for the following reasons. Firstly, the survival of the company did not depend on placing the company under judicial management so much as ensuring that the relocation

agreement was implemented by the parties. If the purposes sought to be achieved by the company in judicial management could equally be achieved by the creditors without detriment to the company or its shareholders, the company had not made out a valid case for depriving a secured creditor of its contractual right to assume possession and control of its security. Secondly, since the company had agreed to dispose of its manufacturing plant which, in effect, constituted its entire undertaking, the question of rehabilitating the company or of preserving all or part of its business as a going concern did not arise. Thirdly, the company had also failed to show that placing the company under judicial management would result in a more advantageous realization of the company's assets than on a winding up. Finally, the relocation agreement contained in open-ended term which called into question the bona fides of this transaction. (2) Mayertro's contention as to proof of public interest was not the correct approach to interpreting s 227B(10). Section 227B(10)(a) had the effect of vesting in the court an overriding power to make a judicial management order if it considered the public interest so required, notwithstanding that it may not be satisfied that the making of the order would be likely to achieve one or more of the purposes set out in s 227B(1). This was undoubtedly the effect of s 227B(10)(a) in relation to s 227B(1). And last but not least, since the existence of 'public interest' in s 227B(10) was a requirement for the exercise of an overriding power, it would connote an interest or object which, if achieved, would transcend any or all of the purposes prescribed in s 227B. As there was no evidence to support a claim that in this position public interest required that the company be placed under judicial management, the petition was accordingly dismissed.

However, in view of the penalties in costs and the difficulty of proving what the public interest is, such orders are likely to be rare.[35]

If the purposes sought to be achieved by the company in judicial management can equally be achieved by the creditors in some other way without any detriment to the company or its shareholders, the company would not have made out a valid case for judicial management**.** Lack of candour in the application might result in its dismissal.

4.3 Effects of filing an application for judicial management

After the presentation of a petition for the appointment of a judicial manager to the court, a judicial management order is usually made 3 to 5 weeks later. In cases of urgency, the court has the power under **s 227B(10)(b) of the Act** to appoint an interim judicial manager pending the making of a final judicial management order. This is to be contrasted with the position under the English provisions where the Court has no such express power and it has been held that the Court has no such implied power.

In the interval between the presentation of a petition and its final determination, the company may not resolve to wind up voluntarily, nor may a winding up order be made on a winding up petition already presented.

The presentation of a petition for the appointment of a judicial manager gives the company a respite from the attentions of its creditors. While such a petition is pending, the company has extensive immunity from liquidation and legal proceedings as there is a complete moratorium on all actions against a company

[35] s 227B(9) of the Act held that 'the costs and expenses of any unsuccessful application for a judicial management order made under this section shall, unless the Court otherwise orders, be borne by the applicant and, if the Court considers that the application is frivolous or vexatious, it may make such orders, as it thinks just and equitable, to redress any injustice that may have resulted.'

without the leave of court. The moratorium covers the commencement of legal proceedings, the enforcement of security, the repossession of goods on hire purchase or under a chattels leasing agreement or subject to retention of title agreement, execution of a judgment, and the levying of distress. The idea behind this is that there should be a moratorium while the judicial management order is in force. During that period the company has a brief respite from the unrelenting pressure of its liabilities. This moratorium period is to be used to come up with a scheme to save the company without the necessity of a liquidation. [this is provided under **clause 397(a)-(c) of the Companies Bill 2013**]

A petition for judicial management may therefore be used to stave off a compulsory winding up or to prevent execution being levied against the company's property. It was widely believed that judicial management will benefit the company and its members primarily, protecting them from a forced liquidation at the behest of a minority of the creditors. To a lesser extent, the unsecured creditors of a company may also benefit from a judicial management order, especially if the company's assets are insufficient to pay off its secured debts. The opportunity to rehabilitate the company will increase an unsecured creditor's chances of eventually getting paid. Unfortunately, this device is open to abuse.

However, such potential abuse may be controlled by the court. If the court dismisses the petition and considers that it was presented frivolously, it may make such orders as it thinks just and equitable to redress any injustice that may have been caused[36]. At the hearing of the petition, the court has full discretion to grant or dismiss the petition or adjourn the hearing and make such interim orders as may be necessary. [see 5.2 page 66]

[36] See footnote 33 at page 50

It has been held in the United Kingdom that the court has power to order the directors of a company making an application for the appointment of a judicial manager to pay the costs of the application if their predominant aim was to obtain a private advantage at the expense of the creditors.

