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ARTICLE

The Path to Judicial Management in Malaysia is Paved with Obstacles: Lessons from Singapore and the United Kingdom

Thim Wai Chen[1], Ruzita Azmi[2] and Rohana Abdul-Rahman[3]

[1]PhD Candidate, School of Law, Universiti Utara Malaysia, Sintok, Kedah, Malaysia; Founder, Chen, Leong & Company, Advocates & Solicitors, Malaysia, [2]Head of Department, College of Law, Government and International Studies, Universiti Utara Malaysia, Kuala Lumpur Campus, Malaysia and [3]Associate Professor, School of Law, Universiti Utara Malaysia; Senior Associate Fellow, Legal and Justice Research Centre Universiti Utara Malaysia, Sintok, Kedah, Malaysia
Corresponding author: Thim Wai Chen; Email: thimwchen@yahoo.com

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Abstract
In embracing corporate rescue, Malaysia introduced Judicial Management (JM) into its company law framework on 1 March 2018. The mechanism was modelled on Singapore's Judicial Management, which itself was based on the United Kingdom (UK) Administration Procedure. Despite its laudable objective of facilitating the rescue of financially distressed companies, the path to JM is paved with obstacles. This article identifies some of these obstacles and examines the issues that give rise to them. At the same time, the article proposes legislative reforms, drawing on comparative laws in Singapore and the UK. For the purposes of this article, three obstacles are examined: first, the power of a secured creditor or debenture holder to veto the JM application; second, the stringent and prohibitive burden imposed on an applicant company caused by the judicial interpretation, at times conflicting, of the provisions governing the application of a JM order; and third, the higher threshold imposed by legislative requirements on creditors' meeting to approve the JM proposal. These obstacles are encountered at three stages of a JM application: first, at the initial stage of the application; second, in considering the merits of the JM; and third, when the creditors vote to approve the application.

Introduction

In her adoption of a corporate rescue culture, Malaysia replaced the company law framework in the *Companies Act 1965* (CA 1965) with a new framework under the *Companies Act 2016* (CA 2016). The CA 1965 framework comprised remedies favouring creditors in the form of winding-up and receivership, which represent a liquidation culture.[1] The transition to the new framework necessitated some significant changes to the laws on winding-up. Notably, under the new Act, the commencement date for winding-up is the date of the court's winding-up order, as opposed to the date of the filing of the winding-up petition under the CA 1965.[2] The CA 2016 came into force on 1 January 2017. However, the corporate rescue mechanisms, in the form of Corporate

The comments of anonymous reviewers received on an earlier version of this article are greatly appreciated.

[1]On the transition from the liquidation culture under the CA 1965 to a corporate rescue culture under the CA 2016, see generally Thim Wai Chen, Ruzita Azmi & Rohana Abdul Rahman, 'Paradigm shift from a liquidation culture to a corporate rescue culture in Malaysia: A legal review' (2020) 29(2) International Insolvency Review 181.

[2]ibid 186–187, 189. The rationale for this significant change was that the onset of winding-up on the mere filing of a winding-up petition – which, however, may not necessarily result in the court granting a winding-up order – would be in conflict with the objectives of the corporate rescue mechanisms. The earlier law would also be harsh on the debtor company, as its bank would be obliged to freeze its bank account due to the deemed position on commencement of winding-up after the filing of a winding-up petition, presenting another obstacle to its restructuring.

Voluntary Arrangement (CVA) and Judicial Management (JM), the subject of this paper, were only effective on 1 March 2018. In force on the same date were also bespoke rules to facilitate the operation of these mechanisms, the *Companies (Corporate Rescue Mechanism) Rules 2018* (CCRMR 2018).[3]

As mentioned above, both the CVA and JM were introduced as part of Malaysia's intention to embrace a corporate rescue culture. This approach was based on recommendations of the Corporate Law Reform Committee (CLRC) established by the Companies Commission of Malaysia (CCM) in December 2003. The efforts of the CLRC resulted in twelve consultative documents on reforms to various aspects of the law relating to companies.[4] Among them was the Consultative Document on Reviewing the Corporate Insolvency Regime – The Proposal for a Corporate Rehabilitation Framework (No 10) (CD No 10), published in August 2007.[5]

In recommending the JM as a corporate rescue mechanism, the CLRC specifically opted to model it on the rescue mechanism in use in Singapore since 1987, known as the Judicial Management (SJM). During the review process, the CLRC also considered the Administration Procedure in the United Kingdom (UKAP), which was the model law for the SJM.[6] The laws in Singapore were preferred to similar laws in the UK for reasons of cultural similarities between Singapore and Malaysia.[7] Accordingly, most of the provisions in the JM were adopted from the SJM as it appeared in the *Singapore Companies Act* (SCA) in 2007, the year of publication of CD No 10. Significantly, after the publication of the CD No 10 but prior to the gazetting of CA 2016, Singapore reviewed its insolvency laws and reported on reforms to its SJM, *inter alia*, in the Report of the Insolvency Law Review Committee 2013 (Singapore ILRC Report).[8]

It has been observed by Nathan that the JM in the CA 2016 should have, but did not, take into account these developments in the laws to remedy the shortcomings of the SJM, even though the Singapore ILRC Report was available three years before the CA 2016 was gazetted as law.[9] The developments in Singapore were again not considered in the amendments made to the CA 2016 by the *Companies (Amendment) Act 2019*.[10]

Despite the JM being labelled a corporate rescue mechanism by the CLRC[11] and the CA 2016,[12] this article argues that an applicant for a JM order faces obstacles at three stages of the JM application which are detrimental to its objectives of achieving corporate rescue. At the first stage, the JM application would probably fail due to the exercise of veto powers by a secured creditor or debenture

[3]The delay in the date of implementation of JM was due to the late availability of the CCRMR 2018 in 2018, see CCM's Guidelines for Corporate Rescue Mechanism under Division 8 Part III of the Companies Act 2016 (5 Dec 2018).

[4]Siti Faridah Abdul Jabbar & Suzana Muhamad Said, 'Malaysia's Companies Act 2016: a jump start!' (2018) 39(1) Company Lawyer 28, 28.

[5]Corporate Law Reform Committee for the Companies Commission of Malaysia, 'A Consultative Document (1) Reviewing the Corporate Insolvency Regime – The Proposal for a Corporate Rehabilitation Framework; (2) Reviewing the Company Receivership Process; and (3) Company Charges and Registration Process – Improvements to the Present Registration System' (CD No 10) <https://www.ssm.com.my/Pages/Publication/CLRC/Consultation_Documents/cd10%20(1).pdf> accessed 11 Jan 2018.

[6]Thung Cheong Choong & Vijaya Kumar Rajah, *Judicial Management in Singapore* (Malayan Law Journal Pte Ltd 1990) 5–6.

[7]CD No 10 (n 5) 41 para 2.2.9.

