LH AG ADVOCATES AND SOLICITORS

Special Issue on Companies Bill 2015

Legal Herald

AUGUST 2016

| All articles by Bella Chu Chai Yee, Samantha Liew Wee Nie, Jessica Man Hui Sze and Sharan Kaur Gill |

in this issue

Overview of the Companies Bill

For more than 50 years, the workings of a company in Malaysia have been governed by the provisions of the Companies Act 1965. The 1965 Act, which has been effective from 15 April 1966, has undergone many revisions over the years but the framework remains largely intact.

Unlike previous amendments, the Companies Bill 2015 (passed by Parliament on 28 April 2016 and currently pending Royal Assent), when enacted, will replace the existing 1965 Act.

The 2015 Bill was first released by the Companies Commission of Malaysia for public consultation on 2 July 2013. It was drafted based on 19 policy statements, which essentially seek to modernise the 1965 Act through the introduction of a new legal framework to simplify the laws and procedure for companies and to facilitate the growth of private companies in Malaysia.

Incorporation of Companies

Many amendments that will be put in place by the 2015 Bill will lower the costs of incorporating and maintaining a private company. With these new amendments, it is likely that more individuals will choose to set up a private limited company to conduct their business rather than registering a business or set up a sole proprietorship. Details of the main amendments can be found at page 3.

KDN PP 12853/07/2012 (030901)

Printed by One2Print Sdn Bhd
Suite 163-1-7, Wisma Mah Sing, 163, Jalan Sungei Besi, 57100 Kuala Lumpur, Malaysia

Share Capital

Par or nominal value of shares denotes the minimum amount of money or monies' worth received by the company for the issuance of fully paid-up shares, and this concept was preserved under the notion that it:

- prevented dilution in shareholding value by restricting the company's ability to issue shares at a discount; and

- ensured that the company would receive adequate consideration and have a minimum amount of capital.[1]

The Corporate Law Reform Committee for the Companies Commission of Malaysia ("CLRC")[2] thought otherwise in its 2008 final report[3] ("the 2008 report"), recommending the abandonment of the concept on the grounds that:

- it is not stated in the law that rights attached to shares are dependent on the price paid on that share, as shareholders' rights are as prescribed by the Companies Act 1965, and/or the articles of association of the company;

- voting rights, dividend rights and pre-emption rights are based on the number of shares held by a shareholder, and not by the amount paid for those shares; and

- "nominal value" may mislead investors to believe that the guaranteed value of the investment in the company's shares is always equivalent to the share's nominal or par value.

The CLRC's recommendations are incorporated as provisions in the new Companies Bill 2015 — please see page 5 for a list of frequently-asked questions in relation to "no par value" shares once the Bill comes into effect.

Financial Assistance

The 1965 Act prohibits any company incorporated under it from providing financial assistance for the acquisition of its own shares or the shares of its holding company.[4] The giving of financial assistance is against the doctrine of capital maintenance which takes its origin from the English company law and is aimed at protecting creditors' interest and preserving the capital of a company.

While the financial assistance prohibition still remains in the 2015 Bill, a new procedure (commonly known as the "whitewash procedure") is introduced to allow a company to get around the prohibition where certain conditions are met. Details of the "whitewash procedure" can be found at page 6.

Written Resolutions

Written resolutions are particularly useful as they eliminate the need for physical meeting. While it is not a new creation, the 2015 Bill has introduced many

1 Chapter One — "Authorised Share Capital and Par Value Share", Section C (Capital Maintenance Rules), A Consultative Document on Capital Maintenance Rules and Share Capital: Simplifying and Streamlining Provisions Applicable to Shares by the CLRC (June 2006), at p 23
2 The CLRC, set up in December 2003, spearheaded the Corporate Law Reform Programme, which was aimed at reviewing the Companies Act 1965
3 Chapter Three — "Share Capital and Capital Maintenance", Review of the Companies Act 1965 — Final Report by the CLRC (30 June 2008), at p 145
4 Companies Act 1965 [*Act 125*], s 67

procedures to govern the passing of written resolutions, including specific provisions on time period for the passing of a written resolution and the manner of circulation. A summary of main provisions introduced by the 2015 Bill in relation to written resolutions can be found at page 8.

Alternative Rescue Mechanism

The 2015 Bill introduced two mechanisms that are currently unavailable to rescue insolvent companies. The concept of corporate voluntary arrangement and judicial management, though foreign in Malaysia, is rather common in other jurisdictions, like Singapore. Details of these mechanisms can be found at pages 9 and 10, respectively.

