

NEW CHANGES TO WINDING UP LAWS
INTRODUCED
BY THE COMPANIES ACT 2016
By Alex Chang Huey Wah Esq

Thank you our Charming MC for the kind introduction
What the MC did not tell you was
Some people can sing and some Can bullshit
I cannot sing

Welcome

I am indeed very honoured to be invited by the SLS to share a few things with you and Even more honoured to have the with us Their Lordships Mr Justice Ravinthran Mr Justice Martin Idang and Mr Justice Ismail Brahim Madam Elsie learned registrar of the KK Court

When will the New companies Act come into force?

The Companies Act 2016 came into force on January 31, 2017 save and except the parts on CVA and Judicial Management.

Repeals and Savings

What happens to the winding up petition already filed?

S 620 Any legal proceedings, remedy or investigation in respect of such right, privilege, obligation or liability shall not be affected by this Act and shall continue to remain in force as if this Act has not been enacted.

Rule 194 curing formal defects

Repeals and Savings

I know, some of you wanted to throw away the old 65 Act...

WHAT ARE THE SALIENT AMENDMENTS?
TO COMPANIES WINDING UP LAWS

- 1 What is the 'threshold' (the minimum amount of debt) to issue the Statutory Notice (formerly the 218 Notice) RM10,000.00 in a Gazette Notification issued informed by the Minister who is in charge of the Companies gazetted by the Government.
see s 2 CA16, At the moment it is the Minster of Domestic Trade, Co-operatives and Consumerism Dato' Seri Hamzah Zainudin Six months from the expiry of the 21 days

Statutory Notice & Judgment

2 Can I file a Companies winding up Petition by sending a statutory Notice only without getting a judgment?

2.1 Yes. As a Judgment is not a prerequisite for the commencement of a winding up
Judgment Required

2.2 *Campana Distributor Sdn Bhd v Amseal Engineering Sdn Bhd* [1998] 7 MLJ 677, [1998] 2 CLJ Supp 12, [1998] 2 AMR 1330. A Companies Winding Up order was granted in favour of the petitioners who did not first obtain judgment while the respondents maintained a counter claim against the petitioners in the form of a civil suit claiming a sum 20 times the amount claimed by the petitioners.

2.3 218 1 e petition See *Tradelift v Waris* Ravi J

3 Insolvency Test in Companies Winding Up

A New Solvency Test and the Personal Liabilities of Directors: financial assistance and shares buyback.

3.1 Section 112 of the Companies Act 2016 provides a solvency test

3.2 Quick assets test

3.3 Total Assets test

3.4 A split 218 and Just and Equitable

3.5 In CA16 the old s218 is split into new sections, namely, sections 465 and 466 with very similar provisions.

3.6 Formerly 1(I) Now 1(h)

3.7 Case law from Sabah *Hiew Kah Yung*

3.8 218 1 i petition not allowed the drastic remedy Ravi J

See *Datuk Wong v Arctic Star* 218 1 b c f i petition, allowed
Ismail JC

4 Affidavit Verifying Petition

4.1 4 days rule, rule 26 Companies Winding Up Rules 1972

4.2 It is best to file it within 4 days after filing the petition otherwise you may have to explain to the registrar when you are getting the Registrar's Certificate.

- 5 When is the commencement of Winding Up?
- 5.1 Section 467 of the CA16, at the date of the winding up order.
 - 5.2 You have to be careful and compare the old CA65 in the old CA65 commencement of winding up was upon the presentation, now it is upon the winding up order.
 - 5.3 However the sections which will be affected most will be the old sections against disposition of properties and distress.

6 When is the commencement of Winding Up?

- 6.1 Old Companies Act s222 now 470
- 6.2 s223 now 472
- 6.3 s224 now 472 also

7 When is the commencement of Winding Up?

- 7.1 However in the new Companies Act 2016 the new sections have been changed to use the words "upon the presentation" of Companies Winding Up Petition.
Disposition of Properties & Transfer of Shares
- 7.2 The position in the the Disposition of Properties and Transfer of Shares of Company after winding up petition has been presented, under the new s 472 (old s 223)
- 7.3 the position in s223 of the CA65 remains unchanged despite it is now known as s472 of CA16, however, there is an exception in which an exempt disposition of the property of the company is allowed without the court order.