[8]Singapore Insolvency Law Review Committee, 'Final Report' (Singapore ILRC Report 2013) <https://www.mlaw.gov.sg/files/news/announcements/2013/10/ReportoftheInsolvencyLawReviewCommittee.pdf> accessed 9 Nov 2023.

[9]Rabrindra S Nathan, 'Does Judicial Management in Malaysia Sufficiently Embody a Rescue Culture?' (2020) 32 Singapore Academy of Law Journal 518, 524–525.

[10]It received the Royal Assent on 28 September 2019 and was gazetted on 9 October 2019.

[11]CD No 10 (n 5) 23–26.

[12]The JM, alongside the CVA, is found in Division 8 in Part III of the CA 2016 under the title 'Corporate Rescue Mechanism'.

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holder, notwithstanding the existence of an exception provision based on 'public interest'. Where the applicant is able to overcome the first stage, it will then have to persuade the court of the merits of its application at the second stage. A review of the cases shows that the courts have interpreted the provisions relating to JM in a strict and narrow manner, with the ultimate effect of not favouring the applicant. This is not helped by some conflicting judicial decisions. Finally, at the third stage, creditors' approval of the JM proposal is needed, but the high legislative threshold is not conducive to a favourable outcome of the JM proposal.

Notably, in 2020 the CCM has proposed some significant changes to the rescue mechanisms, including the JM, via the proposed *Companies (Amendment) Bill*. These proposals appear in the Consultative Document on the Proposed Companies (Amendment) Bill 2020 (CDCAB 2020).[13] Nevertheless, this article, using a doctrinal research approach, argues that the posited obstacles remain but can be addressed by drawing on similar provisions to the JM in Singapore and the UK to improve the JM as a corporate rescue mechanism in Malaysia.

Obstacles in the Path of a JM Application

First Stage: Secured Creditor or Debenture Holder and Veto Powers

The CA 2016 allows the JM application to be filed by a permitted company,[14] either through a resolution of its members or its board of directors; or by the company's creditors, including contingent and prospective creditors; or by all or any of the aforementioned parties jointly or separately.[15] While the procedural steps and documents, such as the mode of the application and its affidavit in support thereof, are set out in the CCRMR 2018, the substantive requirements are found in the CA 2016.

Upon the filing of the JM application, an interim moratorium is triggered.[16] The effect of a moratorium is to prohibit any proceedings against the applicant company, including winding-up, the enforcement of any security over immovable or movable property, or execution processes. The interim moratorium ends when the court determines the outcome of the JM application.[17] Should the court grant a JM order, then a full moratorium statutorily comes into effect under section 411 of the CA 2016. It is wider in scope than the interim moratorium and includes a prohibition on the appointment of a receiver or a receiver and manager (R&M) (if appointed earlier, they will vacate their posts)[18] The moratorium has been described as 'one of the most potent features of a judicial management procedure',[19] since it has the effect of restraining actions or proceedings or other processes taken or to be taken by creditors, including steps to enforce their securities.

However, during the JM application, ie, at the first stage of the JM process, the CA 2016 empowers a secured creditor or debenture holder to veto the application. A significant

[13]Companies Commission of Malaysia, Consultative Document on the Proposed Companies (Amendment) Bill 2020 (28 Jul 2020) <https://www.ssm.com.my/Pages/Legal_Framework/Document/Consultative%20Document%20%26Companies%20(Amendment)%20Bill%202020%20(280720).pdf> accessed 28 Sep 2020. Please note that the proposed Companies (Amendment) Bill has been introduced into the Malaysian Parliament as the *Companies (Amendment) Bill 2023*. This Bill was passed by the *Dewan Rakyat* (House of Representatives) on 28 Nov 2023. It will be presented to the *Dewan Negara* (Senate) and, if passed, will be presented for Royal Assent and enacted into law.

[14]Under CA 2016, s 403, JM is not available to a company which is a licensed institution or an operator of a designated payment system regulated by the Central Bank of Malaysia. In addition, the rescue mechanism is not accessible by a company which is subject to the *Capital Markets and Services Act 2007*, which would include public listed companies – see *Re Scomi Group Bhd* (2021) 10 CLJ 975, 986.

[15]CA 2016, ss 404 and 405(1).

[16]CA 2016, s 410.

[17]ibid.

[18]ibid ss 411(1)(a) and 4(b). Contrast that with the interim moratorium in CA 2016, s 410.

[19]Aiman Nariman Mohd Sulaiman & Effendy Othman, *Malaysia Company Law: Principles and Practices* (2nd edn, Commerce Clearing House (Malaysia) Sdn Bhd 2018) 895.

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amendment made to section 409 by the Companies (Amendment) Act 2019 permits a secured creditor or debenture holder to veto the JM application if either of two conditions is satisfied.[20] The first condition is that a receiver or R&M has been or will be appointed by a debenture holder,[21] and the second condition is that a secured creditor opposes the JM application.[22] With the amendments, the position of a secured creditor or debenture holder to veto the JM application has been strengthened. The saving grace where the JM application is under a veto threat is on the ground of 'public interest'.[23]

Secured Creditor or Debenture Holder of the JM Applicant

According to Goode, 'a world without credit is impossible to imagine',[24] with credit being defined as a 'contractual deferment of debt'.[25] In Malaysia, more often than not, even private companies seeking credit in the form of loans for their business operations are required by financial institutions to provide securities in the form of a charge over their properties or undertakings.[26]

Generally, these financial institutions holding such securities would be regarded as secured creditors. The primary purpose of taking such security is to enhance the security holder's priority for repayment of the loan over other creditors without security in the event of the borrower's insolvency.[27] On the other hand, the mere holding of a corporate guarantee in the absence of any charge or security over the borrower's assets would not make the financial institution a secured creditor.[28] While the CA 2016 has significantly empowered the secured creditor of a JM applicant to veto the JM application, the term 'secured creditor' is not defined anywhere in the CA 2016. In the CA 2016, in relation to the provisions governing the liquidation of companies, the phrase 'secured creditor' denotes a creditor whose claim on the security asset of the borrower has priority over other creditors who have the status of 'unsecured creditor'.[29]

While the rights of a secured creditor in relation to the security are expressly set out in the CA 2016, there is still no definition of the term. Nevertheless, the courts in Malaysia have held that the definition of 'secured creditor' contained in section 2 of the *Bankruptcy Act 1967* (now known as the *Insolvency Act 1967*) (IA 1967)[30] can be adopted for the same phrase found in the CA 1965 for provisions relating to the winding-up of companies.[31] The phrase 'secured creditor' is defined in section 2 of the IA 1967 to mean

[20]The pre-amended section 409 required that *both* conditions must be satisfied before the veto power is validly exercised. With the amendments, the section has been brought in line with the similar provision in Singapore's SJM, except that its second condition does not refer to a secured creditor but a person who has appointed, or is entitled to appoint, such a receiver and manager.

[21]CA 2016, s 409(a).

[22]ibid s 409(b).

[23]ibid ss 409 and 405(5).

[24]Sir Roy Goode, *Principles of Corporate Insolvency Law* (2nd edn, Sweet & Maxwell 2007) 2.