Winding-up of Companies

We also see a fresh update on the provisions relating to the winding up of companies with possible intervention by the court during the winding-up process. A comparison of the approach between the 1965 Act and the 2015 Bill in this area can be found at page 13.

The 2015 Bill sees many other changes in addition to those listed above, including a shift towards stricter corporate governance and the introduction of solvency statements and other provisions meant to facilitate the management and restructuring of share capital of companies. These areas are not covered in this Special Issue, which hopes to provide an overview of the changes brought by the 2015 Bill.

Incorporation of Companies

Separate legal entity

Perhaps the most basic and yet necessary amendment to the Companies Act 1965 is the express provision that a company incorporated under the Companies Bill 2015 is a body corporate having a separate legal entity from its members and shall continue to be in existence until removal from the register.[5] The 1965 Act does not contain such provision and the notion of a company having a separate legal entity is still derived from common law.

Minimum number of members and directors

As part of the effort to modernise the current legal framework of Malaysian companies, the 2015 Bill removes the pervious statutory requirement for private companies to have at least two directors[6] and two members.[7] Under the 2015 Bill, similar to Singapore, a private company can be incorporated with a single member.[8] Joint holders of a share are treated as a single member.[9]

Change in members

Under the present framework, there isn't any contemporaneous obligation for the registrar to be notified of any change of members. More often than not, a search on the Companies Commission of Malaysia database will not reflect the current members of the company. However, this will change as the 2015 Bill requires that the Companies Commission be notified of any change in members or their particulars within 14 days of the change.[10] A company with quoted shares is expressly excluded from this obligation.[11]

5 Companies Bill 2015 cl 20. * All references hereafter to 'Clause', unless otherwise stated, are to the 2015 Bill.
6 Companies Act 1965 [*Act 125*], s 122(1)
7 *Ibid*, s 14(1)
8 Clause 9
9 Clause 42(3)
10 Clause 51(1)
11 Clause 51(3)

Constitution of company

The 2015 Bill removes the mandatory requirement for a company, other than a company limited by guarantee,[12] to have a constitution. The rights, powers, duties and obligations of the directors and shareholders of a company without a constitution will be that prescribed under the 2015 Bill itself.[13]

While the 2015 Bill expressly provides that the memorandum and articles of association of existing companies, as originally registered or altered, shall be the constitution of the company under the new regime,[14] an existing company should consider amending its constitution to be in line with the 2015 Bill. In this regard, the 2015 Bill provides an additional mechanism for companies to alter their constitution. Under the 1965 Act, a constitution can only be altered by a special resolution passed by the shareholders of the company.[15] The 2015 Bill retains[16] this and additionally permits a constitution to be altered by the court on the application of a director or shareholder of a company if the court is satisfied it is not practical to alter the constitution of the company in accordance to the procedure prescribed by the 2015 Bill or the company's constitution.[17]

Capacity of company

In line with the elimination of a mandatory constitution, it is also not mandatory for a company to set out its object[18] and consequently will not be restricted from carrying on transactions that are not within its objects. The 2015 Bill expressly provides a company with the unlimited capacity of a natural person.[19]

The 2015 Bill also expressly provides for the non-application of the doctrine of constructive notice.[20] No person shall be deemed to have notice of the contents of the constitution or any document relating to the company save for documents relating to instruments of charges due to the fact they are registered with the registrar or available for public inspection.[21] While similar provision can be found in the Singapore companies act, the Singapore companies act went further to provide that, in favour of any person dealing with a company in good faith, the power of the directors to bind the company shall be deemed to be free of any limitation under the company's constitution.

It is also worthwhile to take note that under the 2015 Bill, the entire provision on ultra vires transactions[22] presently under the 1965 Act has been removed.