Disposition of Properties & Transfer of Shares

- 8 The old section 224 CA65 which covers distress is also incorporated into this one section.
- 8.1 Fast Cars
 - 8.2 Scientists Made a Study
 - 8.3 What is the effect of Driving Fast Cars
 - 8.4 Advertisement of Petition
 - 8.5 Money saving provisions

- 9 Advertisement
 - 9.1 Advertisement of the Petition in the Newspaper, r 24 Companies Winding Up Rules 1972
 - 9.2 twice or four times?
 - 9.3 What did the rules say?

“...every petition shall be advertised in Form 4, 7 clear days... before the hearing of the petition...” once in the gazette and twice at least in two local newspapers

2 vs 4 Advertisements
 - 9.4 Petro Pipe vs Fieldwork it was held to be 4 times despite hearing my argument on the wordings

- 10 Companies Winding up Rules
 - 10.1 The Winding up Rules 1972 was made under the old CA65 and the Courts of Judicature Act 1964.
 - 10.2 By virtue of s616 of the CA16, it refers to the Rules Committee constituted under the Courts of Judicature Act 1964.
 - 10.3 And since the 1972 rules was made by the same Committee unless it is repealed I feel that we should continue to refer to the old Rules.
 - 10.4 Rules of Court 2012 and Companies Winding up Petitions, Summons in Chambers of Notice of Applications.
 - 10.5 Language for Companies Winding up Petitions
 - 10.6 the affidavit in opposition is like your statement of defence which you must file if you should wish to defend the petition Labuan Financial Services v EC Trust [2015] 1 LNS 540 Purported shareholder failed to file an affidavit in opposition and companies winding up order was made Ravi J

- 11 Appointment of Liquidator
 - 11.1 Appointment of Liquidator the Official Receiver the (Private) liquidator section 227 and Ex Parte SIC sec 227 CA65 Now s477
 - 11.2 Exparte Summons in Chambers
 - 11.3 Interim Liquidator
 - 11.4 Liquidator Or Provisional Liquidator Old 227; new 477 CA16
 - 11.5 Judge said could use 'purposive' interpretation he could read 'shall' as 'directory'

[2015] 3 CLJ 940 High Court Decision Set Aside on Appeal [2015] 1 LNS 10
and [2015] 1 LNS 11

11.6 Removal Liquidator Seng Kim Huat v Rasamutu By Datuk Martin J O R
be appointed in place of liquidator

12 Any Priority with respect to Costs incurred by the Petitioning Creditors?

12.1 Under the old CA65 the petitioning creditor rank together with ALL other
creditors and does not provide any priorities, the pari passu principle.

12.2 Unlike the liquidator in CA65 who could take his liquidation costs first.

13 Payment of Preliminary Costs by Petitioner

13.1 s468(1) of CA16 provides that the Petitioner who at their own costs, conduct all
proceedings in the winding up until a liquidator has been appointed.

13.2 s468(2) of CA16 The Liquidator shall reimburse the Petitioner out of assets of the
company the taxed costs incurred by the petitioner in any such proceedings
unless the Court orders otherwise.

13.3 s468(3) CA16 Where the company has no assets or insufficient assets, and in the
opinion of the Minister any fraud has been committed, the Minister may allow
an amount not exceeding three thousand ringgit.

14 Stay and Termination

14.1 Old S 243 CA65

14.2 Section 492 Stay

14.3 Section 493 termination

14.4 Section 494 Court may require a Report from the Official Receiver and other
considerations

- 15 Stay and Termination
 - 15.1 Old S 243 CA65 Sanyan v Sanyan Lumber Ravi J
 - 15.2 Stay pending appeal and 243 Stay not allowed
 - 15.3 Bank Islam v Wellas Datuk Martin J
 - 15.4 Judgment in default and partial payment
 - 15.5 Motion for stay not allowed

- 16 Stay and Termination
 - 16.1 Father and son company
 - 16.2 Loan
 - 16.3 How to use
 - 16.4 Old S 243 CA65

- 17 Getting Out of the Get Out Clause
 - 17.1 Section 223 Avoidance of dispositions of property, etc.

“Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void....”

