

Business Sustainability: Survival Strategies

6 August 2021

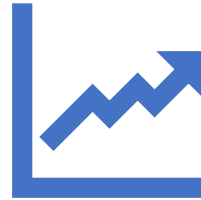
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INTRODUCTION



Recurring lockdown and its impact on businesses



Economy outlook for the second half of 2021



Managing debts and creditors is now crucial for survivability of businesses

Business Sustainability: Survival Strategies

PART 1:

Covid Act – Protects you or postpones the problem?

PART 2:

TURNING FROM DEFENSIVE TO PRE-EMPTIVE
– CORPORATE RESCUE MECHANISMS

PART 3: EFFECT OF CORPORATE RESCUE
MECHANISMS

PART 4: COST CUTTING MEASURES –
RESTRUCTURING & RIGHT-SIZING OF WORK
FORCE



Part 1:

**Covid Act – Protects you or
postpones the problem?**

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Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid- 19) Act 2020 (Act 829)

(**“Covid Act”**)



Covid Act – Introduction

- a) Structure: 19 parts, focusing on Parts 2 and 7
- b) Commencement: 23 October 2020 (General)
- c) Operation Period: 2 years (General), subject to PM's extension order



Part 2: Protection of Certain Contracts

- a) Categories: 9 types of contract, including construction, professional services, commercial tenancy, event, tourism etc.
 - **WPP Business Services Sdn Bhd v Cosmopolitan Avenue Sdn Bhd**
[2021] MLJU 1042 (Sessions Court) Rohatul Akmar SJ
- b) Operation Period: 18 March 2020 – 31 December 2021
- c) Exception: Contracts terminated, legal actions started between 18 March & 23 October 2020.
 - **Ang Pi Kui v Lee Wee Teck** [2021] 1 LNS 58 (High Court) See Mee Chun J



Part 2: Protection of Certain Contracts

Condition: Unable to perform contractual obligation due to Covid measures

- **Pilecon Engineering Bhd v Malaysian Trustees Bhd** [2021] MLJU 1167 (High Court) Adlin Abdul Majid JC



Part 2: Protection of Certain Contracts

Temporary Protections

- a) Opposite party can't exercise its contractual rights
- b) Mediation to settle disputes
 - i. PMC-19
 - ii. Mediation Act 2012



Part 7: Protection of Individuals

- a) Operation Period: 23 October 2020 – 31 August 2021
- b) Exception: Pending bankruptcy proceedings as at 22 October 2020
- c) New Threshold: RM100,000 to present a bankruptcy petition (as opposed to RM50,000 for Winding Up of a company)



Part 2:

**TURNING FROM DEFENSIVE TO
PRE-EMPTIVE**

**- CORPORATE RESCUE
MECHANISMS**

Corporate Rescue Mechanisms (“CRM”)

Corporate Voluntary Arrangement (“CVA”)

- ss 395-402

Judicial Management (“JM”)

- ss 403-430

Arrangement & Reconstruction (“A&R”)

- ss 365-369



Corporate Voluntary Arrangement

Who can start CVA?

a) Company can't be a:

- Company with a charge over its property or undertaking
- Public company
- Institution / Operator regulated by BNM
- Company under CMSA

b) 2 Situations:

- Under JM / winding up = Judicial manager / liquidator
- Normal = Directors



Corporate Voluntary Arrangement

How to start CVA?

a) Directors to submit a proposal to Nominee:

- Nominee to be appointed to supervise the implementation of CVA.
- Statement that CCM information has been updated;
- Terms of the proposed CVA;
- Statement of the company's affairs, containing particulars of creditors, debts, liabilities and assets;
- Opinion from the nominee on whether the proposed CVA is workable;
- Injection of 3rd party funds (if any).

b) File **CRM Rules 2018 Form 1** in Court.



Judicial Management

Who can start JM?