[25]ibid.

[26]Mohd Sulaiman & Othman (n 19) 923.

[27]Gerard McCormack, *Secured Credit under English and American Law* (Cambridge University Press 2004) 7.

[28]*Top Builders Capital Bhd & Ors v Seng Long Construction & Engineering Sdn Bhd & Ors* (2022) MLJU 1 para 104.

[29]CA 2016, s 524. This section, setting out the rights of secured creditors in a liquidation process, codifies the common law position operating under the CA 1965. It was introduced based on the recommendations of the CLRC during its review of the CA 1965. See Corporate Law Reform Committee for the Companies Commission of Malaysia, 'A Consultative Document on Company Liquidation – Reforms and Restatement of the Law' (CD No 4) 66–69. <https://www.ssm.com.my/Pages/Publication/CLRC/Consultation_Documents/cd4%20(1).pdf> accessed 11 Jan 2018.

[30]Amended by Bankruptcy (Amendment) Act 2017 (Act A1534) (effective 6 Oct 2017) <https://themalaysianlawyer.com/wp-content/uploads/2017/05/bankruptcy-amendment-act-2017.pdf> accessed 10 Nov 2023.

[31]*Lian Keow Sdn Bhd (in liq) v Overseas Credit Finance (M) Sdn Bhd* (1988) 2 MLJ 449, 453; *Asia Commercial Finance (M) Bhd v JB Precision Moulding Industries Sdn Bhd (in liq)* (1996) 2 MLJ 1, 7–9. The provisions relating to winding-up are generally the same for both the CA 1965 and the CA 2016, see Mohd Sulaiman & Othman (n 19) 936. Accordingly, the observations of the courts on the definition of 'secured creditor' in the CA 1965 are equally applicable to the CA 2016.

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> [a] person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor but shall not include a plaintiff in any action who has attached the property of the debtor before judgment.

The property of the debtor may either be movable or immovable. Section 3 of the Interpretation Acts 1948 and 1967 defines movable property as property other than immovable property, while the latter is defined as land and interest in, right over, or benefit arising or to arise out of land.

Under Malaysian law, the difference between the security of a mortgage and that of a charge is whether the title to the property of the debtor is transferred to the secured creditor. In the case of a mortgage, the title to the borrower's property is transferred to the lender subject to an equity of redemption, whereby the lender is obligated to transfer the property back to the borrower upon full settlement of the loan.[32] As for the security of a charge, which is often encountered in the case of land, the charge over land does not involve a transfer of title but represents an encumbrance on the title, which on default of payment of the loan entitles the lender to foreclose on the land.[33] A mortgage on a borrower's land is not recognised as a security under the law relating to land, the *National Land Code 2020* (NLC), but is still relevant as a security for movable property such as aircraft and ships.[34]

The law in Malaysia also recognises another form of charge often contained in a debenture, a contractual loan document made between a borrower and its lender. This charge over the borrower's property may either be fixed or floating, where transfer of ownership of the property is not involved.[35] A fixed charge binds the specific and identifiable property, such as manufacturing equipment, while a floating charge is a security over certain types of property which the borrower is legally entitled to trade in, such as its products available for sale as part of its business. However, the floating charge may be converted to a fixed charge in the event of default of payment of the loan or on the appointment of a receiver or R&M by the lender.[36] The clause in the debenture enabling the lender to appoint a professional as receiver or R&M of the borrower's company would permit the receiver or R&M to assume management control of the company over its entire board of directors.[37]

Nevertheless, the word 'charge' is broadly defined in section 2(1) of the CA 2016 to include 'a mortgage and any agreement to give or execute a charge or mortgage whether upon demand or otherwise'. The wide range of instruments that qualify as 'charges' under the CA 2016 is obvious by the requirement to register them with the Registrar of Companies under sections 352 and 353.[38] The types of charges that require registration include charges to secure: a debenture, land, book debts, ship, aircraft, goodwill, or floating charge.[39] The definition would cover charges registered under the NLC,[40] and even an absolute deed of assignment, which is regarded as an 'equitable mortgage'.[41] Thus, the category of lenders to qualify as a 'secured creditor' for the purposes of vetoing the JM application is rather broad.

[32]Chen, Azmi & Abdul Rahman, 'Paradigm shift' (n 1) 184.

[33]ibid. A proceeding to foreclose on the land would involve the lender making an application to the court to obtain an order to auction the land.

[34]ibid.

[35]Shanthy Rachagan, Janine Pascoe & Anil Joshi, *Principles of Company Law in Malaysia* (Malayan Law Journal 2002) 293. The property includes book debts, stock in trade, raw materials, and goods in process of the borrower, see Sir Roy Goode, *Legal Problems of Credit and Security* (3rd edn, Sweet & Maxwell 2003) 122–128.

[36]ibid 294–295.

[37]Goode (n 35) 119. See also Chen, Azmi & Abdul Rahman, 'Paradigm shift' (n 1) 184.

[38]While section 352 spells out the requirement of charges, section 353 lists the types of charges requiring registration. Both sections replicate the registration requirement in section 108 of the CA 1965.

[39]See section 353 for the full list of charges.

[40]Jack Yow Pit Pin, 'Corporate Voluntary Arrangements', in Rabindra S Nathan (ed), *Law and Practice of Corporate Insolvency in Malaysia* (Thomson Reuters Asia Sdn Bhd 2019) 16.

[41]*Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh* (2002) 2 MLJ 513, 530.

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Veto Powers relating to Judicial Management

The veto powers granted to secured creditors or debenture holders to oppose the JM application allow for a swift end of the application. This veto mechanism available in the JM framework has been described by Nathan, a Malaysian corporate insolvency lawyer, as 'antithetical to the notion of corporate rescue'.[42] Nathan's view on the veto powers of secured creditors or debenture holders is fortified by a number of JM applications that were doomed to failure at the outset due to the use of such veto powers.[43] It was observed by the High Court in *Re Biaxis (M) Sdn Bhd* that the JM application must be dismissed in the face of an objection by a single secured creditor, and it is immaterial that the debt 'is significantly less than [that of] the other secured creditors'[44] who have not indicated an intention to object.

As mentioned above, the section on the veto powers of secured creditors and debenture holders in JM was based on similar provisions in the law on JM in Singapore (SJM), a decision made for reasons of cultural similarities between Singapore and Malaysia.[45] However, in the case of SJM, veto powers were only granted to debenture holders and not to secured creditors. At all material times, the veto powers in SJM in the SCA, as set out in section 227B(5), were as follows:

> Subject to subsection (10), the Court shall dismiss a petition if it is satisfied that –
>
> (a) a receiver and manager referred to in subsection (4) has been or will be appointed; or
> (b) the making of the order is opposed by a person who has appointed or is entitled to appoint such a receiver and manager.

