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THEORIES OF CORPORATE INSOLVENCY: A PHILOSOPHICAL ANALYSIS OF THE CORPORATE RESCUE MECHANISMS UNDER THE COMPANIES ACT 2016

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ABSTRACT

This paper aims to provide an examination of the theories that underpin corporate insolvency as developed in the US and the UK, and apply that to the two novel corporate rescue mechanisms; the corporate voluntary arrangement and judicial management, which are embedded in the Companies Act 2016 (CA 2016) of Malaysia. This paper adopted a doctrinal and theoretical approach to law. The tension in the corporate rescue mechanisms in the CA 2016 between creditors and other stakeholders of a company affected the objectives on corporate insolvency in Malaysia. This paper identified the theories

that are reflected in the corporate rescue mechanisms in the CA 2016 – a gap within the provisions which was left out in the process that ranged from consultancy and leading up to the drafting of the CA 2016. In addition, the objectives of introducing the corporate rescue mechanisms were identified. These findings may pave the way to reform the corporate rescue law in order to enhance its conformity with the objectives of corporate rescue in Malaysia. This in turn would facilitate the recovery of financially distressed companies and the minimisation of the loss of employment.

Keywords: Companies Act 2016, comparative theories, corporate rescue mechanisms, corporate rescue objectives.

INTRODUCTION

On 31st January 2017, Malaysia ushered in a new company law framework, the Companies Act 2016 (CA 2016) to replace the old legislation, which was the Companies Act 1965 (CA 1965). The CA 2016 was enacted with the objectives of modernising the company with the addition of clauses on the reduction of the costs of doing business (Jabbar & Said, 2018), and to provide a novel framework to facilitate the bailout of financially distressed companies in Malaysia (Abdullah et al., 2016). The corporate rescue mechanisms embedded in the CA 2016 are through the Corporate Voluntary Arrangement (CVA) and Judicial Management (JM), which was implemented since the 1st March 2018. These two corporate rescue mechanisms were introduced with the expectation that the corporate insolvency laws in Malaysia will meet the modern international standards on corporate rescue, whereby statutory mechanisms were outlined to enable the rescue of financially distressed companies that continue to be economically viable (Abdullah et al., 2016).

The introduction of the corporate rescue mechanisms were based on reforms recommended by the Corporate Law Reform Committee (CLRC), which was set up by the Companies Commission Malaysia (CCM) on 17th December 2003. The reform process by the CLRC was comprised of several reports that included a Consultative Document on Reviewing the Corporate Insolvency Regime – The Proposal for

a Corporate Rehabilitation Framework [No. 10] (CD No. 10), and was published in 2007. Both the corporate rescue mechanisms were modelled on similar laws in other jurisdictions: the CVA is based on the laws in the United Kingdom (UK) with moratorium, while the JM is modelled based on the Singapore law (Abdullah et al., 2016), which in turn was adopted from the administration process from the UK.

Other than referring to the objectives of rescuing financially distressed companies with the use of similar mechanisms in the UK and Singapore (CD No. 10, 26 & 53), the authorities had neglected to identify the underlying theories on the adoption of the particular mechanisms in Malaysia. According to Azmi and Razak (2012), the scant attention made to theorizing the corporate insolvency law in Malaysia was due to the pragmatic approach towards the laws by the authorities with emphasis on the statutory provisions and case laws. However, Finch (1997) stated that the lack of any purpose in the development of insolvency law may lead to “inconsistencies of reasoning and failures of policy” that would substantially affect the related legal sectors. Moreover, it was further observed that the insolvency law is interconnected with other sectors such as “the employment, tort, environmental, pension and banking law fields”. With regards to Malaysia’s position of the matter, the gap on the theories that underpinned the corporate rescue mechanisms still remain unresolved.

This paper aims to address this gap by identifying the philosophical foundation on the corporate rescue mechanisms under the CA 2016. Furthermore, the theories on corporate insolvency as developed in the US and the UK will be examined to highlight the role of the corporate rescue mechanisms in Malaysia. This paper argues that creditors’ interests are favoured in the corporate rescue mechanisms despite the lauded objectives of granting protection on other stakeholders’ interests, such as the employees and suppliers. The objectives of rescuing a company should be, *inter alia*, to prevent a loss of employment of its employees and the loss of business of its suppliers (Omar, 1998; *BNP Paribas v Jurong Shipyard Pte Ltd* (2009) 2 SLR(R) 949, p. 959). The philosophical analysis adopted in this paper concludes that the path to corporate rescue is not reflected in the corporate rescue mechanisms, and therefore, appropriate reforms to the law are needed.

LACK OF A PHILOSOPHICAL PERSPECTIVE ON THE INSOLVENCY LAW IN MALAYSIA

The old regime embodied by the CA 1965 was largely based on the models provided by the UK Companies Act 1948 and the Australian Uniform Companies Act 1961, the provisions of which were acknowledged by the Supreme Court in the *Indo Malaysia Engineering Co Bhd v Muniandy Rengasamy & Co* (1990) 3 MLJ 301:

“We are not unmindful that our own Companies Act was modelled upon the United Kingdom Companies Act 1948 and the Australian Uniform Companies Act 1961 and we think it is proper to give these text book authorities due consideration”, (p. 305).

The influence of the common law principles on insolvency law from the UK and Australia were reflected by its adoption in the Malaysian case laws (Bidin, 2015). An example of the invocation of the UK common law in Malaysia is a 2013 court case between *Francis a/l Augustine Pereira v Dataran Mantin Sdn Bhd & Ors*, (2014) 6 MLJ 56, whereby the Federal Court held that the test to determine the classification of creditors in schemes of arrangement under the CA 1965 as formulated in the UK case of *Sovereign Life Assurance Co v Dodd*, (1892) 2 QB 573, is still good law. This may account for the lack of any philosophical approach on the insolvency law since it has been acknowledged that the UK laws have been built around a pragmatic approach that are adopted by the countries in the Commonwealth (Keay & Walton, 2008; Goode, 2005). It is consistent with the view of Atiyah (1987), where it is generally assumed that lawyers and judges favour a pragmatic approach to law in contrast to one which is theoretical. In Australia, the discussion by Collin (2009) on the theoretical aspects of its insolvency law was made with reference to the theories advanced at length in the United States (US), such as highlighted by Jackson (1982), Baird (1986) and Warren (1987), and to some extent on the theories developed in the UK by Finch (1997, 2009) and Mokai (2001, 2005). Whincop (1997), who noted that the attempts to increasingly use theory to analyse company law in Australia was made only in the 1990s.

Accordingly, Stubbins (2019) indicated that there was an absence of any theory on insolvency law and corporate rescue mechanisms in the Report of the Review Committee on Insolvency Law and Practice

(Cork Report). The model law on corporate rescue for the Cork Report came from Chapter 11 of the US Bankruptcy Code 1978 (Chapter 11) (Omar, 2007). In turn, the Cork Report was used as the guideline to lay the foundation for the progression of insolvency law for the incorporation of corporate rescue by other countries such as Malaysia (CD No. 10, 53), and Singapore (Choong & Rajah, 1990). Moreover, there is an absence of theory on corporate rescue in Malaysia. Therefore, this paper will examine the theories that are available from the US and the UK. However, before a theoretical analysis of the corporate rescue law in Malaysia can be examined, the corporate rescue concept must first be understood.