Annual general meeting and filing of annual return

In line with the Companies Commission of Malaysia's policy to simplify the procedures for private companies in Malaysia, the 2015 Bill only requires a public company to hold a general meeting annually.[23] Safeguards are provided for private companies where a meeting of members may be convened by the boards of directors or upon the requests of the members.[24]

As for filing of annual return, consequential amendments on the timing to file an annual return had to be made since presently a company[25] is required to file its annual return within a month from its annual general meeting.[26] Under the 2015 Bill, an annual return shall be filed

12 Clause 38
13 Clause 31
14 Clause 34
15 Companies Act 1965 [*Act 125*], s 21
16 Clause 36
17 Clause 37
18 Clause 35
19 Clause 21
20 Clause 39
21 *Ibid*
22 Companies Act 1965 [*Act 125*], s 20
23 Clause 340
24 Clause 310
25 A company other than a company keeping pursuant to its articles a branch register in any place outside Malaysia
26 Companies Act 1965 [*Act 125*], s 165(3)

within 30 days from the anniversary of the company's incorporation date.[27]

Interestingly, in the event there isn't any change to the prescribed particulars from the last preceding annual return, the 2015 Bill allows a company to file a statement certifying that there is no change to the prescribed particulars. The actual practicality of this provision is perhaps limited as one of the prescribed particular is the total indebtedness of the company instead of total indebtedness of the company as represented by charges filed against the company.

Certificate of incorporation and share certificates

Under the 2015 Bill, a certificate of incorporation will no longer be issued automatically and a notice of registration issued by the registrar is conclusive evidence that the company has been duly incorporated.[28] Nevertheless, a certificate of incorporation may still be issued by the registrar on application by the company and upon payment of prescribed fees.[29]

Similarly, a company is not required to issue share certificates unless requested so by its shareholders or prescribed by its constitution.[30] The entry of the name in the register of members as shareholder is, in absence of evidence to the contrary, prima facie evidence of legal title.[31]

Common seal

The 2015 Bill provides that a company may elect whether to have a common seal or otherwise.[32] A document that is executed by at least two authorised officers,[33] one of whom is a director, or in the case of sole director in the presence of a witness who attests the signature, shall have the same effect as a document executed under the common seal of the company.[34]

No Par Value (NPV) Shares

What happens to shares in existing companies?
All shares will have no par or nominal value.[35]

At what value are shares to be issued?
Shares will be issued by the directors of the company[36] at a value determined by the directors.

Without par or nominal value, are shareholders still liable for calls on unpaid or partly paid shares?
Yes. Shareholders' liabilities for unpaid monies on shares issued are not extinguished.[37]

Without par or nominal value, what does "share premium" mean?
"Share premium" (being consideration paid for issued shares which exceeds the aggregate par or nominal value of such shares) will no longer exist.

What happens to the "share premium account"?
Any amount in a company's share premium account becomes part of the company's share capital.[38]

What can a company do with its share premium account?
Within **twenty-four (24) months**, the share premium account can be used as follows:[39]

27 Clause 68(1)
28 Clause 19
29 Clause 17
30 Clause 97(1)
31 Clause 101(1)
32 Clause 61(1)
33 Authorised officer was defined to mean a director of the company, a secretary of the company or any other person approved by the board of directors
34 Clause 66(3)
35 Clause 74
36 Clause 75(1)
37 Clause 618(6)
38 Clause 618(2)
39 Clause 618(3)(a) to (e)

- to provide for premium payable on redemption of debentures or existing redeemable preference shares;

- to write off —

  - the existing preliminary expenses of the company; or

  - in relation to issuance of shares of:-

  - expenses incurred;

  - commissions or brokerages paid; or

  - discounts allowed for any duty, fee or tax payable

- to pay up unissued shares and bonus shares under an existing agreement;

- to pay up (in whole or in part) the balance unpaid on existing shares; or

- to pay dividends already declared (if such dividends are satisfied [*sic*] by the issue of shares).

What happens to the company's capital redemption reserve?
Any amount standing to the credit of a company's capital redemption reserve shall become part of the company's share capital.[40]

What can a company do with its capital redemption reserve?
Within **twenty four (24) months**, the company can use the amount standing to the credit of the capital redemption reserve account to pay up unissued shares and bonus shares.[41]

What will "par" or "nominal value" in existing agreements and documents mean?

- Existing shares will have the same par or nominal value[42]

- New shares in the same class of existing shares will have the same par or nominal value[43]

- New shares not previously issued will have a "par or nominal value" [*sic*] determined by the directors:[44]

What will "share premium" in existing agreements and documents mean?
"Share premium" will be taken to mean any residual share capital in relation to the share.[45]

Financial Assistance

It has long been thought that the scope of the financial assistance prohibition is unduly wide and in practice can cover innocuous transactions that are not detrimental to the company. The 'whitewash procedure' provides a statutory get-out that enables a company to give financial assistance.