It is clear that the power to appoint a receiver and manager is commonly associated with debentures, and that section 227B(5) envisaged an objection in the form of a veto by a debenture holder. Instead of following the provisions of section 227B(5), the drafter of the veto power provision for JM in Malaysia added a new and broad category of veto right holder in the form of 'secured creditor'.

In a solvent company, the use of veto powers is seen as an allocation of powers between the two decision-making organs of the company, the shareholders and the directors. Such veto powers may be given to the shareholders so that certain actions of the company taken at board level are only permitted with the approval of the former.[46] For instance, under the CA 2016, the board of directors may exercise its power to allot shares in the company only with the prior approval of the shareholders.[47] In some companies with national interest to protect, a single minority 'golden share' will grant the national government the veto right over any hostile takeover of the company.[48] Seen in the light of the common usage of veto rights, the power is granted to a party that is not in control of the management so as to protect its interests in the company.

However, in the case of a JM application, both the debenture holder and the secured creditor – who, unlike the unsecured creditors, have securities over the company's assets – are still granted veto rights to frustrate any prospect of the company's financial rehabilitation. In contrast, in

[42]Rabindra S Nathan, 'The Path to Corporate Rescue Reform in Malaysia', in Look Chan Ho (ed), *Asia-Pacific Restructuring Review* 2022 (Global Restructuring Review 2021) 70 <https://www.shearndelamore.com/publication/2022/GRR_Asia-Pacific_Restructuring_2022.pdf> accessed 16 Aug 2022.

[43]*Re Biaxis (M) Sdn Bhd* (2022) 7 MLJ 443; *Per: Wellcom Communications (NS) Sdn Bhd dan satu lagi* (2019) 9 MLJ 510; *Re Scomi Group Bhd* (2022) 7 MLJ 620; *Han Yeow Ming & Ors v Yu Chan Trading Sdn Bhd (in receivership) (Malayan Banking Bhd, secured creditor)* (2022) MLJU 596.

[44](2022) 7 MLJ 443, 451.

[45]CD No 10 (n 5) 41.

[46]Elizabeth Boros, 'How Does the Division of Between the Board and the General Meeting Operate?' (2010) 31 Adelaide Law Review 169, 170.

[47]CA 2016, s 75(1)(a).

[48]Frank Wooldridge, 'France and Germany: defences to takeover bids' (2003) 24(4) Company Lawyer 121, 121.

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both Singapore and the UK, such a veto power is only available to a limited group of secured creditors, the debenture holders.

In Singapore, the rationale for granting the veto power for debenture holders was based on the Government's view that the rights enjoyed by debenture holders should not be affected by the rescue mechanism.[49] This view is consistent with that expressed in the UK's 1982 review report on insolvency law, commonly known as the 'Cork Report',[50] which led to the introduction of the UKAP as part of the corporate rescue framework in the UK. Similarly, the Cork Report has inspired corporate insolvency law reforms in Singapore[51] and Malaysia.[52]

In the UK, the recommendations for the UKAP were ironically inspired by the benefits derived from the security of a floating charge and the appointment of an R&M as perceived by the Cork Committee, which had prepared the Cork Report.[53] At the time of the report, the Cork Committee noted that in the absence of any floating charges and the accompanying mechanism of receivership, the financially distressed company was bereft of corporate rescue options.[54] The receivership mechanism was therefore seen at the time as offering a form of corporate rescue.[55] Accordingly, the UKAP was conceived as a corporate rescue mechanism 'to fill in a supposed lacuna in the law where there was no power to appoint an administrative receiver'.[56] Under these circumstances, the UKAP was not available in cases where administrative receivership exists, given that section 9(3) of the *UK Insolvency Act 1986* (UKIA 1986) provides that the court shall dismiss the petition for UKAP if the court is satisfied that there is an administrative receiver of the company. However, the court may still proceed with the petition if the creditor appointing the administrative receiver has consented to the making of the UKAP order. Nevertheless, administrative receivership in relation to the UKAP was largely abolished by the *UK Enterprise Act 2002* (UKEA 2002), save for some exceptions.[57]

The veto power of debenture holders in the SJM was described by Hicks and Woon as 'probably the most significant of all in that a judicial management will only be appropriate where there is no floating security'.[58] The harshness of this provision is mitigated by a 'public interest' exception, which is also adopted for the JM in Malaysia.

The 'Public Interest' Exception

The 'public interest' exception featured in the JM mechanism is based on the recommendations of the CLRC. However, there are no guidelines for its application. Further, it has been judicially

[49]Andrew Hicks & Walter Woon, *The Companies Act of Singapore – An Annotation* (Butterworth & Co (Asia) Pte Ltd 1989) 468.

[50]Report of the Review Committee on Insolvency Law and Practice (Cmnd 8558, 1982) para 503.

[51]Choong & Rajah (n 6) 10.

[52]CD No 10 (n 5) para 3.1.

[53]Goode (n 24) 269. A whole chapter (ch 9) of the Cork Report (n 50) was devoted to the discussion of receivership and floating charge.

[54]Cork Report (n 50) paras 495–496.

[55]Alice Belcher, *Corporate Rescue: A Conceptual Approach to Insolvency Law* (Sweet & Maxwell Limited 1997) 91. See also Rebecca Parry, *Corporate Rescue* (Sweet & Maxwell Limited 2008) 10.

[56]Ian M Fletcher, John Higham & William Trower, *The Law and Practice of Corporate Administrations* (Butterworth & Co (Publishers) Ltd 1994) 16.

[57]The UKEA 2002 entered into force on 15 September 2003. Section 250 of the UKEA 2002 prohibits administrative receivership, albeit with some exceptions. The term 'administrative receivership' was first introduced in the UK Insolvency Act 1985, which was repealed by the UKIA 1986. The term remained in use and is defined in section 29(2) of the UKIA 1986 as a receiver or manager of the whole, or substantially the whole, of a company's property, appointed by the company's debenture holder with a floating charge. According to Kristin van Zwieten, *Goode on Principles of Corporate Insolvency Law* (5th student edn, Thomson Reuters 2019) 404, there are three categories of receivers in the UK, namely administrative receivers, receivers of income, and other types of receivers, including those appointed by court or receivers under a debenture with a floating charge that does not cover all, or substantially all, of the company's property.

[58]Hicks & Woon (n 49) 468.