- 18 In this matter we invited the court of appeal to interpret the word “and” see NZ New Image [2016] 9 CLJ 474
 - 18.1 When our client’s New Zealander partner (“NZ”) wanted to sell their shares by invoking the “get out clause” in the joint venture company (“JV Company”) they explored many options with respect to that request.
 - 18.2 One day without any warnings NZ filed an action against our client. To our client it was wrong as the parties have yet to complete the explorations of the various options to resolve our issues.

- 18.3 Our client submitted that the sale was prohibited by s 223 of the Companies Act 1965 and leave (permission) from the Companies Winding Up Court was needed...
- 18.4 NZ did not agree and felt that they were able to proceed.
- 18.5 In the High Court, a very lengthy argument ensued and the last argument we advanced was that of whether the word 'and' in s 223 of the Companies Act 1965 was to be read conjunctively or disjunctively.
- 18.6 In the High Court, a very lengthy argument ensued and the last argument we advanced was that of whether the word 'and' in s 223 of the Companies Act 1965 was to be read conjunctively or disjunctively.
- 18.7 At the High Court stage, 4 High Court decisions were with NZ, one Court of Appeal decision, one High Court decision and one English High Court decision were on our side on this point.
- 18.8 At the Court of Appeal the learned Judges agreed with the High Court and held that
- 18.8.1 Leave pursuant to s 223 should be applied from the Companies Winding Up Court;
- 18.8.2 The word 'and' should be read disjunctively and NOT conjunctively;
- 18.9 Section 18 of the Specific Relief Act 1950 requires NZ to pray for damages without which the court could not grant damages; and
- 18.10 The omnibus clause "...such other reliefs as the court thinks fit..." may not be invoked to order damages which were not prayed for.

19 The Federal Court

- 19.1 Dissatisfied with the decision of the Court of Appeal, NZ applied for leave to appeal to the Federal Court. 8 grounds were put forward which their appeal is novel (new points not decided previously by the Federal Court) and that a decision of the Federal Court will be of public interest.
- 19.2 We succeed to challenge 7 out of 8 and the Federal Court allowed one Question to be posed.
- 19.3 “Whether by virtue of Section 18(2), (3) and (5) of the Specific Relief Act 1950 the High Court has the inherent power to grant an order for assessment of damages in an action for specific performance involving transfer of shares between the shareholders of a company which went into liquidation after the commencement of the action?”
- 19.4 When the Chairman of the Federal Court 5-member panel posed the Question:
“...tell us why did your client not pay for the shares as per the get out clause?”
“...what is the position in India with respect to Section 18 of the Specific Relief Act 1950...”
- 19.5 We calmly told them as follows:
- 19.5.1 That the High Court did not find me committing any breaches of the agreement;
- 19.5.2 That it was decided by the Privy Council in 1923 upon hearing an appeal from India that first the court must find NZ entitling to specific performance then only, if they have also asked for damages, the court could consider granting damages.
- 19.6 Since in this case NZ was not able to sell their shares to our client, without a court order from the companies winding up court, it is not legally right for a court to order our client to pay something for nothing...

20 Where To Apply For Leave

20.1 The new CA16 in some parts provided that leave shall be made in the winding up court,

20.2 470, 472 CA16 however, it is silent in this section on disposition of properties, so one must refer to the NZ New Image decision where it was decided that leave should be made in the winding up court.

ARDESHIR MAMA AIR 1928 PC 208

BONUS CHAPTERS

Valuation of Shares

LGB ENGINEERING SDN BHD V SAIFUL RAIS SHAIKS SALIM [2015] 9 MLJ 349

The court made an assessment of damages to be paid by our clients at RM74 million.

Saved Our Clients a Huge Sum of RM74 Million

21 Clients sold 50% shares in company A

21.1 But delayed in the transfer of the shares

21.2 A owns 45% in Company B (the other 55% is owned by Kumpulan Perangsang Selangor Bhd (KPSB), a State Owned Investment Company)

21.3 B had a market value of RM441 million

22 Saved Our Clients RM74 Million

22.1 KPSB then called for rights issues

22.2 At the end when the 50% shares were transferred to the plaintiffs

22.3 company A's shareholding in B was reduced to 9% Saved Our Clients RM74 Million

22.4 Damages was ordered to be paid due to the delay $441m \times (45\% - 9\%) \times 50\% = 74m$ Damages RM74 million

23 We convinced the high court on appeal that RM74 million should be reduced to nothing, not even RM1.

23.1 This decision was affirmed by the Court of Appeal vide W-03(IM)-77-07/2014 on November 11, 2014.

23.2 Federal court dismissed the leave to appeal from the Court of Appeal

Corporate Voluntary Arrangement (“CVA”) s395-402

24 Corporate Voluntary Arrangement (hereinafter referred to as “CVA”) s395-402

24.1 A director of a going concern company or Official Receiver may propose a Corporate voluntary arrangement agreement. The director or Official Receiver shall appoint a nominee and submit a proposal to the nominee.