CONCEPT OF CORPORATE RESCUE IN THE CA 2016

Corporate rescue is defined as an exercise which represents “a major intervention necessary to avert eventual failure of the company” (Belcher, 1997, p. 12; Finch, 2009, p. 243). Hence, what is a “major intervention”? In the context of the corporate rescue mechanisms under the CA 2016, a “major intervention”, as seen from the perspective of the creditors, would be the imposition of a moratorium where the enforcement rights of the creditors are legally suspended as in sections 398 and 411 of the CA 2016 for both the CVA and JM respectively. Under both corporate rescue mechanisms, the CA 2016 introduced a newly created profession to manage the processes, which is an independent and professional Insolvency Practitioner (IP). The IP, as defined under section 2 of the CA 2016, is “a person who is an approved liquidator other than the Official Receiver”. Section 433 of the CA 2016 outlines the qualifications required to be an approved liquidator. From the perspective of the directors of the distressed company, though they remain in their management positions, their actions are otherwise supervised by an IP, in the case of a CVA. In the case of a JM, the directors are divested of all powers in the company and these responsibilities are assumed by an IP during the entire JM process.

Hence, an acceptable outcome is to avoid an eventual demise of the company that could be achieved either through company rescue or business rescue mechanisms to avoid liquidation. The ideal outcome of a corporate rescue is a company rescue - described as a pure rescue,

which amounts to the restoration of the company's financial position to its previous healthy status with the management and workforce intact (Frisby, 2004). However, it has been observed that this objective is difficult to achieve in practice (Frisby, 2004; Belcher, 1997; Finch, 2009). A more realistic outcome is a business rescue, which is the sale of the business of the company as a going concern sale or partial going concern sale (Frisby, 2004; Parry, 2008; Finch, 2009; 244) that can be achieved through the JM process. Another form of corporate rescue could be achieved through the CVA by saving the distressed company in whole or in part with the agreed composition of its debts by its unsecured creditors. Essentially, this would enable the company to continue its businesses and preserve its workforce (Frisby, 2004).

The CVA and JM in the CA 2016 were introduced as corporate rescue mechanisms based on the recommendations of the CLRC, however, the concept of corporate rescue was not explicitly outlined in its report. The desired result of corporate rescue in the report reveals that the CVA is designed to retain the same management to operate the distressed company. As for the JM, the rescue plan is implemented by the IP, known as a Judicial Manager (JMgr), with the objective of achieving any one of three possible outcomes, which are: (1) the survival of the company as a whole or in part; or (2) to secure approval of a Scheme of Arrangement (SOA), under section 366 of the CA 2016; or (3) so that it is more advantageous realisation of the company's assets than if it was done on a winding up of the company. Thus, the underlying concept of a corporate rescue under the CA 2016 does not mean that the distressed company is preserved or remains intact. This concept is in line with the established by the World Bank in the "Principles for Effective Insolvency and Creditor/Debtor Regimes":

“[R]escue does not necessarily mean that an insolvent corporation is fully restored or that the main participants in the insolvency (creditors and owners) are eventually restored to their pre-insolvent legal position. Rather, what rescue regimes seek to signal is that, through the application of various techniques and mechanisms (involving something other than the traditional methodology of liquidation), more value can be obtained than would be realized from the standard liquidation sale of the corporation's assets”, (p. 56 para 157).

In summary, the concept of corporate rescue suggests that the bar for corporate rescue of distressed companies is not set too high so that its objective is rendered difficult to attain, by insisting on restoring the companies to its pre-insolvent financial health status (Harmer, 1997). Furthermore, corporate rescue is also regarded as being achieved when at least a higher value of the distressed company's assets is secured through this process, as compared to that through realization from a liquidation or distressed sale (Bidin, 2004; Hunter, 1999). By achieving higher sale value of the assets, this would ultimately benefit the unsecured creditors even when the debts exceed the proceeds of sale. During this process, some employees and suppliers may be retained to continue the business of the distressed company before the sale of its assets so as to maximize the value of the assets (Bidin, 2012; Hunter, 1999).

Both the CVA and JM, or the SOA require the active participation and approval from a majority of the creditors. For the CVA, section 400(2) of the CA 2016 requires the proposal to be supported by seventy-five per centum or more of the total creditors present that have voting rights. As for the JM, section 421 of the CA 2016 requires that the JMgr's proposal be approved by seventy-five per centum or more of the total value of creditors present that have voting rights. The SOA in Section 366(3) of the CA 2016 requires that the compromise or arrangement be agreed by at least seventy-five per centum of the total value of the creditors or class of creditors present that have voting rights. Thus, the process of corporate rescue assures the creditors of a higher recovery rate as compared to the liquidation process. This process would provide the needed incentives for a majority of the creditors to collaborate and endorse the corporate rescue scheme (Collin & Morrison, 2016; Finch, 2012).

Apart from maximizing the wealth of the creditors as a whole, the function of the corporate rescue law under the CA 2016 have also established other objectives. One of these objectives is to protect the interests of other stakeholders, such as the company's shareholders, employees and suppliers (CD No. 10, 20). This is in contrast to the old regime, whereby the general consensus of the insolvency laws under the CA 1965 was that there was a bias towards the interests of the creditors (Kamarul, 2006). However, it should be noted that under the CA 1965, the SOA was used by insolvent companies for restructuring, even though the SOA was not exclusively meant to be invoked as a corporate rescue mechanism (CD No. 10, 20; Nathan, 2019, p.8). It

was observed that the SOA was used by many public listed companies in Malaysia during the 1997/1998 Financial Crisis for the purpose of restructuring (Azmi & Razak, 2015). The CLRC retained the SOA under the CA 2016, and was of the view that it may still be of use for company restructuring. However, its provisions have been limited and is not exclusively intended for corporate rescue (CD No. 10, 13, 63, 69).

PHILOSOPHICAL ASPECTS OF CORPORATE INSOLVENCY

Background

There are several existing theories on corporate insolvency that were developed largely in the US, and subsequently in the UK (Cheffins, 1999). In tandem with the development of the corporate rescue law since the Cork Report in 1982, several scholars in the UK had made contributions to the theories associated with corporate insolvency law (Azmi & Abd Razak, 2012). Goode was arguably the earliest scholar in the UK to incorporate the theorization of corporate insolvency law into his work (Goode, 1997), followed by other notable scholars such as Finch (2002; 2009); Keay and Walton (2008); Mokal (2001; 2005; 2007); Etukakpan (2014); Paterson (2016); and Nsubuga (2016; 2018).

Generally, there are two schools of philosophical thought on the laws governing corporate insolvency. The first is the ‘proceduralists’, who advocate the maximization of recoveries or returns for the creditors. The other is the ‘traditionalists’, who support the wider distribution of the recoveries among stakeholders other than the creditors, such as the company employees (Liscow, 2016; Baird, 1998; Nsubuga, 2016; Etukakpan, 2014). The terms, ‘proceduralists’ and ‘traditionalists’, have been traced by Etukakpan (2014) and Janger (2001) to the writings of Baird (1998; 1986), whereby the same taxonomy has been accepted by Finch (2005) and Goode (2005).