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observed that the 'public interest' exception lacks any definition and thus 'must be determined on a case to case basis.'[59] The provisions of the CA 2016 relating to the 'public interest' exception are largely similar to the provisions of the SJM. Although the SJM is modelled on the UKAP, the 'public interest' exception differs from UK law in that it is only present in the SCA.[60]

While the 'public interest' exception has been part of the law on SJM since 1987, there have only been two reported cases in Singapore dealing with the matter to date. Both cases set such a high threshold that Chan regarded the exception as realistically unattainable.[61] In the first case, *Re Cosmotron Electronics (Singapore) Pte Ltd*,[62] the judge took note of the three statutory purposes for the making of an SJM order, namely that the company's survival is achieved, that approval is given by the creditors and members to a compromise arrangement, and that it is more advantageous to realise the company's assets than to wind up the company. The judge observed that the 'public interest' exception lacked statutory definition and held, without further elaboration, that the exception is applicable only in circumstances where it would transcend any of the three statutory purposes.[63]

In the second case, *Re Bintan Lagoon Resort Ltd*,[64] the court had to consider the application of the 'public interest' exception due to the objection to the SJM application by a creditor who had appointed an R&M. The court opined that the exception will be considered only 'in certain egregious circumstances', without going into detail.[65] However, according to the court, the 'egregious circumstances' do not extend to 'adverse consequences to employees, customers and suppliers' as a result of the failure of the applicant company for the SJM order.[66]

The two Singapore cases had a significant impact on the decision in the Malaysian case of *Re Biaxis (M) Sdn Bhd*.[67] In denying the JM applicant company the availability of the 'public interest' exception, the court opined that this exception should only be applicable in the most exceptional circumstances, which would exclude 'generic reasons associated with wound up companies such as loss of employment, uncompleted contracts'.[68] Nevertheless, in offering an illustration of the element of 'public interest', the court said that it would consider the 'public interest' exception to apply if, at the height of a Covid-19 pandemic, a financially distressed company applying for a JM order was the only one in possession of an effective vaccine against Covid-19.[69] As can be seen from this illustration and the judicial observations in the two Singapore cases, the 'public interest' exception would rarely be invoked.[70]

Dilution of the Veto Powers in Singapore and the UK

Prior to the enforcement of the JM in Malaysia on 1 March 2018, there have been respective reviews made on the SJM in Singapore and the UKAP in the UK. In both jurisdictions, concerns were raised about the impact of the veto powers on the effectiveness of these corporate rescue mechanisms.

[59] *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit* (2019) 8 MLJ 473, 484.
[60] Hicks & Woon (n 49) 468–469.
[61] Tracey Evans Chan, 'The Public Interest in Judicial Management' (2013) Singapore Journal of Legal Studies 278, 298.
[62] (1989) 1 SLR(R) 121.
[63] ibid 127.
[64] (2005) 4 SLR(R) 336.
[65] ibid 343.
[66] ibid 342.
[67] (2022) 7 MLJ 443.
[68] ibid 451.
[69] ibid.
[70] Tan Cheng Han (ed), *Walter Woon on Company Law* (revised 3rd edn, The Thompson Corporation Pte Ltd 2009) 678. See also Gita Radhakrishna, *Insolvency Law – Bankruptcy and Companies Winding-Up* (The Malaysian Current Law Journal Sdn Bhd 2020) 224.

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(a) The SJM in Singapore. In two reports, the authorities in Singapore reviewed, *inter alia*, the effectiveness of the SJM in light of the veto powers of debenture holders. The first report was known as the Singapore ILRC Report 2013[71], and the second was the Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (Singapore Report 2016),[72] published in April 2016. The main reform recommendations were contained in the Singapore ILRC Report 2013, while the Singapore Report 2016 proposed additional reforms to enhance the earlier recommendations.[73]

The Committee recognised the ineffectiveness of the SJM in achieving its objective of rehabilitating financially distressed companies since its introduction in 1987.[74] Significantly, the lack of success of the SJM was attributed to the veto power of debenture holders, which the Committee identified as 'precedence of receivership over judicial management'.[75] The rationale was abundantly clear: the debenture holder will prefer to have its appointed receiver realise the debtor's assets for its own benefit rather than allow a judicial manager to be appointed to manage the same assets for the benefit of the entire body of creditors.[76]

While the 'public interest' exception is available in the SCA to mitigate the veto power, the Committee took note of the judicial observations made in two reported cases, and accepted that the exception is difficult to satisfy by the applicant company.[77] Under these circumstances, the Committee opined that if a debenture holder is present to exercise the veto power, the SJM would not in practice be able to achieve its objective of being a corporate rescue mechanism.[78] In hindsight, the words of Choong and Rajah made in 1990 were prophetic: 'it is difficult to envisage many circumstances where a secured creditor having the power to appoint a receiver and manager will stand back to allow the appointment of a judicial manager over whom he will have considerably less influence'.[79]

Notwithstanding the notoriety of debenture holders with floating charges dooming the SJM application with their veto power, the Committee was not prepared to prohibit the availability of receivership associated with floating charges in debentures.[80] Unlike the UK, the Committee felt that the instrument is still useful as a form of security for financiers.[81]

However, in striking a balance between the rights of debenture holders and those of unsecured creditors, the Committee recommended that the court should be empowered to override the veto power and grant an SJM order when the prejudice caused to unsecured creditors is disproportionately greater if the SJM order is not granted than the prejudice that will be made to debenture holders if an SJM order was made instead.[82]

This recommendation on 'disproportionately greater prejudice' has been incorporated into the statutes; into SCA in section 227B (5)(b) and into the Insolvency, Restructuring and Dissolution

[71]Singapore ILRC Report 2013 (n 8).

[72]Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (20 Apr 2016) <https://www.mlaw.gov.sg/files/news/public-consultations/2016/04/Final%20DR%20Report.pdf> accessed 10 Nov 2023.

[73]ibid paras 2.14–2.15.

[74]Singapore ILRC Report 2013 (n 8) 82. The Committee added that the Scheme of Arrangement, a mechanism not designed specifically for corporate rescue, yielded a better record of success in the rehabilitation of financially troubled companies.

[75]ibid 85. Other reasons for the low uptake of SJM were also given in the Report.

[76]ibid.

[77]ibid 86. The two cases refer to *Re Cosmotron Electronics (Singapore) Pte Ltd* (1989) 1 SLR(R) 121 (n 62), and *Re Bintan Lagoon Resort Ltd* (2005) 4 SLR(R) 336 (n 64).

[78]Singapore ILRC Report 2013 (n 8) 86.

[79]Choong & Rajah (n 6) 108–109.

[80]Singapore ILRC Report 2013 (n 8) 57, 90.

[81]ibid. The Committee noted that in the UK, the UKEA 2002 provided that a debenture holder could not appoint a receiver or R&M, thus effecting a removal of the veto power in the UKAP.

[82]ibid 91.

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Act 2018 (SIRDA 2018)[83] in section 91(6)(b), which deal with the situation where the debenture holder opposes the granting of the SJM. However, pursuant to the 2017 amendments, the authorities saw fit to have the automatic veto power of debenture holders removed.[84] The position in Singapore is that the debenture holder only has a right to oppose the SJM application subject to the 'disproportionately greater prejudice' ruling of the court. The automatic veto power enjoyed by debenture holders, which is triggered when a receiver and manager has been or is to be appointed, is no longer the law.