- a) Can't start at all:
 - i. Institution / Operator regulated by BNM;
 - ii. Company under CMSA.
- b) Directors – Board's / members' resolution
- c) Creditors



Judicial Management

How to start JM?

- a) Application to Court via CRM Rules Forms 6 & 7
 - i. Institution / Operator regulated by BNM;
 - ii. Company under CMSA.

- b) Documents to produce are similar to those stated for CVA, with a view to prove 3 things:
 - i. Unable to pay debts.
 - ii. 1 of the following:
 - 1. Reasonable chance to rehabilitate
 - 2. Reasonable chance as going concern
 - 3. Better serve creditors' interest than winding up



Arrangement & Reconstruction (Scheme of Arrangement)

Who can start A&R?

- a) Company
 - i. Institution / Operator regulated by BNM;
 - ii. Company under CMSA.

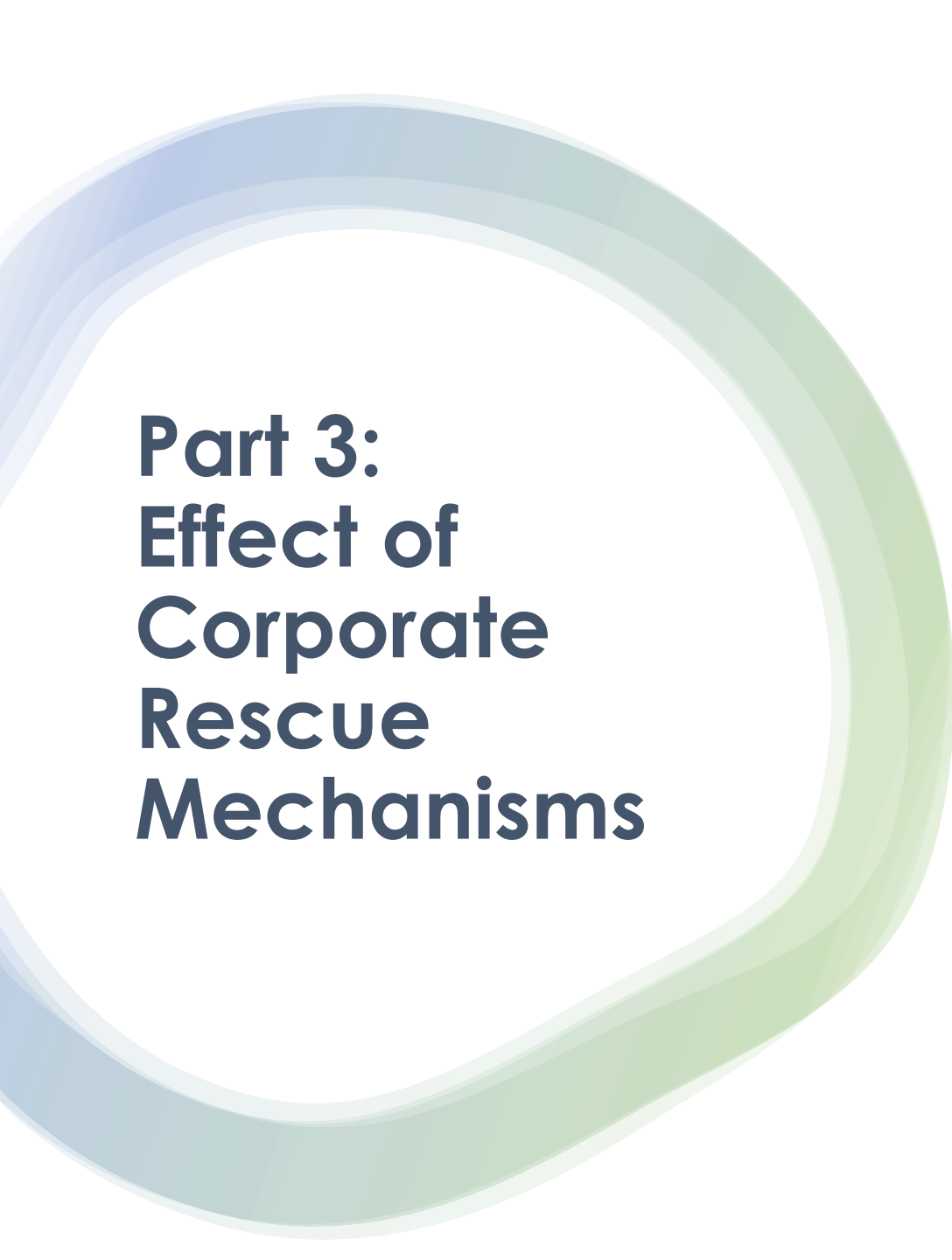
- b) Creditors



Arrangement & Reconstruction (Scheme of Arrangement)

How to start A&R?

- a) Apply to court to hold a meeting.
- b) Hold the meeting & obtain 75% creditors' approval of the Scheme of Arrangement ("**SoA**").
- c) Apply to court to approval the SoA.
- d) Lodge the Court's Order with CCM.



Part 3: Effect of Corporate Rescue Mechanisms

HOW IT AFFECTS THE COMPANY IMMEDIATELY?

HOW IT AFFECTS THE COMPANY IN THE NEAR FUTURE?

Corporate Rescue Mechanisms

Key features	Voluntary Arrangement	Judicial Management	Scheme of Arrangement
Court's involvement		✓	✓
Directors' power	✓		✓
Moratorium (Automatic)	✓	✓	
Moratorium by Court's restraining order (by application)			✓

Effects of moratorium/restraining order

“**No** other proceedings and no execution of other legal process **may be commenced or continues**, and no distress may be levied against the company or its property **except with the leave of the Court** and subject to such terms as the Court may impose”

Corporate Voluntary Arrangement –
8th Schedule

Judicial Management – s.411(4)

Scheme of Arrangement – s. 368