Proceduralists – Creditors’ Bargain/Creditor Wealth Maximization Theories

According to Baird, the proceduralists are a group of insolvency law theorists that share a common belief on the use of agreed procedures

and bargains for the distribution of the debtor's assets among its creditors only (Baird, 1998; Mooney, 2004). The concept of agreed bargains between the creditors and debtor was developed by Jackson, where the concept expands on the role of insolvency laws to honour and respect the priority distribution of the debtor's assets first towards the claim of the secured creditor and subsequently among the unsecured creditors (Jackson, 1982). This essentially led to the development of the Creditors' Bargain theory (CB) (Mooney, 2004). The CB was further developed by both Jackson and Baird to reflect the position of creditors, whereby hypothetically, these creditors had collectively bargained in advance for such distribution of the insolvent debtor's assets at the time of extending the credit (Mooney, 2004; Etukakpan, 2014). This premiss is based on the efficient hypothetical bargain that was agreed among the creditors based on the law outside the insolvency framework, and therefore, must be respected by the insolvency law (McCormack, 2008). Thus, it is proposed that the priority interests of secured creditors, followed by unsecured creditors which have been agreed under the non-insolvency law are to be left untampered under the insolvency law (McCormack, 2008; Baird & Jackson, 1984). Mooney (2004) considered the insolvency law as procedural in nature but the interests of its creditors, both secured and unsecured, were determined by substantive laws that should not be undermined by procedural laws.

Furthermore, the CB was developed to maximize the return or wealth of creditors as a group in times of insolvency of the debtor, without any regard to the interests of employees or other stakeholders. This led to the development of the Creditor Wealth Maximization theory (CWM) (Jackson & Scott, 1989; Goode, 2005; Etukakpan, 2014; Finch, 2009). These theories advocated the notion that employees as providers of labour are grouped together with the shareholders as providers of capital as they are directly associated with the operation of a company, in contrast to creditors who are not involved in the management or operations of the company (Nsubuga, 2016; Etukakpan, 2011). Thus, the protection afforded to employees should be addressed by other areas of the law such as the employment law that would cover all industries, solvent or insolvent, instead of the insolvency law which deals with the wealth of creditors and debt collection only (Baird, 1987a; Baird & Jackson, 1984).

Therefore, despite both CB and CWM theories recognize the existence of the interests of other stakeholders such as the employees of the insolvent company, these theories posit that the insolvency law is only concerned with the welfare of the creditors (Jackson, 1982) (Baird, 1987b). The theories suggest that the insolvency law was designed with the mechanism to maximize the value of the pool of assets of the debtor company with the creditors foregoing their rights to enforce their claims individually with a stay of action, in exchange for a realization of the pool of assets through a process of exchange or sale as a whole, rather than on a piecemeal basis (Jackson, 1984; Baird & Jackson, 1984). This process allows a maximization of the wealth of the creditors by providing enhanced economic value of the pool of assets for distribution (Jackson, 1982).

Both the CM and CWM theories, with regards to the welfare of the creditors in times of insolvency of a company, were reflected in those cases heard before the arrival of the corporate rescue laws. For instance in the UK, in the case of *Brady v Brady* (1987) 3 BCC 535, Nourse LJ stated that, “where the company is insolvent, or even doubtfully solvent, the interests of the company are in reality the interests of existing creditors alone” (p. 552). In Malaysia, a similar observation was made by Ramly Ali JC (as he was then) in *Emporium Jaya (Bentong) Sdn Bhd (in liquidation) v Emporium Jaya (Jerantut) Sdn Bhd*, (2002) 1 MLJ 182 on the structure of the CA 1965, whereby he stated that “in cases where the company is insolvent, the interest of creditors is paramount” (p. 206). The provisions of the CA 1965 also supports the principle of ‘*pari passu*’, where the unsecured creditors of an insolvent company do not have preferential claims over each other but are entitled to share in the assets of the company on an equal footing (*Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd (in liquidation)*, (1988) 4 MLJ 569, p. 578). These were in line with both theories which supported the collective approach to maximize recovery of the creditors’ claims against the insolvent company. The recognition given to the priority interests of secured creditors over the unsecured creditors was also

held by the courts in Malaysia, which further supported the proceduralists' theories as stated above (*Ambank (M) Berhad v CA Steel Sdn Bhd*, (2012) MLJU 421, para 14; *K Balasubramaniam Liquidator for Kosmopolitan Kredit & Leasing Sdn Bhd v MBf Finance Bhd & Anor*, (2005) 2 MLJ 201, p. 223; *Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor*, (2011) 1 MLJ 486, p. 500).

In relation to the subject matter of the US Chapter 11 and rehabilitation of companies, Baird (1998) deemed the objective of Chapter 11 as uncontroversial, however, it was unattainable in practice. He was of the view that it was better to let a failed company be liquidated than to maintain it. This would subsequently cause “more harm than good in the long run”, even though in the process of liquidation, employees will lose their jobs (Baird, 1998). On the other hand, other writers, notably Warren (1993) who is a traditionalist, have taken an opposite view and suggested that the liquidation would not only affect employees but also suppliers who will lose business, the existing customers would frequent other places and neighbouring businesses will lose the benefits of a greater flow of customers to the place. This is explained in the next section.

Traditionalists – Multiple Values

In Baird's view, the other group of insolvency law theorists are known as the traditionalists. They believe that the insolvency laws have a role to play in rehabilitating companies, without which it would fail and would result in the loss of jobs and impairment to the community's economic well-being (Baird, 1998). The traditionalists emphasised that such distressed companies must be given breathing space to rehabilitate but with minimal effect on its creditors whose interest must also be taken into account, apart from other interests of the community (Baird, 1998).

Warren, who is credited with the development of the Multiple Values theory (MV) (Finch, 2009), viewed theories dedicated to a single value like the CB and the CWM as measures that could not be applied in the real world with its multiple factors and players other than the creditors of the distressed company (Warren, 1987, pp. 811-

812). Warren (1987) stated that those factors stemmed from “*a dirty, complex, elastic, interconnected view of bankruptcy from which I can neither predict outcomes nor even necessarily fully articulate all the factors relevant to a policy decision*”, in contrast to the clean and simple factors underlying the CB and CWM. Thus, Warren (1993) asserted that in reality, insolvency law must deal with a distressed company’s multiple defaults and distribute the consequences of those defaults among the various players who are affected by the company’s insolvency, corresponding to their different rights and values. Similarly, Korobkin (1991), whose approach was classified as MV by Finch (2009), argued that the CB and CWM failed to recognize that a company is also an enterprise with personality that affects people both economically and otherwise. With respect to corporate reorganization, the insolvency law recognizes a “financially distressed corporation’s dynamic potential” and its impact is not only economically relevant, but also pertains to social, political, personal and moral values. Hence, the traditionalists emphasise the need for other alternative methods available for liquidation in the insolvency law that takes into account matters pertaining to the preservation of companies, employees’ protection (Korobkin, 1991), and the interests of the community (Gross, 1994; Warren, 1993).

