Global Restructuring and Insolvency Guide - Malaysia

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# Initial Considerations

## Can you take security over all types of assets, including accounts receivable?

**Corporate voluntary arrangement (CVA)**

Yes. Creditors may take security over all types of assets, including cash or account receivable(s), either via a floating charge or a fixed charge and assignment over cash deposit in a bank account.

**Judicial management (JM)**

Same as CVA

**Scheme of arrangement (SoA)**

Same as CVA

**Winding-up**

Same as CVA

## What is the nature of the insolvency process?

**Corporate voluntary arrangement (CVA)**

A CVA is essentially an arrangement between the company and its creditors. Upon commencing a CVA, a moratorium will come into force, allowing a viable but struggling company the opportunity to repay its debts over a period of time to be agreed in the CVA.

**Judicial management (JM)**

The JM process is a form of court-supervised rescue mechanism available for companies in financial difficulty. Upon the application of the company or its creditors, the court will appoint a judicial manager to manage the company's affairs who will decide whether to rescue the company or dispose of the business as a going concern or of its assets for a better return.

**Scheme of arrangement (SoA)**

An SoA is a court-approved compromise or arrangement made between the company and its creditors. The company may persuade its creditors that it is in their interest to accept a compromise of their debts.

**Winding-up**

There are two types of winding-up processes in Malaysia. These are:

Voluntary winding-up

Compulsory winding-up

A voluntary winding-up may be initiated by either a company's members or by a company's creditors. Where a company is wound up voluntarily by its members, the passing of a special resolution is required.

A compulsory winding-up is commenced upon the issuance of a statutory notice of demand and subsequently the presentation of the winding-up petition.

Both winding-up processes involve the company entering into liquidation, the distribution of the value of assets to creditors after disposal of such assets, and the eventual dissolution of the company.

## What is the solvency requirement for a company to file a case in this jurisdiction?

**Corporate voluntary arrangement (CVA)**

There is no solvency requirement. This process is available for both solvent and insolvent companies as a form of corporate restructuring mechanism or a debt restructuring exercise.

**Judicial management (JM)**

The court must be satisfied that the company is or will be unable to pay its debts and that the order for JM, if granted, is likely to achieve one or more of the following:

The survival of the company, or the whole or part of its undertaking as a going concern

The approval of a compromise or arrangement between the company and any such persons involved

A more practical realization of the company's assets would be affected than a winding-up.

**Scheme of arrangement (SoA)**

Same as CVA

**Winding-up**

In a members' voluntary winding-up, the director or majority of the directors of a company are required to prepare a declaration of solvency stating that:

The directors have made an inquiry into the company's affairs.

At the directors' meeting, they have formed the opinion that the company will be able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding-up.

In a creditors' winding-up, the company is insolvent. The company's directors make a statutory declaration that the company cannot continue its business because of its liabilities.

## Is there a requirement to demonstrate COMI ("centre of main interests") for a company to file a case in this country?

**Corporate voluntary arrangement (CVA)**

N/A

**Judicial management (JM)**

N/A

**Scheme of arrangement (SoA)**

N/A

**Winding-up**

N/A

## Is restructuring of both secured and unsecured claims possible?

**Corporate voluntary arrangement (CVA)**

The CVA cannot affect the rights of any secured creditor of the company to enforce their security, except with the concurrence of the secured creditor concerned.

**Judicial management (JM)**

Generally, the judicial manager may only deal with unsecured claims. To deal with the charged property of the company, the judicial manager must obtain a court order.

**Scheme of arrangement (SoA)**

The creditors must be classified into different classes based on their legal rights. For example, secured creditors would make up one class and unsecured creditors another class. Different meetings will be held based on the creditor classes.

**Winding-up**

No. Upon winding-up, restructuring is no longer possible. The liquidator will exercise its powers to deal with its assets and distribute the proceeds accordingly.

## Are the claims of creditors and shareholders put into separate classes for purposes of voting and treatment under the plan or scheme?

**Corporate voluntary arrangement (CVA)**

No

**Judicial management (JM)**

No

**Scheme of arrangement (SoA)**

Yes. It is the applicant's responsibility to organize the composition of the classes of creditors. Classes will be viewed as separate if their interests are so different that they will not be able to consult together with a view to their common interest.

The liquidator assesses the scheme's viability and prepares a report on whether the proposed scheme has correctly classified the creditors, among others.

**Winding-up**

Yes. The Companies Act 2016 provides for different rights and duties of secured and unsecured creditors in the winding-up process.