40 Clause 618(2)
41 Clause 618(4)
42 Clause 618(7)(a)(i)
43 Clause 618(7)(a)(ii)
44 Clause 618(7)(a)(iii)
45 Clause 618(7)(a)(iv)

In terms of acquisition financing, the 'whitewash procedure' will be of interest to financial institutions as they will be able to take security from a target company if the procedure is correctly followed. These major changes to the capital maintenance regime brought about by the 2015 Bill bring the company law landscape in Malaysia into line with international standards.

'Whitewash Procedure'

What type of company can take advantage of the 'whitewash procedure'?

Only private companies, as public listed companies remain prohibited from providing any form of financial assistance for the purchase of their own shares or shares in their holding company.[46]

When can the 'whitewash procedure' be used?

- When a company wishes to fund the acquisition of its shares or shares in its holding company.[47]

- When a company wishes to reduce or waive the debts owed by a shareholder arising from unpaid portion of that shareholder's shares.[48]

What are the preconditions?

- The aggregate amount of the financial assistance and any other previously given financial assistance that remains unpaid does not exceed 10% of the company's current shareholders' funds.[49]

- The company would receive fair value for the financial assistance.[50]

- The financial assistance is to be given within 12 months from the date of the solvency statement.[51]

What is the prescribed procedure?

- Before giving financial assistance[52] —

  - Pass a special members' resolution to approve the financial assistance.

  - Pass a board resolution to resolve that —

(i) it is in the best interest of the company to give the financial assistance; and

(ii) the terms and conditions of the assistance are just and reasonable.

  - Directors who passed the resolution to make a solvency statement on the same day the resolution is passed.[53]

- After giving financial assistance, i.e. within 14 days of such assistance[54] —

  - Circulate to all shareholders a copy of the solvency statement and a notice setting out details of the financial assistance.

How to pass the solvency test?

- Company must be able to pay its debts immediately after the transaction.[55]

- Company must be able to pay its debts as they become due for a period of 12 months immediately after the transaction.[56]

- As at the date of transaction, the company must have more assets than liability.[57]

46 Clause 126(1)
47 Clause 123(1)
48 Clause 123(2)
49 Clause 126(2)(c)
50 Clause 126(2)(d)
51 Clause 126(2)(e)
52 Clause 126(2)
53 For more information on solvency statement, see cl 112
54 Clause 126(5)
55 Clause 112(1)(a)
56 Clause 112(1)(b)
57 Clause 112(1)(c)

What is the penalty for all those involved if the procedure is incorrectly followed?

- Directors — a fine of up to RM3 million or up to five years' imprisonment, or both.[58]

- Company — a fine of up to RM3 million.

What happens to the transaction if there is no proper compliance?

The financial assistance or any contract or transaction in connection with it will still be valid.[59]

Written Resolutions

Below is a summary of the main provisions introduced by the Companies Bill 2015 in relation to written resolutions.

Who is entitled to receive a written resolution?

Members who are entitled to vote on the resolution as at the circulation date.[60]

What is the circulation date of a written resolution?

The circulation date is defined as the on which the written resolution is first circulated to members.[61] Where copies of the written resolution are circulated to members on different days, the first of those days will be the circulation date.

Must a written resolution be signed by all members of the company?

No, a written resolution is passed once it is signed by the number of members required to meet the relevant threshold to pass the resolution.[62]

Must the written resolution be forwarded personally to the members entitled to receive them?

No, a written resolution may be circulated in hard copy personally to the members or by post. Alternatively, it may be sent electronically to the email address provided by members.[63]

What is the maximum time period to obtain the required number of signatures?

A written resolution must be passed within 28 days from the circulation date, unless provided otherwise by the company's constitution.[64] Any resolution passed outside the prescribed time period will not be effective.[65]

Can a written resolution be used for all matters?

No, the restriction on written resolution includes resolutions to remove a director or an auditor before the expiration of their term of office.[66]

Is anyone entitled to request for a resolution to be circulated?

Any member with 5% of the total voting rights of all eligible members may require the company to circulate a resolution as written resolution.[67] The expenses for circulation shall be borne by the member who requested for circulation of the resolution.[68]

Can a company refuse the request for a resolution to be circulated as a written resolution?