(b) The UKAP in the UK. In the UK, it was generally perceived that debenture holders armed with powers to institute administrative receivership were inclined to exercise those powers to appoint R&M for financially distressed companies for their own benefits.[85] These debenture holders were in a privileged position, as the appointment of R&M was not based purely on the company's insolvency, but rather on any stipulated breach of the debenture by the company, and did therefore not constitute an insolvency process *per se*.[86] Accordingly, the administrative receivership remedy available to these debenture holders was designed to be self-serving and incompatible with the collective benefits of the UKAP[87] that would accrue to parties, including unsecured creditors, shareholders, and employees.[88]

Although the UK Government had recognised the importance of floating charges in certain financial transactions relating to the capital markets, it was prepared to restrict the availability of the rights attached to floating charges in debentures in order to appoint R&M for the UKAP.[89] This important abolition of the veto power of such holders of floating charges was brought about by the UKEA 2002.[90] While the holders of floating charges were compensated with the power to appoint the administrator in the UKAP, the changes made by the UKEA 2002 were perceived as reconfiguring corporate rescue law in the UK by placing emphasis on the UKAP.[91]

Reforms to the Veto Power in JM

(a) Reforms as Proposed by the Companies Commission of Malaysia. The Companies Commission of Malaysia (CCM),[92] having identified certain deficiencies in the corporate rescue mechanisms, including the JM, proposed some proposed amendments in a Consultative Document on the Proposed Companies (Amendment) Bill 2020 (CDCAB 2020).[93] Two of the objectives of the proposed reforms were to enhance the framework in the CA 2016 regarding the rescue mechanisms,

[83]The SIRDA 2018 represents an omnibus insolvency Act, with the insolvency provisions migrating from the SCA. Accordingly, the SIRDA 2018 consolidates both personal and corporate insolvency laws, including those relating to restructuring, into a single piece of legislation.

[84]Walter Woon (ed), *Woon's Corporations Law – 2019 Desk Edition* (LexisNexis 2019) 995.

[85]Secretary of State for Trade and Industry, 'Productivity and Enterprise: Insolvency – A Second Chance' (White Paper, Cm 5234, Jul 2001) paras 2.1–2.2 <https://webarchive.nationalarchives.gov.uk/+/http:/www.insolvency.gov.uk/cwp/cm5234.pdf> accessed 1 Mar 2020. See also Vanessa Finch, 'The Recasting of Insolvency Law' (2005) 68(5) The Modern Law Review 713, 716.

[86]John Armour, Audrey Hsu & Adrian Walters, 'Corporate Insolvency in the United Kingdom: The Impact of the Enterprise Act 2002' (2008) 5(2) European Company and Financial Law Review 148, 154.

[87]White Paper (n 85) paras 2.3–2.5.

[88]ibid Foreword.

[89]ibid para 2.18.

[90]See generally Armour, Hsu & Walters (n 86). As a result of the partial abolition of administrative receivership, secured creditors holding floating charges may only appoint R&M to enforce their rights in certain financial transactions as specified in the UKIA 1986, which are considered exceptions to the said abolition. For a discussion of the exceptions, notably project financing and the scope of the exception, see Joe Bannister & Joel Nesbitt, 'Step-in rights: theory in practice' (Recovery, Autumn 2008) 22, 23.

[91]Armour, Hsu & Walters (n 86) 155, 160, 162.

[92]The CCM is also known as *Suruhanjaya Syarikat Malaysia* (SSM).

[93]CDCAB 2020 (n 13).

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which comprise the JM, CVA, and the traditional restructuring mechanism, the Scheme of Arrangement (SOA), and to widen their scope of application.[94]

In its proposal to reform the JM, the CCM merely alluded to two of the six reasons given by the Singapore authorities for the lack of success of its SJM.[95] These two reasons are the reluctance of the board of directors of the distressed company to surrender the control of their management to a third party, the judicial manager, and the absence of coverage of the statutory moratorium on self-help remedies such as contractual termination clauses and contractual set-off, also known as *ipso facto* clauses.[96] Another reason given by the CCM for the lack of interest in the JM was the limited scope of application of JM, as it is unavailable to companies regulated by the *Capital Markets and Services Act 2007*, including public listed companies.[97] To achieve this objective, the proposed reform focused on extending the scope of application of JM to make the rescue mechanism available to public listed companies.

It is disappointing to note that despite a number of cases in Malaysia where the veto power was exercised to defeat the JM application,[98] and despite the court adopting a strict interpretation of the 'public interest' exception,[99] the CCM did not allude to these grounds, which were also raised by the Singapore authorities in their reform proposals.[100] In its proposed reforms, the CCM ought to have considered the reasons for SJM's failure, namely the veto power and the nebulous 'public interest' exception.[101]

(b) Proposed Reforms Relating to Veto Powers. In both Singapore and the UK, the SJM and the UKAP as corporate rescue mechanisms have not produced any encouraging results. The lack of success of both mechanisms has been attributed to the veto power of debenture holders. While the Singapore law has provided a mechanism to mitigate the veto power in the form of a 'public interest' exception, it has not achieved its objective due to the strict interpretation of the phrase by the courts.

Accordingly, the authorities in both countries pursued reforms to dilute the veto powers. In Singapore, a 'disproportionately greater prejudice' provision was added to the SJM to empower the court to override the veto power. In the UK, the veto power is no longer available due to the substantial abolition of administrative receivership in regard to the UKAP.

In view of the similarity in business cultures between Singapore and Malaysia, it is likely that any dilution of the veto power would entail reforms similar to those adopted in Singapore. This view is supported by the trend in Malaysia to adopt Singapore's legislative reforms, such as the CCM's proposed reform on the provision of super-priority financing.[102] In the context of this article, the first such reform proposed to be implemented in Malaysia would be the adoption of the 'disproportionate prejudice' provision.

The second reform proposed by this article would be to limit the veto power to debenture holders only, which was the limitation contained in both the SJM and the UKAP. By empowering secured creditors to veto the JM application, the draftsman of this provision has included a large group of potential opponents of JM, given that most companies in Malaysia would have given

[94]ibid 5.

[95]ibid 8. For the six reasons, see Singapore ILRC Report 2013 (n 71) 84–88.

[96]Consultative Document on the Proposed Companies (Amendment) Bill 2020 (n 13) 8.

[97]ibid 8, 31, 85. See CA 2016, s 403, which was the subject of a public listed company being excluded from applying for JM in *Re Scomi Group Bhd* (2021) 10 CLJ 975, 985–986.

[98]See the cases listed in n 43.

[99]See *Re Biaxis (M) Sdn Bhd* (2022) 7 MLJ 443.

[100]Singapore ILRC Report 2013 (n 71) 85–86.

[101]For a discussion on the nebulous nature of 'public interest', see Thim Wai Chen, Ruzita Azmi & Rohana Abdul Rahman, 'Rehabilitation of abandoned housing projects in peninsular Malaysia: reaching out to rescue mechanisms in the companies act 2016' (2022) 14 Journal of Property, Planning and Environmental Law 61, 69–72.

[102]CDCAB 2020 (n 13) 11. For proposed reforms on super priority rescue financing in Singapore, see Singapore ILRC Report 2013 (n 71) 112.