25 Corporate Voluntary Arrangement (“CVA”) s395-402

25.1 The nominee thereafter shall submit to the director or Official Receiver indicating that:

25.1.1 whether there is reasonable prospect for the proposal being approved; funds is sufficient during the moratorium for the company to carry on its business meetings of the company should be summoned to consider the proposal

26 Judicial Management s403-430

26.1 The company or its creditors may apply to the Court to place the company under Judicial Management and appoint Judicial Manager.

26.2 Judicial Management is not applicable to:

26.3 a company which is a licensed institution or an operator of a designated payment system regulated under the laws enforced by the Central Bank of Malaysia; and

26.4 a company which is subject to the Capital Markets and Services Act 2007

26.5 The company or its creditors may apply to the Court to place the company under Judicial Management and appoint Judicial Manager.

26.6 Application to Court for a company to be placed under judicial management and for appointment of a judicial manager

- 26.7 An application for an order that a company should be placed under a judicial management and for an appointment of a judicial manager may be made to the Court by the company or its creditor if the company or its creditor considers that—
- 26.8 the company is or will be unable to pay its debts; and
- 26.9 there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up.

27 How Does Corporate Voluntary Arrangement (CVA) Work

28 What is a CVA's appointment of a nominee?

- 28.1 The appointment of a nominee under CVA shall act as a trustee or supervisor to supervise the implementation of the voluntary arrangement.
- 28.2 In the case where liquidator is Official Receiver, the nominee shall be an insolvency practitioner

Qualified Insolvency Practitioner

29 Who is a qualified insolvency practitioner (section 2 and 394 of the CA16).

- 29.1 a person who is an approved liquidator other than Official Receiver
- 29.2 Any person who is qualified to be appointed as an insolvency practitioner whose powers and duties shall include the powers and duties specified in the Seventh Schedule

What is Moratorium Period

30 What is a moratorium period and how long will it last?

- 30.1 A moratorium period shall remain in force for a period of 28 days.
- 30.2 An extension of the moratorium period for not more than 60 days is possible when a meeting is summoned, subject to the consent given by the nominee and members of the company, and obtaining 75% majority in value of creditors who are present and voting either in person or by proxy at the meeting.

- 31 What can the Creditors do during the Moratorium Period?
- 31.1 no petition may be presented for the winding up of the company;
 - 31.2 no meeting may be called or requisitioned except with the consent of the nominee or the leave of court and subject to, where the court gives leave, such terms as the court may impose;
 - 31.3 no resolution may be passed or order may be made for the winding up of the company;
 - 31.4 no application for judicial management order may be made against the company;
 - 31.5 no judicial manager may be appointed;
 - 31.6 no landlord or any person to whom rent is payable may exercise right of forfeiture, except with the leave of court and subject to such terms and conditions the court may impose;
 - 31.7 no other steps may be taken to impose any security over the company's property, except with the leave of court and subject to such terms and conditions the court may impose;
 - 31.8 no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company or its property except with the leave of court and subject to such terms and conditions the court may impose;
 - 31.9 no steps shall be taken or transfer any share of the company or to alter the status of any member of the company except with the leave of court and subject to such terms and conditions the court may impose.

Vote in Favour or Against the CVA?

- 32 Are the creditors entitled to vote in favour or against the CVA?
- 32.1 Yes.
 - 32.2 The required majority to approve a proposal for voluntary arrangement in the creditors' meeting shall be seventy-five per centum of the total value of the creditors present and voting at the meeting either in person or by proxy.
- 33 Can ALL Companies Apply for CVA?
- 33.1 CVA does not apply on the following companies:
 - 33.1.1 a public company;

- 33.1.2 a company which is a licensed institution or an operator of a designated payment system regulated under the laws enforced by the Central Bank of Malaysia;
- 33.2 a company which is subject to the Capital Markets and Services Act 2007; and
- 33.3 a company which creates a charge over its property or any of its undertaking.