Yes, any person who is aggrieved by the member's request may apply to the court for an order that the request is an abuse of rights conferred by the 2015 Bill.[69]

58 Clause 126(6)
59 Clause 124
60 Clause 298(1)
61 Clause 299
62 Clause 306(4)
63 Clause 300
64 Clause 307(1)
65 Clause 307(2)
66 Clause 297(2)
67 Clause 302
68 Clause 304
69 Clause 305

Corporate Voluntary Arrangement

Eligibility

A voluntary arrangement is defined[70] in the Companies Bill 2015 as a composition in satisfaction of a company's debts or a scheme of arrangement of a company's affairs. While any director[71] of a company, a judicial manager[72] of a company under judicial management order or a liquidator[73] of a company that is being wound up may make a proposal to the company and its creditors for a voluntary arrangement under the Companies Bill 2015, this rescue mechanism is not available to a public company, a company which is a licensed institution or an operator of a designated payment system regulated under the laws enforced by the Bank Negara Malaysia, a company which is subject to the Capital Markets and Services Act 2007 or a company which creates a charge over its property or any of its undertaking.[74]

Proposal

In addition to the terms of the proposed voluntary arrangement and a statement on the affairs of the company, a proposal for voluntary arrangement shall include the appointment of a nominee who will act as a trustee or supervisor supervising the implementation of the arrangement.[75] The duties and obligations of a nominee are prescribed under the Seventh Schedule of the Companies Bill 2015.

Moratorium

Once the company has filed all the documents[76] referred to in clause 398 of the Companies Bill 2015 in court, a moratorium will commence automatically[77] and remain in force for 28 days.[78] The moratorium shall end at the end of the day of the meeting summoned by the nominee for the consideration of the proposal.[79] The moratorium may be extended for a period of not more than 60 days with the consent of the nominee and the members of the company.[80]

A moratorium essentially functions as a stay where no proceedings[81] may be taken against the company, including any winding-up petition or any application for judicial management order pending the meeting of the creditors and members to consider the proposal. Any steps to impose any security over the assets of the company or to transfer any shares of the company require the approval of the court.[82]

Approval

The arrangement can be approved[83] by a simple majority of the members of the company and seventy-five per centum of the total value of creditors present and voting at the meeting. Once approved, the arrangement shall be binding[84] on all creditors of the company, irrespective of whether they voted in favour of the arrangement or otherwise.

70 Clause 394
71 Clause 396(1)
72 Clause 396(3)
73 *Ibid*
74 Clause 395
75 Clause 396(2)
76 The documents include the proposal for the proposed voluntary arrangement, statement on company's eligibility for a moratorium, statement from the nominee that he has given his consent to act and statement from the nominee containing his opinion on the arrangement
77 Clause 398
78 Clause 3, Eighth Schedule
79 Clause 5, Eighth Schedule
80 *Ibid*
81 Clause 17, Eighth Schedule
82 *Ibid*
83 Clause 400
84 Clause 400(5)

Judicial Management

When a company is unable to pay its debts, it may be subject to various insolvency proceedings. The aim of insolvency approaches is for the insolvency administrator to take over the affairs of the debtor company in order to settle the debts of the creditors and distribute the insolvency proceeds to the rightful persons in accordance with law and equity.

The new Companies Bill 2015 offers two new insolvency methods, namely, the corporate voluntary arrangement ("CVA") and judicial management. These methods were introduced based on the recommendations made by the Corporate Law Reform Committee (CLRC) back in 2008.

As its name suggests, judicial management involves the appointment of an independent manager whose role will be to assess the condition of the distressed company, formulate a proposal to manage the company and, once the proposal is approved by the requisite number of creditors, to implement it. Unlike liquidation proceedings, which typically leave all those concerned worse off (with the life of the company being put to an end, and creditors being left with little hope of recovering the full value of debts owed to them), judicial management strives to resuscitate a distressed company and nurse it back to financial health under the supervision of the courts.

The court can only make an order for judicial management if — and only if — the company is or will be unable to pay its debts;[85] and the making of the order will be likely to achieve one or more of the following purposes:[86]

a) the survival of the company, or the part of its undertaking as a going concern;

b) the approval of a compromise or arrangement between the company and its creditors; and

c) a more advantageous realisation of the company's assets than on a winding-up.