Who runs the company?



Scheme of Arrangement
- Directors

Voluntary Arrangement
- Directors guided by
nominee/supervisor

Judicial. M
- Judicial Manager

**Will the company be
deemed insolvent?**



“The test to ascertain commercial insolvency is rather simple. It is this. That the company is **unable to meet the current debts as they fall due.**”

*Gulf Business Construction (M) Sdn Bhd v Israq Holding
Sdn Bhd, Court of Appeal, 2010*

Will the company be deemed insolvent?

?

Scheme of Arrangement

Voluntary Arrangement

The company is likely to have sufficient funds during the proposed moratorium to enable the company to carry on its business.

Judicial. M

'the company is or will be unable to pay its debts'

**What happens if the company
is insolvent in reality?**



“During the period for which a moratorium is in force -
...No petition may be presented for the winding up of
the company”

“No resolution shall be passed or order be made for
the winding up of the company”

Example of Restraining Order

4. That a restraining order be granted pursuant to section 368(1) of the Companies Act 2016, whereby all current and further proceedings in any legal action and/or any arbitration against the Applicant, and/or involving the Applicant, including but not limited to any winding up petition or proceedings, execution or enforcement process, arbitration proceedings, filed by any party, whether or not the party is a Scheme Creditor or otherwise, be forthwith restrained and stayed, except by leave of this Honourable Court for a period of three (3) months from the date of this Order herein (the "Restraining Order") and that the Applicant appoints a person nominated by a majority of the creditors to act as director;

**What happens to the
company's existing contract
obligations?**



Be mindful of these terms

“Events of Default”

“Insolvency”

Will CRM trigger calling of Bank Guarantee?