## Is shareholder approval needed to commence a case? Are shareholders entitled to vote on a plan?

**Corporate voluntary arrangement (CVA)**

Yes. Approval requires a simple majority vote (more than 50%) of the members.

**Judicial management (JM)**

Yes, shareholder approval by special resolution (approved by 75%) is only required for the shareholders for the company to commence the JM process. Shareholder approval is not required where creditors commence the JM process.

**Scheme of arrangement (SoA)**

Yes, shareholder approval is only required where the company, I propose the SoA. In these circumstances, at least 75% majority in value of the members or classes of members present and voting is required.

**Winding-up**

Yes. In the case of a voluntary winding-up:

An ordinary resolution (more than 50%) is required where the period expires or on the occurrence of an event as specified in the company's constitution.

A special resolution (approved by 75%) where the company chooses to wind up voluntarily

This is not required in a compulsory winding-up.

## Is there an ability to bind minority dissenting creditors (i.e., cramdown)?

**Corporate voluntary arrangement (CVA)**

Once the required majority approves the proposed CVA at the creditors and members meeting, it shall take effect and be binding on all company creditors, whether or not the creditors voted in favor of the proposal.

**Judicial management (JM)**

Once the judicial manager's proposal is approved, it shall be binding on all company creditors, whether or not the creditors voted in favor of the proposal.

**Scheme of arrangement (SoA)**

Once the court has given its sanction, the scheme shall be binding on all creditors or class of creditors. This order will only have an effect upon lodgement of an office copy of the order with the registrar.

**Winding-up**

If a winding-up order is granted, all creditors will be bound by the effect of such a winding-up order. Creditors will also be bound by certain acts taken by the appointed liquidator in a voluntary winding-up.

# Commencing the Process

## Who can commence?

**Corporate voluntary arrangement (CVA)**

The company's directors, the judicial manager (if the company is under a judicial management order) or the liquidator (if the company is being wound up)

**Judicial management (JM)**

The company itself or its directors, under a resolution of its members or the board of directors, or a creditor (including any contingent or prospective creditor), or all or any of those parties, together or separately

**Scheme of arrangement (SoA)**

The company itself, its members or any creditor of the company, the liquidator (if the company is being wound up) or the judicial manager (if the company is under a judicial management order)

**Winding-up**

The members or creditors of a company in a voluntary winding-up

Any creditor may present a petition in a compulsory winding-up upon the expiry of the time limit prescribed in the statutory notice.

## Is shareholder's consent required to commence proceeding?

**Corporate voluntary arrangement (CVA)**

Yes

**Judicial management (JM)**

Yes, only where the company applies to commence proceedings. Where creditors apply to commence proceedings, shareholders' consent is not required.

**Scheme of arrangement (SoA)**

Yes, only where the company applies to commence proceedings. Where creditors apply to commence proceedings, shareholders' consent is not required.

**Winding-up**

Yes, but only in a voluntary winding-up. Where creditors apply to commence proceedings, shareholders' consent is not required.

## Is there an ability to consolidate group estates?

**Corporate voluntary arrangement (CVA)**

N/A

**Judicial management (JM)**

N/A

**Scheme of arrangement (SoA)**

N/A

**Winding-up**

N/A

## Is there any court involvement?

**Corporate voluntary arrangement (CVA)**

There is minimal court involvement in a CVA.

If any of the company's creditors or any other person is dissatisfied by any act, omission or decision of the supervisor, the company's creditor may appeal to the court under Section 401(4) of the Companies Act 2016.

**Judicial management (JM)**

The court is responsible for appointing the judicial manager and issuing the JM order.

Once the JM order is granted, the court takes a hands-off approach whereby the judicial manager is only required to report the result of the meeting to the court and the Companies Commission of Malaysia and to such other persons as the court may approve.

**Scheme of arrangement (SoA)**

The entire process requires court involvement.

Initiating an SoA requires the applicant to seek an order from the court to convene meetings of the members and various classes of company creditors. Any SoA that has obtained the required voting majority still needs to be approved by the court so as to be given binding effect.

**Winding-up**

There is minimal court involvement in a voluntary winding-up.

A compulsory winding-up process is initiated upon presenting a winding-up petition to be heard by the court. At the hearing, the court will decide whether to allow or dismiss the petition. If the petitioner has nominated no liquidator, the court shall appoint an approved liquidator or official receiver as the liquidator as it deems fit.