An application for judicial management may be made by the company itself, its directors or creditors, either together or separately, through a notice of application.[87] Once a judicial management order is granted, the board of directors ceases to function and there is an automatic moratorium on any transfer of shares, legal suits and enforcement actions against the company.[88]

For secured creditors, a judicial management order also means that no steps can be taken to enforce any charge or security,[89] and any receiver and manager already appointed is required to vacate their office.[90]

Pursuant to Clause 409 of the Bill, the court will dismiss a judicial management application if it is satisfied that:

a) a receiver or a receiver and manager has been or will be appointed; and

b) the making of the order is opposed by a secured creditor.

An exception to this statutory veto power afforded to secured creditors is the "public interest" exception. The Bill provides that:

85 Clause 404
86 Clause 405
87 Clause 405(1)
88 Clause 410
89 *Ibid*
90 Clause 411

> "… nothing in this section shall preclude a Court from making a judicial management order and appointing a judicial manager if the Court considers the public interest so requires".[91]

Since the Bill offers no definition of public interest, the pertinent question then arises of how public interest will be defined by the Malaysian courts. As the Malaysian judicial management regime has been modelled after Singaporean provisions, it is worthy to take a close look at the stand taken by Singapore in this respect.

Singapore position

The judicial management regime in Singapore was introduced in 1987 as a result of the Pan-Electric crisis during the recession of 1985. Pan-Electric Industries was a Singapore based public listed company with 71 subsidiary companies. At its demise, it had a total debt of S$480 million and all its shares held by 5,500 shareholders were found to be worthless overnight, which caused the closure of the Singapore and Malaysian stock exchange markets for an unprecedented three days.

Following the Pan Electric crisis, Singapore recognised the desirability of not pushing companies that could be revitalised into liquidation. The Report of the Fiscal and Financial Policy Sub-Committee of the Economic Committee stated that "measures should be introduced so that a viable business capable of making a contribution to the economy could be preserved whenever possible for the benefit of employees, the commercial community and the general public".[92] Thus judicial management was introduced in Singapore.

In *Re Cosmotron Electronics (Singapore) Pte Ltd*,[93] the High Court of Singapore, noting that there is no statutory definition of "public interest", opined that since public interest is 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 [of the Companies Act (Cap 50, 1994 Rev Ed)].

In the more recent case of *Re Bintan Lagoon Resort Ltd*,[94] the Singapore High Court expressed its view that public interest should only be invoked in narrow circumstances. The judicial management application was brought by a group of unsecured creditors who sought to wrest control of the process of selling the company's assets from the receiver and manager in favour of judicial management.

In dismissing the petition, the court held that the power of the court to invoke the public interest exception should not be lightly exercised, and the mere fact that it is in the public interest to rescue a company with a decent chance of survival alone is not enough. The court went on to suggest that:

> "The question whether the public interest so requires may perhaps best be answered by considering the likely consequences of not making a judicial management order. Will a refusal to make such an order lead to or allow the dismemberment or collapse of a company whose failure will have serious social or economic impact? The Pan-Electric type of case comes immediately to mind as a paradigm but I do not suggest that the circumstances need be as dire nor that the consequences of not granting the order should be as grievous."

91 Clause 405(5)(a)
92 Tarek M Hajjiri and Adrian Cohen, *Global Insolvency and Bankruptcy Practice for Sustainable Economic Development*: (Vol 2) International Best Practice
93 [1989] 2 MLJ 11; [1989] SLR 251
94 [2005] SGHC 151; [2005] 4 SLR 336

In other words, as an assistant law professor with the National University of Singapore noted:

> "… there must be some systemic level of repercussions, as instanced by the example of the Pan Electric Group collapse given by the court, and not merely the typical, insulated implications of failure of the company's business in question as part of the normal entry and exit process of businesses in a competitive market."[95]

Public interest: An analysis

Some have criticised the strict approach taken by the Singapore courts in its interpretation of "public interest". The assistant professor mentioned is of the view that by adopting too narrow a test, there is a risk of thwarting the basic public interest objective for the corporate rescue process in preserving going concern value.[96] In his article, he posits that a more flexible and nuanced interpretation of the public interest exception would allow the court to make a judicial management order, notwithstanding the objection of secured creditors, which would promote the overall interests of the company and its creditors.[97]

A respected Singapore lawyer concurred with the principles espoused in *Re Bintan*, saying that if the security rights of a creditor are to be overridden by public interest considerations, a case has to be established clearly and forcefully.[98]