In the case of ***Re Genesis Technologies International Pte Ltd***[37], it was held that although the primary or main purpose of judicial management is the protection of the company from its creditors, the court should be vigilant to ensure that it is not directly or indirectly used by the directors and shareholders to the detriment of creditors and unsecured creditors in particular. The motives of the application should therefore be clearly honourable. Further, a company whose debts far exceed its assets in effect belongs to its creditors. The court must show great heed to the wishes and views of such creditors.

What happened in this case was the Genesis Technologies International (S) Pte Ltd, formerly known as Genesis Technology Pte Ltd, filed a petition for an order for judicial management under S.227B of the Companies Act (Cap 50, 1994 Ed). The company was incorporated on 17 August 1990. The nominal capital of the company was $12,766,000 divided into 12,766,000 shares of $1 each. The amount of the capital paid-up or credited as paid up was $12,766,000. The first and principal object for which the company was established was as follows:

'To carry on all or any of the business of manufacturers, producers, distributors, installers, maintainers, repairers of, general merchants, importers, exporters and dealers in electrical and electronic systems, electronic components, goods, appliances and apparatus of every description; to act as principals or agents and deal in any articles belonging to any such businesses and things used in connection therewith

[37] [1994] 3 SLR 390

and to carry on the business of providing electrical and electronic know-how and training in the use and service of electrical and electronic systems, electronic components, goods, appliances and apparatus of every description.'

In late 1993, the company had received various notices of demand from its creditors. Some creditors had commenced legal proceedings and obtained judgment. Two creditors, namely, Neotechnics Pty and PNE Electric Pte Ltd, who were owed $18,437.87 and $15,404.25 respectively, had served statutory notices of demand under S.254(2) of the Act. Both notices were dated 13 December 1993. The 21-day period had expired and the company was unable to pay the debts or to secure or compound them to the reasonable satisfaction of the creditors. According to the petition, the company had three secured creditors, that is, Overseas Union Bank, Tat Lee Bank and United Overseas Bank Ltd. Charges had been created over the company's assets in favour of the banks and the outstanding secured debts amounted to approximately $3.4m. The unsecured debts, according to the company, amounted to $7.8m. Thus the company was hopelessly insolvent. It had suffered accumulated losses in the region of $16m. The company, however, said that there was a reasonable probability of rehabilitating itself or preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served by a judicial management order than by resorting to a winding up.

It was stressed that its motive for the petition was not to stave off irate creditors, nor was it a ruse to buy time. The company was sincere about paying its liabilities, both secured and unsecured, through a scheme of compromise or arrangement. The company, however, failed to credibly demonstrate the grounds on which the petition was founded, as required under s 227B(1) of the Act.

4.4 Petition for appointment of a judicial manager

A judicial manager may be appointed by the court upon an application (referred to as an application for a judicial management order) made by the company or by a creditor, including a contingent or prospective creditor.

A company may present an application (referred to as an application for a judicial management order) pursuant to a resolution of the members. It appears that an ordinary resolution will do, unlike where the members wish to have the company wound up. The directors may also apply for the appointment of a judicial manager if authorised by a resolution of the members or of the board of directors. An individual member or director appears to have no power to apply for the appointment of a judicial manager. The application may be made only if the majority of the directors or members agree to such a course.

The petitioner nominates the judicial manager who must be an approved company auditor and who is also not the auditor of the company. The court has the power to reject the nomination of the applicant and appoint another person in his stead.

The creditors may oppose the nomination of a person proposed as judicial manager by the petitioner. This may be done by the majority in number and value of the creditors (including contingent or prospective creditors).[38]

4.5 Opposition to appointment of a judicial manager

A person who is entitled to appoint a receiver and manager is entitled to oppose the making of a judicial management order.[39] Where such a person opposes the making of the order the court must dismiss the application unless it considers that the public

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[38] Halsbury's Laws of Singapore – Company Law

[39] s 227B(5) of the Act held that 'subject to subsection (10), the Court shall dismiss an application for a judicial management order if it is satisfied that (a) a receiver and manager referred to in subsection (4) has been or will be appointed; or (b) themaking of the order is opposed by a person who has appointed or is entitled to appoint such a receiver and manager

interest requires the appointment of a judicial manager. This in effect gives a creditor who has the power to appoint a receiver and manager a veto over the appointment of a judicial manager. The rationale for this is to preserve the rights of such a creditor. Indeed, the court may not make a judicial management order while a receiver and manager has been appointed or if one is to be appointed, unless there is some overriding public interest.