Upon the liquidator's application, the court may order the liquidator to be released and that the company be dissolved.

## Who manages the debtor?

**Corporate voluntary arrangement (CVA)**

Either the nominee or a supervisor in charge of supervising the implementation of the CVA

**Judicial management (JM)**

The judicial manager will oversee the implementation of the proposal. Once the purpose of the JM order has been achieved, the judicial manager may apply to discharge the order.

**Scheme of arrangement (SoA)**

The company and its board of directors retain control over the process.

**Winding-up**

The appointed liquidator or the official receiver

## What is level of disclosure of process to voting creditors?

**Corporate voluntary arrangement (CVA)**

Disclosure of the CVA process and the company's affairs is required as the CVA is subject to the creditors' approval.

**Judicial management (JM)**

Disclosure of the JM process and ultimate proposal to creditors is required — a JM application can be dismissed if a secured creditor/debenture holder is opposed.

**Scheme of arrangement (SoA)**

Same as CVA

**Winding-up**

In a voluntary winding-up, disclosure to the company's creditors is required — the company must lodge a copy of the resolution with the registrar within seven days after the meeting and circulate the notice in one widely circulated national language newspaper and English language newspaper within ten days following the meeting.

After presenting the petition to the court in a compulsory winding-up, the petition must be advertised once in the gazette and at least twice in any two local newspapers circulating in Malaysia. If a winding-up order is granted, this sealed winding-up order must also be advertised in two local newspapers and be published in the Federal Government Gazette.

## What entities are excluded from customary insolvency or reorganisation proceedings, and what legislation applies to them?

**Corporate voluntary arrangement (CVA)**

Publicly listed companies

Licensed institutions or operators of designated payment systems under Bank Negara laws

Companies subject to the Capital Markets and Services Act 2007

Companies that create a charge over its property or any of its undertaking

**Judicial management (JM)**

Publicly listed companies

Licensed institutions or operators of designated payment systems under Bank Negara laws

Companies subject to the Capital Markets and Services Act 2007

**Scheme of arrangement (SoA)**

N/A

**Winding-up**

N/A

## How long does it generally take for a creditor to commence the procedure?

**Corporate voluntary arrangement (CVA)**

N/A, as directors of the company, commences the procedure with a nominee.

**Judicial management (JM)**

One to three months to make an application for JM

**Scheme of arrangement (SoA)**

One to three months to apply for leave to commence the creditors' court-convened meeting(s)

**Winding-up**

Not applicable in a voluntary winding-up.

A compulsory winding-up usually takes 2-3two to three months upon presenting the petition to obtain a winding-up order.

# Effect of Process

## Does debtor remain in possession with continuation of incumbent management control?

**Corporate voluntary arrangement (CVA)**

Yes. It is a management-driven restructuring process with minimal court involvement, but the creditors will typically appoint an independent insolvency practitioner to supervise the implementation of the proposal.

**Judicial management (JM)**

No. The key feature of judicial management is that the process is no longer management-driven.

**Scheme of arrangement (SoA)**

Yes. However, the company will typically appoint a scheme manager whose powers, duties and rights are set out in the scheme document. The existing management of the company will not necessarily be displaced.

**Winding-up**

No. Once a winding-up order is made, the company's board of directors is functus officio (i.e., its mandate has expired). The power and duty of running the company falls to the liquidator.

## What is the stay/moratorium regime (if any)? Is the stay or moratorium worldwide?

**Corporate voluntary arrangement (CVA)**

A moratorium commences automatically upon filing the requisite documents as listed in Section 398(1) of the Companies Act 2016.

**Judicial management (JM)**

A moratorium commences automatically upon the filing of the JM application.

**Scheme of arrangement (SoA)**

There is no automatic moratorium in an SoA.

The company or any member or creditor of the company may apply to the court to restrain further proceedings in any action or proceedings against the company even before or contemporaneously to the application for the SoA.

**Winding-up**

**Before winding-up order is made**

At any time after the presentation of a winding-up petition and before a winding-up order has been made, the company or any creditor or contributory may, where any action or proceeding against the company is pending, apply to the court for an order to stay or restrain further proceedings in the action or proceeding, and the court may stay or restrain the action or proceeding accordingly on such terms as it sees fit.

**After winding-up order is made**

When a winding-up order has been made or an interim liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and in accordance with such terms as the court imposes.

## Is there a provision for debtor in possession or rescuer financing or superpriority or priming financing?

**Corporate voluntary arrangement (CVA)**

There is no specific provision on this matter.