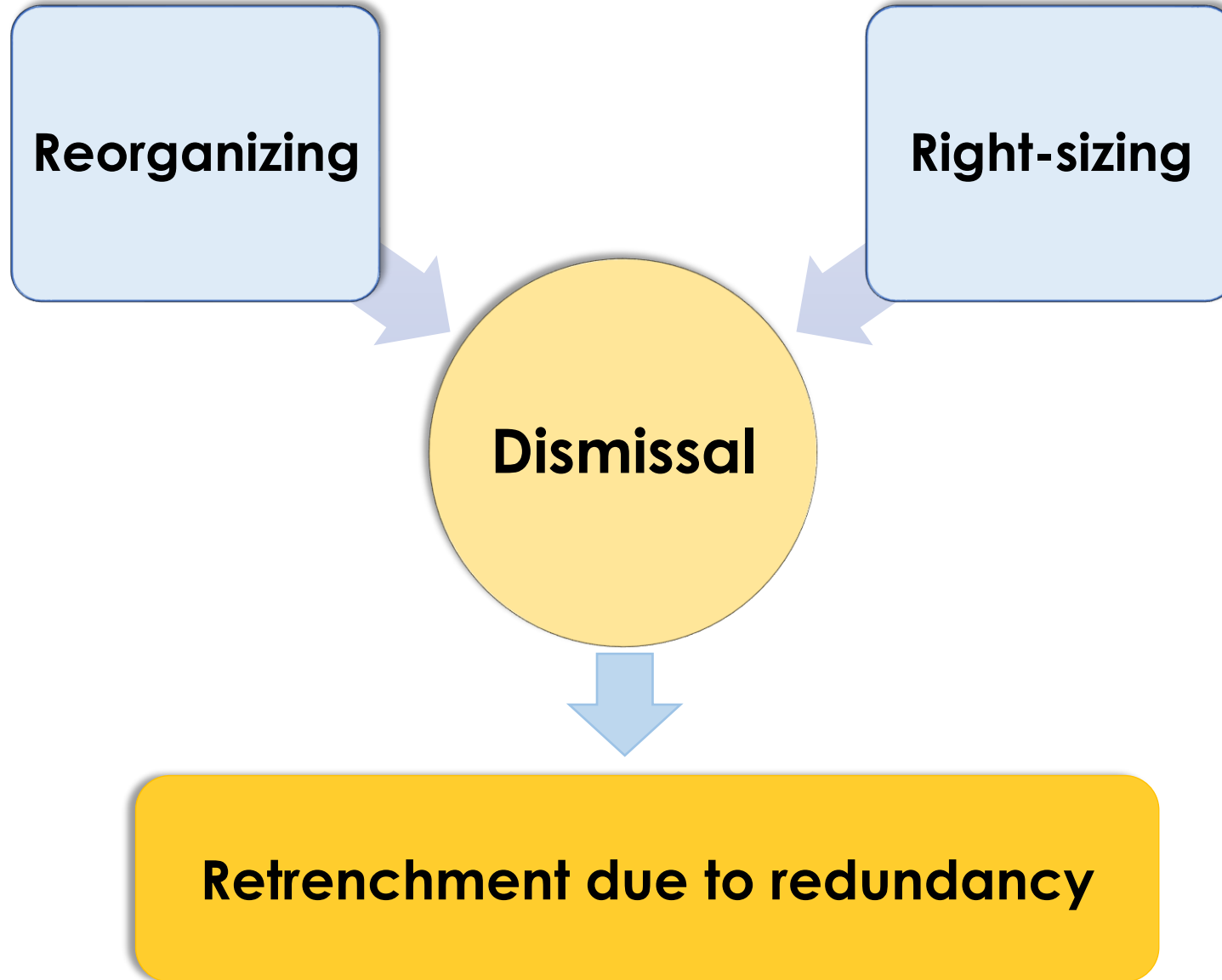


What are the conditions for calling of Bank Guarantee?



Part 4: Cost Cutting Measures

Restructuring &
Right-sizing of work
force



Industrial Relations (Amendment) Act 2020

- Automatic referral to the Industrial Court if there is no settlement at the Industrial Relations Department stage.