Oddly, there is no specific provision allowing other persons to oppose the making of a judicial management order. Creditors may appear, but apparently only to oppose the nomination of a proposed judicial manager. The Companies Regulations seem to envisage that only the persons mentioned in s 227B(3)(c) of the Act (that is, creditors opposing the appointment of a specified person as judicial manager) and s 227B(5)(b) (that is, a person who may appoint a receiver and manager) may appear at the hearing of the application. As regards the creditors, no provision is made to allow them to oppose the making of the judicial management order, as opposed to challenging the nomination of the judicial manager. Presumably the court could take into account the opposition of the creditors in deciding whether or not to exercise its discretion to make the order. Despite the literal wording of the section, the creditors' right to support or oppose a judicial management order has been implicitly accepted by the court.

4.6 Circumstances under which no order may be made

The court may not make a judicial management order under the following circumstances: -

(1) If the company has already gone into liquidation. In the case of a company in voluntary liquidation, presumably this means after the resolution has been passed to

voluntarily wind up the company or after the declaration referred to in section 291(1) has been lodged with the Registrar. In the case of a company in compulsory winding up, it is suggested that the material date is the date of the winding up order, notwithstanding that a compulsory winding up is deemed to have commenced on the date of the making of the winding up application. This is because it is envisaged as part of the statutory scheme that any pending winding up applications will be dismissed upon the making of a judicial management order. Clearly this could not happen if the court was precluded from making a judicial management order after the making of a winding up application.

(2) If the company is a bank, a finance company or an insurance company.

(3) If a receiver and manager has been or will be appointed. It should be noted that the fact that a receiver has been appointed does not preclude the making of a judicial management order. [this is provided under **clause 396 of the Companies Bill 2013**]

However, notwithstanding these prohibitions, the court has a power to appoint a judicial manager if some overriding public interest requires it.

4.7 Notice of application

Notice of the application must be given to the company (in the case of a creditor's application) and to the holders of debentures secured by a floating charge. In the case of debentures secured by a fixed charge notice need be given to the debenture holders only if there is a power to appoint a receiver and manager under the debentures. Presumably notice given to the trustee for the debenture holders (where one is appointed) should suffice. [this is provided under **clause 395(b) of the Companies Bill 2013**]

4.8 Effect of judicial management order on directors

Once a judicial management order is made and while it remains in force, all powers conferred and duties imposed on the directors shall be exercised and performed by the judicial manager.

S 227G(1) of the Act provides that, on the making of a judicial management order, the judicial manager shall take into his custody or control all the property to which the company is or appears to be entitled. [this is provided under **clause 402(1) of the Companies Bill 2013**]. **S 227G(2)** goes on to state that, during the period for which the order is in force, all the powers and duties of the directors shall be exercised and performed by the judicial manager and not by the directors. The judicial manager may do all such things as are necessary for the management of the affairs of the company and shall do all such things as the court may sanction, as stated under **s 227G(3) of the Act**.

In other words, upon judicial management is made, the board of directors become functus officio and its functions and powers are transferred to the judicial manager.

It is for this reason that many companies, especially private limited companies, have great reluctance to resort to this.

It should be noted that the making of a judicial management order has no effect on the rights of owners or shareholders.

4.9 Procedure of the judicial management

When a judicial manager is appointed, he has 60 days (or such longer period as the court may allow) to formulate and lay before the creditors of the company at a meeting called for that purpose a statement of his proposals for the achievement of

the purposes for which the order was made. A creditor is not entitled to vote at the meeting unless he has first lodged a proof of debt. A creditor may not vote in respect of any unliquidated or contingent debt or any debt the value of which is unascertained. A secured creditor is not allowed to vote if his security covers the debts owed to him; he may vote if he surrenders the security or if part of the debt owed to him is unsecured. The proposals may be approved by the majority of the creditors in number and value. The meeting may propose modifications to the judicial manager's proposals, but they will be effective only if he consents.