The inclusion of the community and public interest is at the core of the Communitarian Vision (CV), which corresponds to the MV (Keay & Walton, 2008, 28). The insolvency law that incorporates the CV approach would allow for the rehabilitation of companies with provisions to take into account the community or public interests such as the protection of employees’ jobs (Finch, 2009). The effect of liquidation of a company on the community in the corporate rescue era has been observed by Millett J in *Re Barlow Clowes Gilt Managers Ltd* (1991) BCLC 750:

“The liquidation of an insolvent company can affect many thousands, even tens of thousands, of innocent people.In the case of a major trading company it can affect its customers and suppliers and the livelihood of many thousands of persons employed by other companies whose viability is threatened by the collapse of the company in liquidation. An insolvent liquidation cannot be dismissed as ‘just a case about money’”, (p. 760).

The above observation of the learned judge mirrors the views of the traditionalists' on the impact of liquidation of a company on people, other than its creditors. However, it fails to encompass the wide categories of community interests, as advocated in the MV or CV.

Unlike the CB or CMW, the traditionalists recognize that parties other than the distressed company's creditors are also affected by the company's liquidation, and suggest that it is reasonable and fair to take into consideration the broader interests in the insolvency law. However, the traditionalists' perspective has its limitations namely; while the interests that it seek to encompass outside of the distressed company's creditors such as its employees, customers and suppliers can be identified, it does not provide any parameters on the class of community interests that need to be covered (Schermer, 1994; Keay, 2000; Finch, 2009). Furthermore, in the event of conflict between those interests during the selection process, little or no guidelines were developed to resolve those conflicts, such as the weightage that are to be allocated to a particular party (Keay & Walton, 2008; Finch, 1997; 2009). The consequence of employing the theories of the traditionalists without reservation runs the risk of causing confusion to the decision-makers during its implementation in the insolvency law, particularly on the values that need to be allocated to the various competing groups of stakeholders (Finch, 2009).

Theories Developed in the UK

As noted earlier, several theorists in the UK are in the forefront of developing new insolvency law theories, notably Finch and Mokal. In promoting her theory known as the Explicit Value approach (EV), Finch (1997) highlighted the limitations in the earlier theories as developed by: first, the proceduralists' views as being too narrow that focus on creditors' interest, and secondly, the traditionalists' views that failed to provide proper measures of the values that need to be considered in the insolvency law. She then proposed four values as appropriate measures of the insolvency law namely, efficiency, expertise, accountability and fairness. Although it may still be subjected to scrutiny due to it "lacking in precise benchmarks", these measures represent an improvement over the traditionalists' views when identifying the values in the insolvency law to justify its process (Finch, 2009, p. 63). The list of values is identifiable but limited, and

it is not subjected to the open-endedness found in the theories of the traditionalists. Efficiency refers to “*the securing of democratically mandated ends at lowest cost*”. Expertise refers to “*the allocation of decision and policy functions to properly competent persons*”. Accountability refers to “*the control of insolvency participants by democratic bodies or courts or through the openness of processes and their amenability to representations*”. Finally, fairness refers to the “*issues of justice and propensities to respect the interest of affected parties by allowing such parties access to, and respect within, decision and policy processes*” (Finch, 2009).

However, Finch (2009) acknowledged that trade-offs between the four identified values remain an issue since such trade-offs are inevitable during the insolvency processes, as the EV takes into account “the public and private, the procedural and substantive, and the contractarian and democratic dimensions of insolvency”. An example was provided by Finch (2009) of a trade-off problem that arose from protections for secured creditors and employees with their differing interests in the financially distressed company, as dependent on the weightage and priorities that were accorded to each value in a particular society and political setting. Thus, while the EV is an improvement on the theories developed by both the proceduralists and the traditionalists, it too has its challenges.

Another shortcoming in the EV as pointed out by Mokal (2003) is that the theory fails to differentiate between the procedural and substantive objectives in the insolvency law. Mokal argued that out of the four values identified by Finch for establishing an insolvency framework, only ‘fairness’ can be regarded as a substantive objective of the law. With regards to substantive objective of the law, Mokal interpreted it to mean the goal or end with which the law strives to attain. Some of the examples of the substantive objective of corporate insolvency law are as follows; “[T]o be just to all the relevant parties”; “[T]o treat parties as equals”; “[T]o provide a fair scheme of co-operation under the circumstances peculiar to insolvency”; and “[T]o show equal concern and respect for the interests of all those facing such circumstances”. The other three values, ‘efficiency’, ‘expertise’ and ‘accountability’ are merely procedural in nature and represent the goals on “how the law goes about attaining its substantive goals”. Thus, it refers to the methods employed in ensuring that the objective

of substantive law can be achieved. In short, Mokai argued that ‘efficiency’ represents the ends or objectives which the law seeks to attain, while ‘efficiency’, ‘expertise’ and ‘accountability’ are the means to achieve the ends or objectives and are not correlated to one another (Mokai, 2003; McCormack, 2008).

In previous studies, Mokai (2001) developed an alternative insolvency law theory to the CB and CMW (the CB model), in the form of the Authentic Consent Model (ACM). He examined the measures on how the CB model can be justified based on the creditors’ collective views obtained on an *ex ante* position of each creditor’s transaction with the debtor company, despite it being different in nature and time of occurrence at the time when the position of the debtors’ company is still solvent. Moreover, he noted that Jackson was aware of this problem in the CB model and had acknowledged that his model was predicated on a homogenous pool of creditors. Thus, in reality, the CB model is unsustainable since the unsecured creditors are different in terms of skill at debt recovery and their relationship with the debtor company in view of past records, which in turn represents their strengths and weaknesses in any bargain among themselves (Mokai, 2001).

However, the main objective of ACM is the notion of justice and reciprocity, whereby Mokai deduced that this allowed the creditors and all parties whose rights and obligations could be affected by insolvency law to co-operate. Justice, as advocated in ACM, calls for all parties affected by insolvency law to be equally treated. This suggests that in insolvency processes, the interests of those affected parties are treated without any discrimination by granting them equal rights. This would result in an equal distribution of assets of the insolvent company. The insolvency proceedings refer to the set of social, commercial and legal circumstances that correspond to insolvency, which are triggered when a company is insolvent (Mokai, 2001).

By establishing that the parties are “free and equal, and as fully co-operating members of society,” (Mokai, 2001), the second part of the equation in ACM is premised on reciprocity. Therefore, it is in each party’s interest to reciprocate the treatment accorded by others in the same group who are affected in the insolvency proceedings, and

hence, upholding the main aims of the ACM which is “reciprocity is a form of fairness” (Mokal, 2005). Similar to the CB model, the parties in the ACM are hypothetical, but compared to previous models, the parties possess constructive attributes that would deny them the knowledge of their own strengths such as intelligence, social positions and bargaining acumen. This is conducive for all parties to accept reciprocity (Mokal, 2001). In Mokal’s view, these parties with constructive attributes are said to have ‘dramatic ignorance’, similar to performers being told to act with certain attributes in a drama. In contrast with the parties in the CB model, Mokal termed them as having ‘natural ignorance’, which allows them knowledge of their attributes during the bargaining process that would be of hindrance to any collective decision as proposed in the CB model. ‘Natural ignorance’ refers to parties being unaware of the result of their transactions with the debtor company, but still maintain their attributes as they represent the real parties stated in the CB model (Mokal, 2001; 2005).