This would depend on the terms of the arrangement.

**Judicial management (JM)**

Same as CVA

**Scheme of arrangement (SoA)**

Same as CVA

**Winding-up**

There is no specific provision on this matter.

However, liquidators can make arrangements for financing the costs of liquidation. In such cases, the financing would rank as "costs and expenses of the winding-up" alongside the liquidator's fees and ahead of all other unsecured creditors.

## Can procedure be used to implement a debt-to-equity swap?

**Corporate voluntary arrangement (CVA)**

There is no restriction on debt-to-equity swaps.

**Judicial management (JM)**

Same as CVA

**Scheme of arrangement (SoA)**

Same as CVA

**Winding-up**

N/A

## Are third party releases available?

**Corporate voluntary arrangement (CVA)**

Generally not, unless specifically agreed in the proposal (e.g., the release of third-party security providers/guarantors).

**Judicial management (JM)**

Same as CVA

**Scheme of arrangement (SoA)**

Same as CVA

**Winding-up**

There is no specific provision/restriction on this matter. It is the discretion of the receivers/liquidators to determine whether such release can be granted.

## Are the proceedings recognised abroad?

**Corporate voluntary arrangement (CVA)**

There is no provision under the Companies Act 2016 for cross-border assistance or corporation relating to Malaysian insolvency proceedings with a foreign dimension.

The UNCITRAL Model Law on Cross-Border Insolvency provides mechanisms to deal with cross-border insolvency proceedings. However, Malaysia has not incorporated this model law into domestic legislation.

**Judicial management (JM)**

Same as CVA

**Scheme of arrangement (SoA)**

Same as CVA

**Winding-up**

Same as CVA

## Has the UNCITRAL Model Law been adopted?

**Corporate voluntary arrangement (CVA)**

No

**Judicial management (JM)**

No

**Scheme of arrangement (SoA)**

No

**Winding-up**

No

## Can a debtor continue to carry on business during insolvency proceedings?

**Corporate voluntary arrangement (CVA)**

Yes. The CVA should not affect the day-to-day operations of the business.

**Judicial management (JM)**

Yes. However, operations will be carried out by the judicial manager, as during the period for which a JM order is in force, all powers conferred and duties imposed on the directors shall be exercised and performed by the judicial manager and not by the directors.

**Scheme of arrangement (SoA)**

Yes. The company and its board of directors can continue to operate throughout the process. However, any disposition or acquisition of property other than in the ordinary course of business of the company, without the leave of court, shall be void and the company and every officer shall be guilty of an offense.

**Winding-up**

No. Upon the appointment of the liquidator, all powers of the directors cease, except where the liquidator is of the opinion that continuing activities will benefit the winding-up. The liquidator is in charge of overseeing the liquidation process.

The liquidator is responsible to the court and registrar throughout the winding-up process.

# Other Factors

## Are there any wrongful or insolvent trading restrictions and what is the directors' liability?

**Corporate voluntary arrangement (CVA)**

Directors of a company will always be subject to any claims of:

Preferential debts

Insolvent trading

Fraudulent trading

There are criminal sanctions to directors involved, including imprisonment and fines or both.

**Judicial management (JM)**

Same as CVA

**Scheme of arrangement (SoA)**

Same as CVA

**Winding-up**

Same as CVA

## What is the order of priority of claims?

**Corporate voluntary arrangement (CVA)**

The order of priority will be subject to what has been agreed in the arrangement.

**Judicial management (JM)**

Same as CVA

**Scheme of arrangement (SoA)**

Same as CVA

**Winding-up**

The priority of claims in a winding-up is as follows:

Secured creditors, to the extent of the value of their collateral

Claims by certain third parties in respect of which the company is insured and in respect of which an amount is or has been received by the company

Preferential creditors, including certain claims in respect of employment by the company, the costs incurred by the petitioner and the liquidator's costs and expenses

Unsecured creditors

Deferred creditors

## Do pension liabilities have any priority over other unsecured claims?

**Corporate voluntary arrangement (CVA)**

N/A

**Judicial management (JM)**

N/A

**Scheme of arrangement (SoA)**

N/A

**Winding-up**

N/A

## Is it possible to challenge prior transactions?

**Corporate voluntary arrangement (CVA)**

Yes

**Judicial management (JM)**

Yes

**Scheme of arrangement (SoA)**

Yes

**Winding-up**

Yes

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