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security to financial institutions in order to constitute them as secured creditors when obtaining loans from them.[103] It was rather unfortunate that the CLRC had used the phrase 'secured creditors' during its deliberation on the veto powers.[104] But in recommending the inclusion of section 227B(5) in the SCA, it should have been clear to the draftsman that the reference to the phrase 'secured creditors' was concerned with those creditors holding the security of a floating charge.[105] This is also abundantly clear from a perusal of the Report of the Singapore Select Committee which led to the introduction of section 227B(5).[106] The rationale behind this approach was that the appointment of a judicial manager on the making of the SJM order would have the effect of converting the crystallised charge back into a floating charge, thereby depriving the security holder of its crystallised fixed charge.[107] The CA 2016 also provides a legitimate reason for excluding secured creditors from the veto power provision. This is because section 408(1)(b)(ii) only requires notice of the company's JM application to be served on the debenture holder.

The third reform proposed would be to enhance the 'public interest' exception, as it is now grossly under-utilised. This may be achieved by providing examples of events that constitute 'public interest'.[108] One such example has been provided by the CLRC in referring to a social problem endemic to Malaysia: abandoned housing projects in need of rehabilitation, which have left many homebuyers without completed houses and still having to service the loans taken out to finance their house purchases.[109]

The subject matter of such an uncompleted housing project was considered in the case of *Monday-Off Development Sdn Bhd v Bumimetro Construction Sdn Bhd & Ors*.[110] The developer of the uncompleted housing project with sold units had applied for a JM order. Certain unsecured creditors had objected to the application. In granting the JM order, the court had, *inter alia*, briefly alluded to the 'public interest' element in the JM provision, which it regarded as a factor that would be beneficial to the unit purchasers in completing the housing project.[111] It is unfortunate that the reference to 'public interest' was rather brief, without undertaking any helpful discourse on previous judicial observations made in Singapore and Malaysia which had offered a narrow interpretation of the phrase.

Nevertheless, the use of illustrations appended to a section of a statute has been observed to elucidate the intended operation of the section.[112] Similar observations have been made by courts in Malaysia,[113] Singapore,[114] and Australia[115] in relation to illustrations appended to their respective Penal Codes, which were modelled on the Indian Penal Code. Notably, the Judicial Committee of the Privy Council in an appeal from Penang, then part of the Straits Settlement, in the case of *Mohamed Syedol Ariffin v Yeoh Ooi Gark*,[116] opined that in the construction of a statute, the

[103]Mohd Sulaiman & Othman (n 19) 923.

[104]CD No 10 (n 5) 39–41.

[105]ibid 41 para 2.29.

[106]Report of the Select Committee on the Companies (Amendment) Bill (Bill No 9/86) <https://sprs.parl.gov.sg/selectcommittee/selectcommittee/download?id=273&type=report> accessed 28 Aug 2022.

[107]ibid A14 para 3.2. Generally, the debenture instrument would provide for the floating charge over the assets of the debtor company to be automatically converted or crystallised into a fixed charge upon the appointment of a receiver or R&M, see Goode (n 35).

[108]For a discussion on the use of illustrations appended to a statutory provision, see Chen, Azmi & Abdul Rahman, 'Rehabilitation' (n 101).

[109]CD No 10 (n 5) 20 para 1.2.

[110](2021) MLJU 915.

[111]ibid paras 58–62.

[112]Avtar Singh & Harpreet Kaur, *Introduction to the Interpretation of Statutes* (3rd edn, LexisNexis Butterworths Wadhwa Nagpur 2009) 102.

[113]*Alif Mustadzar bin Ahmad lwn Pendakwa Raya* (2022) MLJU 464, para 25–29.

[114]*Public Prosecutor v Teo Heng Chye* (1989) 3 MLJ 205, 209–210.

[115]*Re Chong Wooi Sing and Toh Yuh Teng v R* (1989) FCA 66.

[116](1916) 1 MC 165.

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court is under a duty to accept the illustrations appended to the statute and that such illustrations would only be rejected in special or exceptional cases.

Second Stage: Judicial Consideration on the JM Application

At the second stage of the JM application, the court is required to consider the merits of the case on the basis of the documents filed in support of the application for a JM order and the appointment of a judicial manager. The application must be heard expeditiously within a period of sixty days from the date the application is filed with the court.[117]

Conflicting Judicial Decisions – Insolvency Practitioner Report and Unsecured Creditors Rights to Oppose JM Application

While the substantive law for JM is found in the CA 2016, the procedural rules to complement its operation are found in the CCRMR 2018. However, if the procedural rules are lacking, recourse may be had to the Rules of Court 2012.[118] Nonetheless, there have been a few reported cases in Malaysia offering additional guidance in the form of rulings on the JM application. In the case of *In Re Sin Soon Hock Sdn Bhd*,[119] Wong Hok Chong JC made several practical observations on the procedures and requirements in a JM application. Firstly, the proposal for the consideration of the creditors after the granting of the JM order must be formulated at the time of the preparation of the JM application.[120] Secondly, the formulated proposal would form the basis for supporting the JM application as to the likelihood of achieving one or more of the statutory purposes.[121] Thirdly, the person with the expertise to prepare the formulated proposal would be the insolvency practitioner (IP), who has a key role in the entire JM process and who is likely to be appointed as the judicial manager.[122] Fourthly, not only the applicant company but also the court would have to rely on the IP's expertise for guidance, whose evidence, either in an affidavit or an attached expert report, would be crucial to the JM application.[123]

The same principles and practical guidelines were expressed in another case heard by the same judge as *In Re Sin Soon Hock Sdn Bhd*. In *Re Biaxis (M) Sdn Bhd*,[124] his lordship opined that the absence of an affidavit or expert written opinion from the appointed IP rendered the JM application devoid of any credibility that the proposal was likely to achieve its stated purposes.[125] In addition, his lordship made a further significant observation that unsecured creditors, unlike secured creditors, are prohibited from opposing the JM application.[126]

Notably, another judge of the High Court, Nadzarin bin Wok Nordin JC, in several cases took a different view from Wong Hok Chong JC: firstly, on the requirement for a detailed statement of JM proposal, including the restructuring plans, at the JM application hearing stage, and, secondly, on the prohibition on unsecured creditors opposing the JM application.

In the case of *Federal Power Sdn Bhd v Dara Consultant Sdn Bhd*,[127] Nadzarin bin Wok Nordin JC held that the detailed recovery plan to be prepared by the proposed judicial manager was only needed upon obtaining the JM order and not at the application hearing stage.[128] His lordship took

[117]CCRMR 2018 (n 3) rule 9.
[118]ibid rule 2. The Rules of Court 2012 are a set of procedures governing the civil litigation process in Malaysia.
[119](2020) 7 AMR 482.
[120]ibid 486.
[121]ibid 486–487.
[122]ibid.
[123]ibid 487.
[124](2022) 7 MLJ 443.
[125]ibid 454.
[126]ibid 445, 450.
[127](2022) 7 MLJ 563.
[128]ibid 569.