Under what circumstances can a Company apply for Judicial Management

- 34 Is being unable to pay its debts the only consideration?
 - 34.1 No.
 - 34.2 There is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up

- 35 For discussion I refer to: *JCT LIMITED v. MUNIANDY NADASAN & ORS AND ANOTHER APPEAL* [2016] 3 CLJ 692 Held 4
 - 35.1 (4) The actions of CNLT, through Sahgal, who was then the managing director, had been designed to defraud the creditors.

- 36 He was dishonest in his dealings, the results of which had been that the creditors were defrauded.

- 37 He dealt in transactions that had dubious objectives which not only had adverse ramifications on CNLT itself, but they also had the effect of defrauding the creditors by holding out that CNLT was a going concern, so that the creditors would continue to do business with CNLT, when in fact, the latter was insolvent.

- 38 Further, the payments made to JCT were business transactions that were carried out by Sahgal to defraud the creditors, as they were clearly deprived of repayments of their loans to CNLT.

- 39 As such, the trial judge was justified in making the consequential order against JCT to repay the monies, so dubiously paid to it, back to the provisional liquidators of CNLT. (para 86)

Business as a Going Concern

- 40 What is preserving its business as a going concern.
- 40.1 the survival of the company, or the whole or part of its undertaking as a going concern;
- 40.2 a more advantageous realisation of the company's assets would be effected than on a winding up.

Judicial Management Order

- 41 A judicial management order may be sought for purposes other than corporate survival, e.g. to secure a moratorium in connection with a scheme of arrangement.
- 42 Indeed, an important aspect of the procedure is that on presentation of the petition for a judicial management order, there is an effective "freezing" of the company's position.
- 43 No distress may be levied or execution commenced or continued on the company's goods.
- 44 Owners of goods supplied to the company on hire-purchase or lease terms or on terms providing for retention of title are not permitted to repossess. The company is thus given breathing space by being protected from immediate action by its creditors.
- 45 Who is an Insolvency Practitioner
- 45.1 a person who is an approved liquidator other than Official Receiver
- 46 A judicial management order granted by the Court will remain in force for how long?
- 46.1 From the date an order is made, a judicial management shall remain in force for six months.
- 46.2 Extension of the Judicial Management?

46.3 With the application to be made by the Judicial Manager, a judicial management may be extended for another six months.

Actions

47 What actions cannot be taken against the Company during the judicial management?

47.1 no resolution shall be passed or order made for the winding up of the company;

47.2 no receiver or receiver and manager of the kind referred to in section s374 shall be appointed;

48 no other proceedings and no execution or other legal process shall be commenced or continued and no distress may be levied against the company or its property except with the consent of the judicial manager or the leave of court, and if the Court grants leave, subject to such terms as the Court may impose;

49 no steps shall be taken to enforce security over the company's property or to repossess any goods in the company's possession under any hire purchase agreement, chattels leasing agreement or retention of title agreement except with the consent of the judicial manager or the leave of court, and if the Court grants leave, subject to such terms as the Court may impose;

50 no steps shall be taken or transfer any share of the company or to alter the status of any member of the company except with the leave of court and subject to such terms and conditions the court may impose;

Options Available to the Creditors

51 Since the parts of the new Act in relation to CVA and JM is not in force yet what must the creditors do?

51.1 Always take action as soon as possible

52 Are my present winding up petitions affected?

52.1 There is a saving provision, any pending applications that have been filed immediately before the commencement of the CA16 shall be treated as though the CA16 has not been enacted.

"Saving Provisions"

53 Shall I start a Companies Winding Up Petition against my debtors before the “saving provisions” of the New Companies Act 2016 come into force?

53.1 You may if you wish, given the fact that there is a saving provision, it will not affect the winding up petition if you fall within the saving provisions in the event the CA16 has been implemented.

Winding Up Petition

54 If I commence a Companies Winding Up petition:

54.1 Do I need a Judgment?

54.2 It is not mandatory to obtain a judgment to commence a Companies Winding Up Petition. The Honourable Court may grant an order if the Honourable Court is of the opinion that it is just and equitable to wind up the company.

Question and Answer

Thank You