Based on the concepts of justice and reciprocity, Mokal made a comparison between the ACM and the CB model, and examined the availability of a stay on enforcement of the creditors’ claims in insolvency. The stay of creditors’ actions was regarded as an integral part of insolvency proceedings, which was employed by Mokal to illustrate the application of the ACM approach and its comparison with the CB model.

He suggested that the parties in the ACM, with their lack of knowledge of each other’s attributes, would be inclined to reach a common consent termed as ‘authentic consent’ in their bargaining for a collective stay on enforcement of their claims. As for the parties in the CB model, with respect to their knowledge of the attributes of each party, there would be a biasness towards the most influential parties in the bargaining process. Therefore, this would halt any agreed collective bargaining between all parties involved (Mokal, 2001).

In relation to the parties that are considered in the ACM, the respective circumstances of each case would decide the outcome (Mokal, 2001). The fluidity in ACM allows it to take into account the matters that correspond to insolvency situations, where are affected parties are included if they can show that their interests are affected. The ACM model have been implemented to parties other than creditors, which

involved issues that correspond to corporate insolvency (Mokal, 2001). He further observed the wrongful trading provisions in the UKIA 1986 that involved the rights and interests of managers and shareholders other than creditors were justified with their inclusion based on the ACM model. However, the ACM would exclude the employees or the broader community if they were affected by financial distress, regardless of whether the debtor company is insolvent or not (Mokal, 2001).

A SUMMARY OF THE PHILOSOPHICAL APPROACHES IN INSOLVENCY LAWS

The philosophical approaches in insolvency laws adopted in both the US and UK were diverse, and ranged from proceduralists (Jackson, 1982; Baird, 1987(a)) to the traditionalists (Warren, 1987; Korobkin, 1991; Finch, 1997; Mokal, 2001). In these approaches, a common denominator was discerned that corresponded to the interests of the company's creditors, whereby the objective of the corporate rescue was to protect the interests of creditors of the distressed company that was similar to the measures of the proceduralists, or those of other stakeholders including the creditors of the distressed company that was similar to the measures of the traditionalists. The early theories advocated by the proceduralists were in the form of CB and CWB, with the sole objective of maximizing the wealth of creditors while disregarding the interests of other stakeholders. This led to the development of other alternative theories. The first issue stemmed from the traditionalists, where the MV recognized the impact of liquidation on parties other than creditors of the insolvent company and extended it to employees, customers, suppliers and even the community without any guidelines to determine the class of affected parties. However, Schermer (1994) asserted that since community interest cannot be effectively measured, therefore, it is dangerous or unrealistic to consider it. Subsequent challenges were posed from the UK, first from Finch and then, Mokal. Due to the lack of guidelines on the measure of the values in determining the class of affected parties, Finch came up with four values namely; efficiency, expertise, accountability and fairness in the EV. However, Finch had admitted that it was difficult to determine each value when a trade-off is present, such as between the creditors and employees of a distressed company. Furthermore, the evaluation of any trade-off may only be done under

certain contexts and cannot be predicted on pre-determined rules (Xie, 2016; Finch, 2009). Another problem that was pointed out by Mokai was that there is only one of the four values, i.e. fairness, which represented a substantive goal of insolvency that could be attained, while the other three values are procedural goals that are the means or methods to achieve the end result. The failure by Finch to provide standards to distinguish and determine the four values suggests that the EV approach is considerably flawed (Xie, 2016).

Mokai established an alternative theory, which is the ACM. It is primarily directed at the proceduralists' view with its creditors of diverse attributes representing a collective group who will agree to an enforcement of a stay of actions on their claims against the insolvent company. Mokai argued that, in real life, the proceduralists' view is unattainable. He further asserted that the ACM, with its values of justice and reciprocity as constructive attributes to replace the diverse attributes of those creditors, would therefore be in a position to agree to such an enforcement of the stay of actions. However, as posited in both theories of the proceduralists and ACM, the parties in those situations are hypothetical, whereby the parties are ideally blessed with reasonable and rational attributes and share no resemblance to the affected parties in real life. McCormack (2008) doubted that the ACM will "lead us any closer in the direction of providing specific proposals or solutions for specific situations (p. 35)", in relation to the purpose of corporate rescue law.

However, the traditionalist's view, with its objective of preserving the operations of the company and protecting community interest, can be regarded as being in line with the objectives set out in the Cork Report (Nyombi, 2018; Cork Report, para 191-198, 203-204, 212, 240). Thus, if the stakeholders' interests are taken into account, then the survival of the company, where possible, is "economically preferable to liquidation" (LoPucki & Doherty, 2015).

THE OBJECTIVES OF THE CORPORATE RESCUE LAW IN MALAYSIA

By introducing the corporate rescue mechanisms in the company law framework, the CLRC noted their concerns: First, there was a lack of focus on corporate rescue in the CA 1965 whereby distressed

companies had the option of either liquidation or receivership (CD No. 10, p. 24 para 1.5); Second, distressed companies under the CA 1965 had to resort to using the SOA as a restructuring tool even though its objectives were not meant as a corporate rescue mechanism (CD No. 10, p. 24 para 1.6; p. 63 paras 4.1 & 4.2); Third, the availability of corporate rescue mechanisms must be in line with the international standards set by the World Bank (CD No. 10, p. 24 para 1.7); Lastly, in compliance with the World Banks' guidelines, the appropriate corporate rescue mechanisms would be the CVA and the JM (CD No. 10, p. 26 para 1.8).

One of the features necessary for a corporate rescue mechanism, as noted by the CLRC, was to cater for the safeguarding of creditors' interest with provisions for: a moratorium against any dissipation of assets of the distressed company; voting rights of the creditors; and rights of creditors to receive information on the company and rescue plan (CD No. 10, p. 25 para 1.7 (iv); p. 13 para 1.2 (iv)). To gain a better understanding of the objectives of corporate rescue in a country such as in the UK, Finch (2009) resorted to the Cork Report which recommended corporate rescue. In Malaysia, the emphasis on the need to protect the interests of the creditors was apparent from the objectives of a corporate rescue framework, as expressed by the CLRC which are as follows (CD No. 10, pp. 19-20):

1. the facilitation of the recovery of companies which are in financial difficulties;
2. the suspension of legal actions by individual creditors through the creation of a moratorium;
3. the removal of the directors' powers of management of the company, even if they retained their position as directors;
4. the avoidance of transfer and transactions which unfairly prejudice the general body of creditors;
5. ensuring that there is an orderly distribution of the company's assets;
6. the provision of a fair system for the ranking of claims against the company;
7. making provisions for the investigation of the company's failures and the imposition of liability of those responsible for the failure;
8. the protection of the public from directors who might in future engage in improper trading;

9. maintaining the ethical standards and competence of insolvency practitioners; and
10. the dissolution of a company at the end of the liquidation process.