Documents!

Documents!

Documents!



**Be prepared
for Industrial
Court**

Be prepared with:

- Reports on financial difficulties – P&L, audited accounts
- Plans / structure of reorganization and rightsizing
- Proof of redundancy – job functions diminished greatly / ceased to exist
- Justification for selection of retrenched employees
- Witnesses



CONCLUSION



TIME



ASSESSMENT



CONSULTATION

KEY TAKEAWAYS

Comparison of Corporate Rescue Mechanisms

	Does it Require Court Approval?	Who Will Control the Company?	Availability of Moratorium?	Can the Moratorium Be Extended?	Who Can Apply / Initiate?
CORPORATE VOLUNTARY ARRANGEMENT (CVA)	No ¹	Directors with the Supervision of a Nominee	Automatic Moratorium of 28 Days	May be extended for a further 60 days	Directors
JUDICIAL MANAGEMENT (JM)	Yes	Judicial Manager	Interim Moratorium until JM Order is made. Permanent Moratorium of 60 days upon JM Order being made	May be extended for a further 6 months	Directors; Creditors
SCHEME OF ARRANGEMENTS (SOA)	Yes	Directors	No automatic moratorium; Directors must apply for Restraining Order lasting 3 months under Section 468, CA 2016	Restraining Order may be extended for a further 9 months	Directors; Creditors; Shareholders
*All proposals put forward under the CVA, JM or SOA schemes must receive the support and approval of 75% of the company's creditors (and shareholders under the SOA scheme)					

¹ However, the Company must file the Proposal in Court for the Automatic Moratorium to apply.

Authored by a team of experienced and seasoned dispute resolution practitioners at Gan Partnership, this book offers a comprehensive discussion focusing on, inter alia, critical components of corporate governance for companies in Malaysia from litigation perspectives. This book critically assesses the roles of and remedies for key stakeholders when dealing with the intricacies of corporate governance under the present regime – Companies Act 2016, and other related legislation.

The corporate governance landscape in Malaysia is experiencing a major shift following the introduction of corporate liabilities via the enforcement of a new section 17A to the Malaysian Anti-Corruption Commission Act 2009. The authors discuss the position of corporate liabilities in Malaysia and propose some practical good governance measures to be adopted by companies in view of such legislative developments, by drawing reference to the case studies in other countries that have enforced a similar position.

About the Authors

Gan Khong Aik is the founder of Gan Partnership. He has been in active litigation practice and appearing as a lead counsel since his admission as an Advocate and Solicitor of the High Court of Malaysia in 1995. His areas of expertise include corporate & commercial disputes, insolvency & liquidation, and crisis & risk management. Khong Aik is a Fellow of the Chartered Institute of Arbitrators, United Kingdom, an arbitrator with an international arbitration court in China, and a mediator with the Malaysian Mediation Centre.

Foo Joon Liang co-founded Gan Partnership in 2011. Joon Liang is a Fellow of the Chartered Institute of Arbitrators, United Kingdom, Singapore Institute of Arbitrators, and Hong Kong Institute of Arbitrators. He sits on the panel of arbitrators and adjudicators of the Asian International Arbitration Centre and is one of the first ten Malaysian appointees to the panel of arbitrators of the Hainan International Arbitration Court. Joon Liang has spent the past 20 years building upon an active dispute resolution practice in arbitration, litigation, and adjudication.

Tan Min Lee focuses on dispute resolution in her practice at Gan Partnership, particularly arbitration in commercial and construction disputes since she embarked on her career as an Advocate and Solicitor of the High Court of Malaysia. Min Lee is on the panel of adjudicators for the Asian International Arbitration Centre.

Manoeuvring Corporate Governance in Malaysia

Litigation Perspectives

Gan Khong Aik
Foo Joon Liang
Tan Min Lee

Manoeuvring Corporate Governance in Malaysia: Litigation Perspectives

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Q&A

Thank you!

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