

RHIZA & RICHARD

WHO IS MORE “DISTRESSED”

Introduction

Countries around the world expect the Covid-19 Pandemic to cause economic devastation. On our shores, many businesses face difficulty in paying their dues. As such, the government seeks to offer temporary relief to these distressed businesses.

On 23 April 2020, the Companies (Exemption) (No. 2) Order 2020 was issued.

The Winding Up Proceedings

When a company fails to pay its debts, its creditors can commence legal action to recover the debts.

Once a creditor obtains a court judgment, arbitration award or adjudication decision against the debtor company and the latter fails to pay, the creditor is entitled to apply to the courts to wind up the debtor company.

The procedure on winding up by court is in Part IV, Subdivision 7, section 464 to 475 of the Companies Act 2016.

It starts with a notice of demand for payment from the creditor seeking payment of the debt (RM10,000 and above) within 21 days from the debtor company. After the expiry of the 21 days, if the demand remains unsatisfied, the creditor can file a winding-up petition against the debtor company. This is governed by section 466 of the Companies Act 2016.

The Companies (Exemption) (No. 2) Order 2020

As a temporary relief to distressed businesses, the Companies (Exemption) (No. 2) Order

2020 brought about a temporary change to the Companies Act 2016.

It revised the 21 days period to 6 months. Hence from now until 31 December 2020, the debtor company has 6 months (instead of 21 days) from the date of service of the statutory demand to respond and to pay before a creditor can present a winding-up petition against it.

Apart from that, the threshold in relation to a company's 'inability to pay its debt' has also been revised from RM10,000 to RM50,000 by the Minister.

It is Not A Specific Act Providing Relief Caused by Covid-19 Pandemic

This exemption order should not be compared to laws specifically enacted to provide relief for the economic hardship caused by the pandemic in other countries. In Singapore, the Covid-19 (Temporary Measures) Act 2020 is a specific legislation seeking to offer temporary relief to businesses and individuals who are unable to perform their contractual obligations due on or after 1 February 2020 because of COVID-19. As it is a specific law, it covers a wide spectrum of contracts and scenarios.

The exemption order 2020 is just one of the initiatives to alleviate the hardship inflicted on businesses by the pandemic. Hence it applies to *all* companies.

Whilst it may be an antidote to some distressed businesses, it has its side effects.

There are creditors with debtors who refused to pay *even before* the Covid-19 pandemic.

These debtors had failed to pay despite being decreed to pay. They are in fact insolvent if put to the Acid Test Ratio.

Already facing similar challenges caused by the pandemic, these creditors are now prevented from putting insolvent debtors in liquidation.

Now, who is more distressed. It is time for the aggrieved creditor to explore other legal options to protect its interests.

When 1 Door Closes, 2 Remain Open

Under section 466(1) of the Companies Act 2016, there are 3 circumstances where a company would be deemed to be unable to pay its debt. One of it is the inability to satisfy the statutory demand within the prescribed timeframe.

The other 2 circumstances are when execution proceedings on the debtor company are returned unsatisfied or when the court held that the debtor company is unable to pay its debt taking into account the contingent and prospective liabilities of the company.

Other Modes of Execution

The exemption order does not prevent a creditor from taking out other modes of execution against the debtor company.

1. Garnishee Proceedings

Garnishee proceedings enable a creditor, known as judgment creditor in garnishee proceeding to apply to the Court for any other identified person who is indebted to the debtor company or judgment debtor, known as the garnishee to pay the judgment creditor. In effect, it enables the judgment creditor to freeze the judgment debtor's bank account and have the monies therein paid over.

2. Writ of Seizure and Sale

A Writ of Seizure and Sale allows the judgment creditor to seize and sell the judgment debtor's movable property, i.e. stocks, office equipment etc., to satisfy the judgment.

3. Judgment Debtor Summons

A Judgment Debtor Summons enable the judgment creditor to summon the judgment debtor directors to the Court to enquire where are the judgment debtor's properties to aid further or other execution proceedings.

4. Prohibition Order

This procedure allows the judgment creditor to seek an order from the Court to sell the judgment debtor's immovable properties, such as lands houses etc., to satisfy the judgment.

Frankly, there are numerous legal remedies available to an aggrieved creditor. Whether they should or could be pursued depend on the facts of the case as well as what the creditor knows about its debtors.

Conclusion

The Companies (Exemption) No. 2 Order 2020 provides distressed businesses temporary relief. It gives the necessary breathing space for businesses to restructure and reorganize. Their survival benefits the work force and contribute positively to the economy.

However, there would be creditors who may be disadvantaged. These creditors cannot rest on their laurels. They must vigilantly protect their interests by actively pursuing their debts. Alternative remedies must be explored without further ado.

In our next newsletter, we will explore the draconian effects and potential abuse of Section 410 of the Companies Act 2016 where despite the debtor admitting its inability to pay debts, the directors of the company are allowed to continue to run the business of the company.

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