To date, the public interest ground has never been successfully invoked in any reported case to override the veto right given to a secured creditor entitled to appoint a receiver and manager. This is perhaps rightly so. For "public interest" to defeat the *ex debito justitiae* right of a secured creditor to obtain a winding-up order against an insolvent company, there must be in existence overwhelming circumstances justifying the same. Too lenient an approach in this regard would offend the principles of commercial morality. **LH-AG**

95 Tracey Evans Chan, "The Public Interest In Judicial Management" Singapore Journal of Legal Studies [2013] 213 at 290
96 *Ibid*
97 *Ibid* at 278-300
98 Lee Eng Beng, Singapore Academy of Law Annual Review on Insolvency Law (2005) 6 SAL Ann Rev 279 at 292

Compulsory Winding Up

Companies Act 1965	Companies Bill 2015
Application for winding up • Statutory threshold for presumption of inability to pay debt is RM500.[99] • No limitation on time to file a winding-up petition.	Application for winding up • Statutory threshold for presumption of inability to pay debt is a sum to be prescribed by the minister cha rged with the responsibilities for companies.[100] • Winding-up petition must be filed within six months[101] from the expiry of the demand for payment.
Discretion of the court • Court has the power to stay a winding up or restrain further proceedings after the presentation of the winding-up petition, but before a winding-up order has been made.[102] • Court also has the power to stay all proceedings in relation to the winding up at any time after an order for winding up has been made.[103]	Discretion of the court • In addition to the power to stay[104] proceedings, the court has the power to terminate[105] a winding up of a company even after an order for winding up has been made whereupon a company ceases to be in liquidation.
Payment of preliminary cost • Reimbursement of preliminary costs by Parliament limited to RM750.[106]	Payment of preliminary cost • Reimbursement of preliminary costs by Parliament limited to RM3,000.[107]
Avoidance of disposition of property • Any disposition[108] made after the commencement of winding up by the court is void unless ordered otherwise by the court.	Avoidance of disposition of property • Any disposition other than an exempt disposition[109] made after the commencement of winding up by the court is void unless ordered otherwise by the court.

99 Companies Act 1965 [*Act 125*] s 218(2)
100 Clause 466(1)
101 Clause 466(2)
102 Companies Act 1965 [*Act 125*] s 222
103 *Ibid*, s 243
104 Clauses 470 and 492
105 Clause 493
106 Companies Act 1965 [*Act 125*] s 220(3)
107 Clause 468(3)
108 Companies Act 1965 [*Act 125*] s 223
109 Exempt disposition is defined in cl 472(2) to mean a disposition made by a liquidator, or by an interim liquidator of the company in exercise of power conferred on him under the 2015 Bill or by the rules that appointed him or by an order of the court

About the authors



Senior associate **Bella Chu Chai Yee** (cy@lh-ag.com) and associate **Samantha Liew Wee Nie** (wnl@lh-ag.com) are both with the Corporate Department of Lee Hishammuddin Allen & Gledhill, and are part of a team headed by **Tay Weng Hwee** (twh@lh-ag.com)


Jessica Man Hui Sze (mhs@lh-ag.com) is an associate with the Corporate Department, and is part of a team led by **Aaron Gerard Sankar** (ags@lh-ag.com)


Sharan Kaur Gill (skg@lh-ag.com) is an associate with the Employment Practice Group, and is part of a team led by **Dato' Thavalingam C Thavarajah** (tt@lh-ag.com)

About Lee Hishammuddin Allen & Gledhill

The Firm has more than 100 lawyers in Kuala Lumpur, Penang and Johor Bahru. Our areas of practice include the following specialist practice groups, each led by an experienced partner:

Arbitration
Banking & Insolvency
Construction
Corporate & Commercial Disputes
Employment
Energy, Oil & Gas
Financial Services
Foreign Investment
Insurance
Intellectual Property & TMT
Islamic Finance
Mediation
Mergers & Acquisitions
Real Estate
Regulatory & Compliance
Shipping
Tax, GST & Customs

If we can be of service to you, please contact us at:

Lee Hishammuddin Allen & Gledhill
Level 16, Menara Tokio Marine Life
189, Jalan Tun Razak
50400 Kuala Lumpur, Malaysia
Tel : +603 2161 2330
Fax : +603 2161 3933, 2161 1661
E-mail : enquiry@lh-ag.com

Published by the Knowledge Department
Lee Hishammuddin Allen & Gledhill

For further information about the *Legal Herald*, please contact knowledge@lh-ag.com or the person whom you normally consult.

