

## SELECTIVE CAPITAL REDUCTION UNDER THE MALAYSIAN COMPANIES ACT 2016

### Introduction

Section 115 of Companies Act 2016 (the “**Act**”) deals with the reduction of share capital, whereby a company may, unless otherwise provided in its constitution, undertake a selective capital reduction (“**SCR**”) exercise by:

- a) a special resolution and confirmation by the High Court in accordance with Section 116 of the Act (“**Court Order Procedure**”); or
- b) a special resolution supported by a solvency statement in accordance with Section 117 of the Act (“**Solvency Statement Procedure**”).

In light of the above, it is therefore vital for the company to ensure that the constitution of the company authorizes the reduction of share capital. In the event where the constitution does not authorize the reduction of capital, then the procedure for amending the constitution shall first be carried out.

### Solvency Statement Procedure under Section 117

Prior to the Act coming into force, a company may only reduce its share capital by way of a special resolution sanctioned by a court order under its older regime. However, under the current regime,[1] the Act provides the corporate world an alternative procedure whereby a company may reduce its share capital by passing a special resolution which is supported by a solvency statement.[2]

The Solvency Statement Procedure may be summarized as follows:

- a) the company is required to send a notice to the Director-General of the Inland Revenue Board and the Registrar of Companies (“**Registrar**”) within 7 days of the date

of the resolution. The notice must state that the resolution has been passed and contain the text and the date of the resolution. A copy of the solvency statement is to be lodged with the Registrar together with the notice;[3]

b) the company is required to meet the solvency requirements under Section 117(3) of the Act, and such requirements are met if all directors of the company make a solvency statement in relation to the reduction of share capital.[4] However, the company need not meet the solvency requirements if the SCR is solely by way of cancellation of any paid-up share capital which is lost or unrepresented by available assets;[5]

c) the company makes the solvency statement or a copy thereof available for inspection without charge by its creditors at its registered office for six weeks from the date of the resolution;[6] and

d) the company advertises a notice of the SCR not later than seven days from the date of the resolution in two widely circulated newspapers in Malaysia - one in Bahasa Malaysia and the other in English language.[7]

In addition to the above summary of the Solvency Statement Procedure, the Act also states that a company shall pass a special resolution to reduce its share capital within 14 days (in the case of a private company) or 21 days (in the case of a public company) from the date of the solvency statement.[8]

An SCR exercise carried out by a company pursuant to Section 117 of the Act may be subjected to an objection by the creditors as Section 118 of the Act provides for the creditors' right to object to the same. Once a company has passed a special resolution for reducing its share capital pursuant to Section 117 of the Act[9], any creditor of the company may apply to the High Court for the resolution to be cancelled within 6 weeks from the date of the resolution.[10]

Such right to object is applicable to any creditor of the company who is entitled to any debt or claim which would be admissible as proof against the company at the date of his application to the High Court if such date were the commencement of the winding-up of the company.[11] When such application is made, the creditor shall serve the application on the company and serve a notice of the application on the Registrar as soon as possible.[12]

### **Court Order Procedure under Section 116**

The concept of the Court Order Procedure under the old regime was retained and transferred into Section 116 of the Act, whereby Section 116(1) of the Act states that subject to the confirmation by the High Court, a company may, by a special resolution, reduce the share capital of a company in any way which includes all or any of the following:

a) by extinguishing or reducing the liability on any of its shares in respect of share capital not paid-up;

b) by cancelling any paid-up share capital which is lost or unrepresented by available assets;

c) by paying back to its members/shareholders any paid up share capital which is in excess of the needs of the company.[13]

The High Court's role in an SCR exercise is as follows:

a) to ensure that the interests of creditors must be safeguarded;

b) the interests of the members are considered, and the proposed SCR exercise will result in just and equitable treatment of shareholders; and

c) the interest of the public is considered.

Under the current regime pursuant to the Act, the Court Order Procedure may be summarized as follows:

a) the members of a company must pass a special resolution to approve the proposed SCR exercise of the company;[14]

b) If the proposed SCR involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital:

i) every creditor of the company who, at the date fixed by the Court, is entitled to any debt or claim which would be admissible in proof against the company;

ii) the High Court will settle a list of creditors who are entitled to object, shall ascertain as far as possible without requiring an application from any creditor the names, the nature and the amount of debts or claims of those creditors, and may publish notices fixing a final day on or before which creditors not entered in the list may claim to be so entered, unless the High Court is satisfied on affidavit that there are no such creditors; and

iii) If a creditor entered in the list whose debt or claim is not discharged or has not been determined does not consent to the reduction, the High Court may dispense with the consent of that creditor on the company securing payment of his debt or claim by appropriating as the High Court directs,

- if the company admits the full amount of the debt or claim or though not admitting it is willing to provide for it, the full amount of the debt or claim; or

- if the company does not admit and is not willing to provide for the full amount of the debt or claim or if the amount is contingent or not ascertained, an amount fixed by the High Court after the similar inquiry and adjudication as if the company were being wound up by the High Court.[15]

c) the High Court may direct that all or any of the provisions of paragraph (b) above shall not apply with regards to any class of creditors, after considering any special circumstances of any case;[16]

d) the High Court may make an order confirming the SCR if it is satisfied with respect to every creditor who is entitled to object, that his consent to the reduction has been obtained or his debt or claim has been discharged, determined or secured;[17]

e) the Company shall then lodge the High Court order with the Registrar. The resolution for SCR as confirmed by the High Court order shall take effect upon such lodgment;[18]

f) the Registrar will then issue a notice confirming the SCR which shall be conclusive evidence that all of the requirement in relation to reduction of share capital in the Act have been complied with and that the share capital of the company is as stated in the order;[19] and

g) upon lodgment of the order of the High Court, the particulars shown in the court order shall be deemed to substitute the corresponding particulars in the constitution, if any, and such substitution and any addition ordered by the High Court to be made to the name of the company shall be deemed to be alterations of the constitution for the purposes of the Act for such period as is specified in the order of the High Court.[20]

## **Conclusion**

In conclusion, there are now two different methods whereby a company may opt for in undertaking an SCR exercise. Therefore, a company should consider both alternatives and decide on the preferable method for adoption. Nevertheless, a company shall be mindful that while the Solvency Statement Procedure may save time and reduce costs, the solvency statement may attract additional risks of personal liability on the part of all the directors when signing off the solvency statement.[21]

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[1] Section 64 of Companies Act 1965.

[2] Section 115 (b) of the Act.

[3] Section 117 (1) (a) & Section 117 (3)(c) of the Act.

[4] Section 117 (3) (a) of the Act.

[5] Section 117 (4) of the Act.

[6] Section 117 (5)(c) & Section 117 (6)(b) of the Act.

[7] Section 117 (10) of the Act.

[8] Section 117 (3) (b) of the Act.

[9] Section 118(1) of the Act.

[10] Section 118 (2) of the Act.

[11] Section 118 (3) of the Act.

[12] Section 118 (4) of the Act.

[13] Section 116 (1) of the Act.

[14] Section 116 (1) of the Act.

[15] Section 116 (2) of the Act.

[16] Section 116 (3) of the Act.

[17] Section 116 (4) of the Act.

[18] Section 116 (6) of the Act.

[19] Section 116 (7) of the Act.

[20] Section 116 (8) of the Act.

[21] <https://themalaysianlawyer.com/2018/10/26/selangor-properties-berhad-proposed-selective-capital-reduction/>

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