If the creditors decline to approve the proposals, the court may order that the judicial management order be discharged. This is not inevitably the case, as the court has wide powers to adjourn the creditors' meeting and make such interim orders as it thinks fit.

Where the judicial manager's proposals have been approved, he must manage the company in accordance with those proposals. He may revise the proposals from time to time, but only if those revisions are approved at a creditors' meeting. The creditors may appoint a committee to supervise the judicial manager. This committee cannot interfere with the management of the company, but may require the judicial manager to furnish it with such information as it may reasonably require. The judicial manager takes the place of the board of directors and may exercise all the powers conferred upon the directors by the Act or by the memorandum and articles.

To enable the judicial manager to carry out his duties, the directors of the company and the secretary must submit a statement of affairs to him within 21 days of receiving notice that the judicial management order has been made.

In exercising his powers of management, the judicial manager must ensure that members and creditors are treated fairly. A member who feels that the affairs of the company have been conducted in a manner which is "unfairly prejudicial" to the members generally or to some part of them may apply to the court for relief.

Unless discharged earlier or extended by the court, a judicial management order remains in force for 180 days. The English statutory provisions however leave open the period of validity for a judicial management order. A judicial management order may be prematurely discharged if the creditors decline to approve the judicial manager's proposals, or if the court so orders by reason of the judicial manager acting in a manner unfairly prejudicial to the creditors or members, or if it appears on the application of the judicial manager that the purposes of the judicial management order cannot be discharged. When the judicial management order is discharged, the judicial manager automatically vacates office.

A judicial manager is the only administrative entity involved in a judicial management. He is not subject to the control of the Official Receiver, but is subject to the control of the court and the creditors.[40]

4.10 Conclusion

It is of utmost paramount to go through the judicial management scheme that was implemented in our neighbouring country, i.e. the Republic of Singapore, as it able to give a head up to the readers as to whether it is a good move for our country to adopt the judicial management scheme as it had been repeatedly urged by our Corporate Law Reform Committee and Bar Council. As discussed, it seems that most of the

[40] See footnote 27 page 46

judicial management provisions that had been implemented in the Singapore Companies Act had been adopted by our Companies Bill 2013.

CHAPTER FIVE

Conclusion and recommendations

5.1 Classification of creditors

One difficulty of the existing procedure under the Companies Act 1965 that is used to rehabilitate a company is the fact that, under section 176 (1) of the Companies Act 1965, i.e. scheme of arrangement, the different classes of creditors must be identified and these classes who must vote separately as a class in favor of the proposal as mentioned under Chapter 2 of this paper. If the person in control of the process is required to identify the separate classes of creditors and obtain the respective classes' approval, it is possible that the proposal could not be prepared and implemented within the specified time frame. Thus, in stark contrast with the s 176 requirement, there should not be any need to identify separate classes of creditors in relation to the judicial management process.

5.2 Effect of application for a judicial management order

As mentioned under Chapter 3 of this project paper, the main purpose of having the judicial management scheme is to provide a breathing space for the company, one important feature is the moratorium period which will enable the company to prepare a proposal and to implement it without the threat of a winding up petition or any action by the creditors of the company that will frustrate the purpose of the judicial management process. Unfortunately, this device is open to abuse.

In the Republic of Singapore, such potential abuse may be controlled by the court. If the court dismisses the petition and considers that the judicial management order was presented frivolously, it may make such orders as it thinks just and equitable to

redress any injustice that may have been caused, as provided under **s 227B(9) of the Singaporean Companies Act**.

Hence, such authority or power given to the court under the Singaporean Companies Act, i.e. to dismiss the petition and make orders as it thinks just to compensate any injustice that may have been caused, should be adopted in our Companies Act when introducing the judicial management provisions in our Companies Act 1965. This is because one of the objectives of introducing the judicial management is in the hope that it able to complement the lacking of the existing scheme of arrangement, as provided under s 176 of the Companies Act 1965.

5.3 Conclusion

In summary, it is crucial to learn from the Republic of Singapore regarding its practice on judicial management scheme as it has been implemented for so many years and had been proven successfully by our Corporate Law Reform Committee. By doing so, only the strengths and benefits will be adopted by our Companies Bill 2013.

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