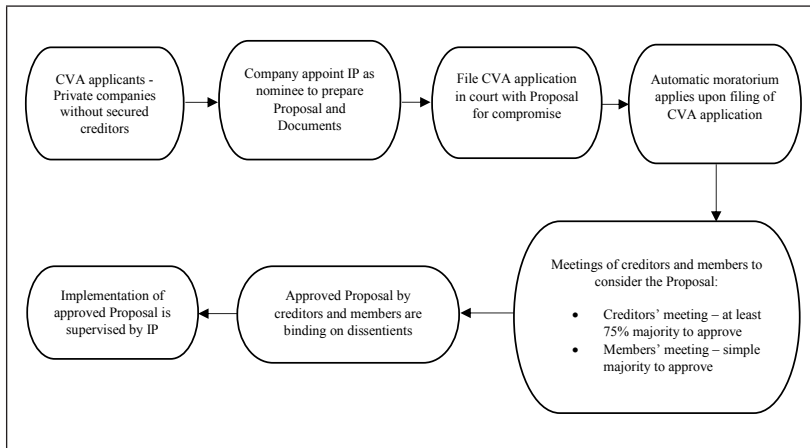
These ten objectives were derived from Goode's observations (CD No. 10, p. 19 footnote 1), which were then presented in the Cork Report (Goode, 1990, p. 5 footnote 20; Cork Report para 191-199). In relation to the CLRC, the report emphasized that the corporate rescue framework will facilitate: "the preservation of the economic value of the distressed company as a going concern for all stakeholders affected by it; the minimization of losses for creditors, including employees, and others who deal with the distressed company; the provision of a better return to all creditors if the rescue is unsuccessful; and the provision of protection based on public interest such as the rescue of abandoned housing projects" (CD No.10, p. 20 para 1.2).

THEORIES AND CORPORATE RESCUE MECHANISMS

Corporate Voluntary Arrangement

The Corporate Voluntary Arrangement (CVA) is a simple mechanism that allows an agreement to be made between the company and its creditors for payment of a portion of its debts. It is only available to private companies that has not charged its properties or any of its undertakings. Therefore, companies with secured creditors are excluded. During the CVA process, the company remains in operation with its board of directors and managerial powers intact. A moratorium against the unsecured creditors will come into force automatically upon the filing of the CVA application in the courts. The CVA proposal and documents will be filed with the CVA application, and is prepared by an IP that has been appointed by the company directors as a nominee. The CVA proposal must be approved by at least 75 percent of the unsecured creditors and a simple majority of members at their respective meetings. This would then be a binding contract for all unsecured creditors, including the dissentients. The CVA proposal is implemented by the company, but it is monitored by a supervisor who in turn must be a registered IP (Mohd Sulaiman & Othman, 2018).

Diagram 1 – The CVA Process



The objectives of corporate rescue are achieved in the CVA process in the following manner: first, the company is allowed to be maintained as a going concern; second, the initiation of proceedings is by the debtor company; third, a moratorium is applied upon the filing of relevant documents into court; fourth, the unsecured creditors' interests are protected by having a decisive say in the process; and lastly, the CVA process is under the supervision of a professional IP (Mohd Sulaiman & Othman, 2018).

It is notable that the theories discussed earlier do not provide any distinction between a public and a private company, however, these theories have been closely applied to the former (Parry & Gwaza, 2019). The exclusion of the CVA process from private companies after having secured creditors and then for eligible private companies by having the CVA decided solely on unsecured creditors would favour the theories advocated by the proceduralists, in the form of CB and CWM. However, the CVA process that maintains the company as a going concern would at least protect the interests of the employees and suppliers, even though the entire CVA process is under the supervision of an IP. With regards to the corporate rescue law in the UK, McCormack (2008) observed that while the interests of employees and other stakeholders may be subordinate to that of the company's creditors, the interests of the former group are still part and parcel of the corporate rescue law. That observation is also in line with the processes of CVA and the objectives stated by the CLRC, provided

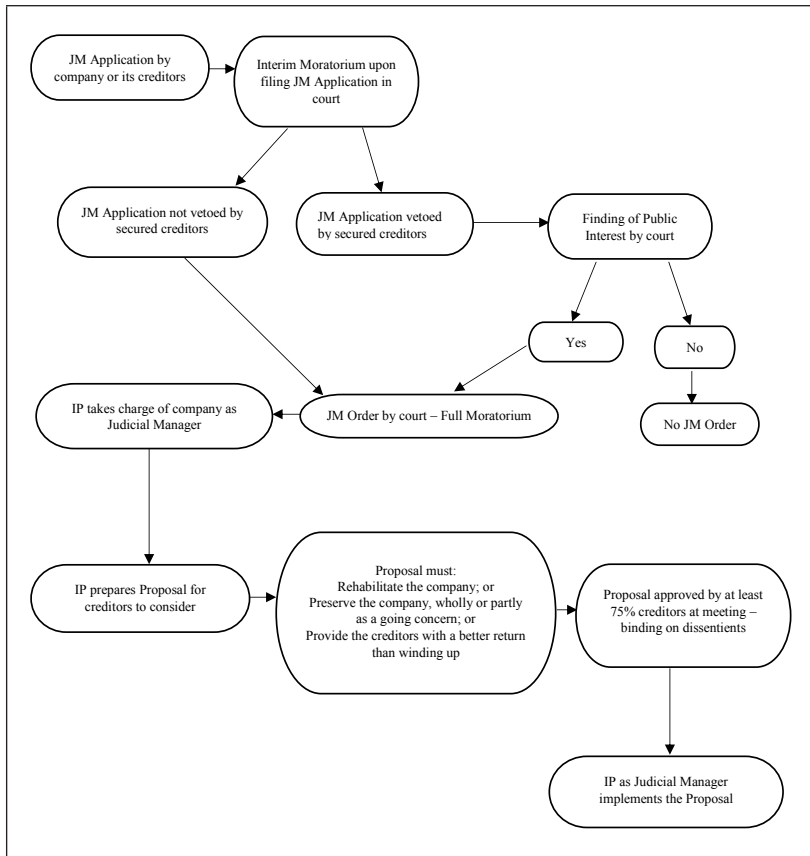
that they are adopted from the UKCVA and Goode's observations from the Cork Report. Taking into consideration that the CVA process would eventually lead to the preservation of the company, the goal of the corporate rescue exercise is not solely on creditor's wealth maximization. The objectives, other than maximizing the wealth of creditors, are achieved by utilizing the CVA. Therefore, this would allow for the application of other theories such as the traditionalists as in the MV, Finch's EV or Mokai's ACM.

However, at the time of writing this article, there are no reported cases that employed the CVA process since its implementation on 1st March 2018. The insufficient implementation of the CVA as a corporate rescue tool reflects the shortcomings in the law which restricts its availability to any private company that has been issued a charge on its property or undertakings (Raja, Darryl & Loh, 2020). It is common in Malaysia for financial institutions, when lending to private companies, to require some form of security such as charges over the companies' property or undertakings, which is a feature absent in the UK model (Mohd Sulaiman & Othman, 2018).

Judicial Management

Unlike the CVA, the Judicial Management (JM) is a court-supervised rescue mechanism. It could be employed to either a company or its creditors. While an interim moratorium comes into force upon the filing of a JM application in court, the court may nevertheless dismiss the application if it is vetoed by secured creditors. However, if the court is of the view that 'public interest' takes priority, the court can grant a JM order. Upon the granting of a JM order, a full moratorium takes effect and an IP is appointed to take charge of the company, its businesses and affairs. The IP, known as a JMgr, is required to prepare and present a proposal to the company's creditors for their consideration. The proposal must encompass plans with the purpose of rehabilitating the company or to preserve the company, wholly or partly, as a going concern, or provide the creditors with a better return than through the liquidation of the company. Moreover, the proposal must be approved by at least 75 percent of the creditors at a meeting, which will then be a binding contract on all unsecured creditors, including the dissentients. The IP is responsible to implement the measures in the approved proposal (Mohd Sulaiman & Othman, 2018).