Opinion, comments and suggestions are welcome.

PRACTICE AREAS

Corporate

FINANCIAL SERVICES
Tay Weng Hwee
Email: twh@lh-ag.com

Ong Eu Jin
Email: oej@lh-ag.com

Angeline Cheong May May
Email: cmm@lh-ag.com

Aniza Osman
Email: ao@lh-ag.com

Chia Loong Thye
Email: clt@lh-ag.com

Tan Gek Im
Email: tgi@lh-ag.com

FOREIGN INVESTMENT
Ooi Bee Hong
Email: obh@lh-ag.com

ISLAMIC FINANCE
Megat Hizaini Hassan
Email: mh@lh-ag.com

MERGERS & ACQUISITIONS
Tay Weng Hwee
Email: twh@lh-ag.com

Aaron Gerard Sankar
Email: ags@lh-ag.com

Ooi Bee Hong
Email: obh@lh-ag.com

ENERGY, OIL & GAS
Tay Weng Hwee
Email: twh@lh-ag.com

Ooi Bee Hong
Email: obh@lh-ag.com

REAL ESTATE
Ooi Bee Hong
Email: obh@lh-ag.com

Chia Loong Thye
Email: clt@lh-ag.com

Tan Gek Im
Email: tgi@lh-ag.com

Aniza Osman
Email: ao@lh-ag.com

Dispute Resolution

ARBITRATION
Dato' Nitin Nadkarni
Email: nn@lh-ag.com

Lambert Rasa-Ratnam
Email: lr@lh-ag.com

Ang Hean Leng
Email: ahl@lh-ag.com

BANKING & INSOLVENCY
Kumar Kanagasingam
Email: kk@lh-ag.com

Sean Yeow Huang-Meng
Email: yhm@lh-ag.com

Andrew Chiew Ean Vooi
Email: ac@lh-ag.com

Mong Chung Seng
Email: mcs@lh-ag.com

Loh Chu Bian
Email: lcb@lh-ag.com

Hoi Jack S'ng
Email: hjs@lh-ag.com

CONSTRUCTION
Dato' Nitin Nadkarni
Email: nn@lh-ag.com

CORPORATE & COMMERCIAL DISPUTES
Rosli Dahlan
Email: rd@lh-ag.com

Lambert Rasa-Ratnam
Email: lr@lh-ag.com

G Vijay Kumar
Email: vkg@lh-ag.com

SM Shanmugam
Email: ssm@lh-ag.com

Ang Hean Leng
Email: ahl@lh-ag.com

Andrew Chiew Ean Vooi
Email: ac@lh-ag.com

INSURANCE
G Vijay Kumar
Email: vkg@lh-ag.com

MEDIATION
Chia Loong Thye
Email: clt@lh-ag.com

ENERGY, OIL & GAS
Dato' Nitin Nadkarni
Email: nn@lh-ag.com

Andrew Chiew Ean Vooi
Email: ac@lh-ag.com

SECURITIES LITIGATION
Lambert Rasa-Ratnam
Email: lr@lh-ag.com

SM Shanmugam
Email: ssm@lh-ag.com

SHIPPING
Datuk D P Naban
Andrew Chiew Ean Vooi
Mong Chung Seng
Email: shipping@lh-ag.com

TRUST, PROBATE & ADMINISTRATION
SM Shanmugam
Email: ssm@lh-ag.com

Employment

Lim Heng Seng
Email: lhs@lh-ag.com

Dato' Thavalingam C Thavarajah
Email: tt@lh-ag.com

Intellectual Property & TMT

Bahari Yeow
Email: yth@lh-ag.com

Adlin Abdul Majid
Email: aam@lh-ag.com

Tax, GST & Customs

Datuk D P Naban
Email: dpn@lh-ag.com

S Saravana Kumar
Email: sks@lh-ag.com

Datuk Aznam Mansor
Email: am@lh-ag.com

SM Shanmugam
Email: ssm@lh-ag.com

Regulatory & Compliance

Adlin Abdul Majid
Email: aam@lh-ag.com

The Legal 500 Asia Pacific Leading Firm 2016

Winner Asia Pacific Awards Chambers and Partners 2016 Lee Hishammuddin Allen & Gledhill Malaysia Law Firm of the Year

Top Ranked Asia Pacific Chambers and Partners 2016 Leading Firm

LH AG Advocates and Solicitors