Diagram 2 – The JM Process



In the JM process, several of its features would align itself with the objectives of corporate rescue as envisaged by the CLRC. Those features are: (1) the availability of moratorium; (2) the protection accorded to the interest of creditors as well as in the public interests; (3) the purpose of preservation of the company or at least the betterment of the return to creditors; and, (4) the management of the company and supervision of the JM process under a professional IP.

The advantages accorded to secured creditors and the requirements for approval of the JM process are based on the objective of providing better returns to creditors, as one of the three objectives for the courts to grant a JM order pursuant to section 405(b) of the CA 2016 is the maximization of wealth for the creditors. Therefore, the theories of

the proceduralists, through the CB and CWM, are the underlying principles of the JM process. In the first reported case in Malaysia, *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd* (2019) 8 MLJ 473 (Leadmont case) (p. 484), the High Court held that Section 409 of the CA 2016 empowers a secured creditor to veto the JM application if two conditions are satisfied, namely: (1) “a receiver, or receiver and manager of the whole, or substantially the whole of a company’s property under the terms of any debentures of the company has been or will be appointed”; and, (2) “the making of the judicial management order is opposed by that secured creditor who has appointed or is entitled to appoint such receiver or receiver and manager of the company’s property”. These conditions are now read disjunctively with the word “and” between the two conditions being substituted with “or” under the Companies (Amendment) Act 2019 that was enforced on 9th October 2019. As a result of the amendments, a secured creditor would only need to satisfy either conditions to veto the JM application, thus, making it easier to dismiss a JM application.

Public Interest in Judicial Management

In the ‘Leadmont’ case, the court also held that the JM process allows ‘public interest’ to be taken into account when evaluating an application for a JM order, as embedded under Section 405(5)(a) of the CA 2016, to the extent that it grants the power to override the objections or the veto power of secured creditors pursuant to section 409 of the CA 2016. By taking into account the public interest, this essentially is in line with the objectives highlighted in the Cork Report on the features of a good modern insolvency law such as follows:

“The effects of insolvency are not limited to the private interests of the insolvent and his creditors, but that other interests of society or other groups in society are vitally affected by the insolvency and its outcome, and to ensure that these public interests are recognized and safeguarded”, (para 198(i)).

The need to protect public interest and the preservation of companies were also noted in the CLRC as part of its objectives for corporate rescue. The inclusion of this factor in the JM process suggests that the theories developed by the traditionalists, such as the MV, Finch’s

EV and Mokai's ACM, are applicable as these theories highlighted that public or community interests need to be taken into account in a corporate rescue framework, and may in certain circumstances override the interests of creditors, as embedded under Section 405(5) (a) of the CA 2016. The preservation of companies would also protect the interests of its employees and suppliers, which are in line with the traditionalists' view.

Despite the well intentions of the legislature to introduce the 'public interest' feature, the 'Leadmont' case revealed the absence of any guidelines for its application, and it "so must be determined on a case to case basis" (p. 484). This feature was adopted from the Singapore model. In Singapore, at the time of writing this article, there are only two reported cases that were based on the 'public interest' provisions. In the case of *Re Cosmotron Electronics (Singapore) Pte Ltd*, (1989) 1 SLR(R) 121 (p. 127), and *Re Bintan Lagoon Resort Ltd*, (2005) 4 SLR(R) 336 (Bintan case), the courts in both cases did not grant the JM order on grounds of 'public interest' due to lack of supporting evidence by the applicant debtor company. In the 'Bintan' case (p. 342), the court held that the failure of a company that brought forth adverse consequences to its employees, customers and suppliers does not generally constitute an event of "public interest". The court also opined that it was prepared to consider "public interest" only in "certain egregious circumstances" (p. 343), without offering any guidelines. Thus, the courts' interpretation of "public interest" have set a benchmark that is unattainable to offset the "serious economic or social impact" of the veto powers granted to the secured creditors (Chan, 2013).

Based on the position taken by the judiciary in Singapore with respect to 'public interest', it is likely that the courts in Malaysia will adopt a similar attitude. In other aspects of rights pertaining to the protection of personal liberty, Ahmad (2004, p. li) asserted that the courts in Malaysia are reluctant to adopt a "liberal conception of rights" of persons, which tend to suggests that the courts would defer in establishing the rights of persons within the definition of 'public interest'.

In light of the reluctance of the courts in offering any guidelines, it must be noted that legal changes that affect the community should be "a matter for the legislature and not for the judges" (Farrar & Dugdale,

1990). Lord Reid made a similar observation in *Pettit v Pettit* (1970) AC 777, whereby he held that; “[Matters] which directly affect the lives and interests of large sections of the community and which raise issues which are the subject of public controversy and on which laymen are as well able to decide as are lawyers. On such matters it is not for the courts to proceed on their view of public policy for that would be to encroach on the province of Parliament”, (p. 795).

Although the secured creditors have been granted veto powers, which suggest that the protection of creditors’ interests is at the core of the company rescue mechanism, the addition of a provision for ‘public interest’ even to the extent of overriding those veto powers is in line with the theories advocated by the traditionalists such as in the MV. However, the lack for a definition of ‘public interest’ is not helped by the absence of any guidelines in the CA 2016, or even by the courts. This position is exacerbated by the approach of the courts on deferring to a strict construction of the statutes, whereby in this instance, the statutes that are under the ‘public interest’ provision in the CA 2016 attempt to encroach the rights of secured creditors to veto the JM application (*AG for Canada v Hallett & Carey Ld* (1952) AC 427, p. 450).

Moreover, Md Dahlan (2015) doubted that sufficient statutory guidelines were given to the court on a JM application under the provisions in the Singapore Companies Act, which are identical to the CA 2016, and would have enabled the courts to deliberate on the conflict of interests of the purchasers of abandoned housing (representing the ‘public interest’ element) and that of the creditors of the housing development company. The large number of abandoned housing has been described as a ‘spectre’ of the public housing policy that have been entrusted to private housing developers by the Malaysian Government since the 1960s.

The values of ‘fairness’ and ‘justice’ as proposed in the EV and ACM respectively could be utilised in certain circumstances that involve the rescue of abandoned housing which was mentioned by the CLRC as an example in its report, where ‘public interest’ may be of relevance (CD No. 10, p. 20 para 1.2). In abandoned housing, the plight of the house purchasers are apparent at not only losing their uncompleted houses due to financial distress faced by the housing development

company, but are also burdened by the various loans taken to finance the house purchase (Md Dahlan, 2015). Their position as unsecured creditors are similar to those creditors who have trade dealings with the financially distressed housing development company, however, the house purchasers are not considered trade creditors or trade customers. As a consequence of the government's policy of entrusting private housing development companies to meet the housing needs of the nation, the home purchasers do not have sufficient legal protection in the housing development framework to prevent or compensate for the housing abandonment (Md Dahlan, 2012). This constitutes a matter of injustice and unfairness to those purchasers. In relation to justice and fairness, it is important to note that there are developments elsewhere that may offer a better explanation on the meaning of the two concepts.

Rawls (1971), in developing a theory on social justice as a matter of fairness, argued that all persons are treated equal, however, there may be some differences from the equality principle if the position of a majority of those lesser fortunate persons are improved in comparison to that under the equality principle. The jurisdictional basis of Rawls to help the vulnerable draws on his concept of justice as fairness, and the notion of justice should be granted to them (*National Legal Services Authority v Union of India* (2014) 4 LRC 629, p. 682). With regards to the application of the concept of fairness in the context of corporate insolvency and restructuring, Paterson (2017) proposed that fairness in a situation that involves a distribution of money or goods would treat "identically situated person" equally. However, if there are an insufficient amount, then a criteria must be set to determine whether the creditors are "identically situated or not" with the incorporation of such criteria into law. Finch (2009) identified two questions to determine if a person is vulnerable. First, it is asked whether he is able to secure a preferential position and to adjust terms to reflect his relationship risks with the debtor company, which will normally involve a certain stake in the company in the form of securities. Secondly, whether he is able to absorb losses from the failure of the debtor company that needs to be achieved through trading contract negotiations. Furthermore, it was highlighted that the employees of the debtor company, in contrast with its trade creditors, are in a much vulnerable position due to their inability to post positive answers to the questions asked in the study. It is contended that an even more

vulnerable category of persons than the employees, which are the house purchasers in abandoned housing who are far removed from the daily activities of the debtor company and would not be privy to its daily affairs unlike the employees.

Another school of thought viewed the presence of secured creditors as unfavourable to the rehabilitation of companies since their investments are largely protected by being able to dispose of the secured assets. These creditors would not show as much interest in the financial recovery of the debtor insolvent company unlike the unsecured creditors (Kasak, 2019). The reason for this attitude was noted by Goode (2005) and Wood (2011), where the secured creditors are not constrained by the *pari passu* rule since the secured assets no longer belong to the debtor company. In addition, secured creditors, such as financial institutions, are better organised and updated of the financial statements of the debtor company. Secured creditors have superior knowledge on the financial standing of the debtor company as compared to unsecured creditors (Symes, 2008). After all, credit is the root cause of corporate insolvency (Fletcher, 2009, p. 4) and based on its superior position as financial lenders, the secured creditors should bear the task of monitoring the financial health of the debtor company which may lower the risk of its financial demise (Symes, 2008). Based on this argument, in the context of the house purchasers in abandoned housing, the violation of the secured creditor's veto right based on 'public interest' is minimal and justified in contrast to the plight of the numerous house purchasers. In adopting this argument, the 'public interest' provision in the JM law offers some form of protection to a small section of unsecured creditors such as the house purchasers in abandoned housing. The use of the 'public interest' provision in this manner would support the approach of the traditionalists in protecting the community interests (Warren, 1993; Gross, 1994).

The concept of fairness must be determined with "a scrupulous attention to the statutory language – the authentic expression of the legislative will – and that no further recourse to popular morality, when the language is not clear, is either demanded or justified" (Allan, 1993, p. 77). If the concept of fairness was left to the courts, then the rule on fairness, as established in *Ex parte James. In re Condon* (1874) LR 9 Ch App 609 (p. 614) (rule in *Ex parte James*), must be fluid and its determination should not be confined to any specific category of cases

(Vaccari, 2020). In Malaysia, the rule in *Ex Parte James* was upheld by the court in *See Teow Guan v Kian Joo Holdings Sdn Bhd* (2010) 1 MLJ 547 (p. 575), whereby it was the duty of a liquidator to act fairly and justly in the context of a sale of the assets of the company in liquidation. In order to overcome that rule to achieve a certain level of certainty, the provisions of the Contracts Act 1950 of Malaysia highlights the illustrations provided under Section 16, on the subject of “undue influence”. Accordingly, the provisions on ‘public interest’ may be statutorily enhanced with either guidelines or illustrations for its implementation to encompass the house purchasers in abandoned housing as the “identically situated” persons where it is objectively justified to treat them differently from other unsecured creditors of the insolvent housing development company.

CONCLUSION

The two existing philosophies of corporate insolvency as developed in the US by the proceduralists and traditionalists offer a differing stand on the priority interest that should be accorded in the corporate insolvency law, where it should either be in favour of creditors only, or creditors and other stakeholders as in “one interest or several” (Goode, 1997). During corporate insolvency, the proceduralists’ view as represented by the CB and CWM is aimed at maximizing the creditors’ interests. On the other hand, the traditionalists’ view in the form of MV advocates a multiple values approach to encompass the interests of other stakeholders, and those within the community (Korobkin, 1993). Subsequent theories were developed in the UK which supported the views of the traditionalists, however it was observed that the interests of other stakeholders and the community lack adequate measures to reflect its weightage for consideration in the real world. The UK theories, EV and ACM, attempted to fill in the gaps with measures with the notions of ‘fairness’ and ‘justice’. Although these notions are based on hypothetical parties, they are considered improvements to the US theories. Of particular interest is the possible application of the notions of ‘fairness’ and ‘justice’ to define the ‘public interest’ provision under the CA 2016 for JM.

Both the CVA and JM under the CA 2016 have incorporated elements of the CB and CWM in its provisions on the protection of the interests of creditors. However, in promoting the company as a going concern,

the CVA implies that at least sustaining the jobs of its employees is a concern. This is in line with the observations made on the developments made in insolvency law by Hoffmann J, in the case of *Re Welfab Engineers Ltd* (1990) BCLC 833, which “are intended to encourage trying to save the business rather than destroy it” (p. 838). Moreover, it also exhibited values proposed by other alternative theories to include parties other than just creditors, for the purpose of a corporate rescue scheme. On the practical aspect, the CVA is underutilised with no reported cases at the time of writing this paper, given that the availability of the mechanism is limited to those private companies which do not have a charge over its property or undertakings. While the JM application may be vetoed by secured creditors, these veto powers are subjected to the court’s ruling on ‘public interest’, which supports the theories of the traditionalists. However, the ‘public interest’ provision has not been successfully utilised due to the lack of guidelines in the statute and the reluctance of courts as shown by the two cases from Singapore to include employees, customers and suppliers as part of the company rescue scheme in the attempt to salvage the financially distressed companies. The notions of ‘fairness’ and ‘justice’ may offer direction in enhancing the ‘public interest’ provision to protect the interests of house purchasers in abandoned housing. This issue was highlighted by the CLRC, where ‘public interest’ was mentioned as a possible remedy against the veto powers of secured creditors.

Furthermore, both the CVA and JM have incorporated features that are consistent with the theories proposed by the traditionalists. However, this paper concludes that the central philosophical perspective of the corporate rescue mechanisms are strongly advocated by the CB and CWM, whereby these measures have placed more emphasis on the welfare of the creditors as its primary consideration. While the objectives for introducing corporate rescue have been established in the CLRC, the limitations on the availability of the CVA and JM suggest that these objectives have not been achieved under the CA 2016. The path to reform the corporate rescue mechanisms in Malaysia will entail major reconsideration of the role of secured creditors who are able to exert control over the rescue attempts and whose interests are protected by the corporate rescue laws. Reforms on laws affecting secured creditors have been considered and made in the UK, such as the abolition of administrative receivership (Parry & Gwaza, 2019; Paterson, 2016).

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