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note of the decision in *Re Biaxis (M) Sdn Bhd*, but added that at the JM application hearing stage, any affidavit by the proposed judicial manager, while helpful to the court in assessing the application, is not a requirement under the CA 2016 or the CCRMR 2018.[129] Nevertheless, a brief recovery plan is still needed for the court to assess whether any of the statutory purposes is likely or more likely than not to be achieved, rather than mere assertions.[130]

The requirement of a comprehensive recovery report prepared by the IP would make the JM an impracticable and expensive rescue mechanism. Such a report would add to the cost of the JM application and defeat the objective of a rescue mechanism to facilitate the speedy and timely rescue of a financially distressed company. Previously, for the UKAP process, rule 2.2 of the *UK Insolvency Rules 1986* (UKIR 1986) provided that a report prepared by an IP could be attached to the application, setting out the IP's opinion on the achievement of the statutory purposes. Although the report was not mandatory, the courts placed great emphasis on the report, and as a result extensive details have been included in it. Having found that the report was a contributing factor in discouraging the number of UKAP cases, the UK authorities have removed rule 2.2 from the Insolvency Rules.[131]

In the traditional rescue mechanism, the SOA, the court is prepared to grant leave to convene a creditors' meetings at a preliminary stage of the SOA, without having to go into the details of the scheme. In contrast, the JM as a specially designed rescue mechanism is disadvantaged by the requirement of an in-depth report by the IP.[132]

On the issue of whether unsecured creditors are prohibited from opposing the JM application, Nadzarin bin Wok Nordin JC ruled out such a prohibition. His lordship reasoned that while rule 13 of the CCRMR 2018 provides for such a prohibition for unsecured creditors, the rule was not to contravene the parent statute, the CA 2016, which is silent on such a prohibition.[133] His lordship also relied on the Rules of Court 2012 to allow the unsecured creditors to intervene in the hearing of the JM application.[134] In other cases heard by the same judge, the unsecured creditors were similarly allowed to intervene and oppose the JM application.[135]

In another High Court case, *Million Westlink Sdn Bhd v Maybank Investment Bank Berhad & Ors*,[136] Azmi Ariffin J upheld the prohibition on unsecured creditors opposing the JM application. However, on appeal, the Court of Appeal, in an unreported judgment, overruled his lordship's decision and found in favour of the unsecured creditors.[137] Nevertheless, leave to appeal the Court of Appeal's decision has been granted by the Federal Court,[138] but at the time of writing there is no reported news on the outcome.

On a perusal of the provisions for JM in the CA 2016, it is expressly provided that where the nomination of the judicial manager is made by the company, then the creditors, including those

[129]ibid 570.

[130]ibid. See also a decision by the same judge in *Goldpage Assets Sdn Bhd v Gan Kam Seng & Ors* (2021) 9 MLJ 618, 630–631.

[131]Ian M Fletcher, John Higham & William Trower, *Corporate Administrations and Rescue Procedures* (LexisNexis UK 2004) 16–17. See also Edward Bailey & Hugo Groves, *Corporate Insolvency: Law and Practice* (3rd edn, LexisNexis Butterworths 2007) 361; Vanessa Finch. *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 370. Rule 2.2 was substituted under the UK Insolvency (Amendment) Rules 2003.

[132]*Re Kuala Lumpur Industries Bhd* (1990) 2 MLJ 180, 182.

[133]*Goldpage Assets Sdn Bhd v Unique Mix Sdn Bhd* (2020) MLJU 723 paras 22–38.

[134]ibid paras 39–40. As has been mentioned, the Rules of Court 2012 are a set of procedures governing the civil litigation process in Malaysia.

[135]*Twin Unitrade Sdn Bhd v TSK Hardware Sdn Bhd* (2020) MLJU 2326 para 27; *Vision Development Concept Sdn Bhd v Low Sheh Ling* (2020) MLJU 2387 para 37; *Monday-Off Development Sdn Bhd v Bumimetro Construction Sdn Bhd & Ors* (2021) MLJU 915 para 42; *Best Re (L) Ltd v Chubb Samaggi Insurance Public Co Ltd* (2021) MLJU 310 paras 3 and 5.

[136](2019) MLJU 1721.

[137]Aiman Nariman Mohd Sulaiman & Effendy Othman, *Malaysia Company Law: Principles and Practices* (3rd edn, Commerce Clearing House (Malaysia) Sdn Bhd 2021) 1160.

[138]ibid.

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unsecured, are empowered to oppose the nomination.[139] Accordingly, in the absence of an express provision in the CA 2016, it is debatable whether the unsecured creditors are entitled to oppose and be heard on the JM application.[140] The rules in the CCRMR 2018 are consistent with the position in the CA 2016 that the parties eligible to oppose the JM application are confined to debenture holders and secured creditors.[141] Further, it is also in line with the recommendations of the CLRC in adopting similar laws in Singapore.[142]

Principle of 'Exercise in Futility'

Another principle to be applied in determining a JM application was set out in *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit* (the *Leadmont* case).[143] The court allowed the application to set aside the JM order on the ground that the proposal put forward by the judicial manager was bound to fail due to the opposition of the secured creditor and six other unsecured creditors, who accounted for 46.9% of the admitted proof of debts and were therefore unable to satisfy the requisite approval of 75% in value of the total creditors. In the words of Wong Chee Lin JC, 'the proposal is an exercise in futility, as more than 25% of the total value of creditors will vote against any scheme, and the applicant will not achieve the requisite majority of creditors.'[144]

The aforementioned requisite level of approval is set out in section 421(2) of the CA 2016, which requires the proposal prepared by the judicial manager to be approved by 75% of the total value of creditors present and voting before it becomes binding on all creditors of the applicant company and the proposal is implemented. The *Leadmont* case demonstrated that the court shall set aside the JM order prematurely before a creditors' meeting is held if it can be shown that the requisite number of creditors do not support the JM scheme even as early as the hearing of the JM application.

The principle of 'exercise in futility' has been applied in cases on SOA in Singapore[145] and Malaysia through the use of such terms as 'hopelessly insolvent'.[146] The courts have utilised this principle as a basis for not granting leave to convene a creditors' meeting to consider the SOA scheme, as there is no realistic prospect of securing the requisite creditor approval for the proposed scheme.

However, some courts in Singapore have held that it is not appropriate or correct to apply the 'exercise in futility' principle to an application at an earlier stage, such as an application for a restraining order (RO) for the SOA under section 210(10) of the SCA. This approach was adopted in *Pacific Andes Resources Development Limited*[147] and *Re IM Skaugen SE and other matters*.[148] In both cases, the courts considered that the opposition to the application for an RO by creditors

[139]CA 2016, s 407(3).

[140]Woon (n 84) 997. However, it was observed by the authors that based on similar provisions in the Singapore statute, GP Selvam J in *Re Genesis Technologies International (S) Pte Ltd* (1994) 2 SLR(R) 298 permitted objections from the unsecured creditors to oppose the SJM application.

[141]CCRMR 2018, rule 13.

[142]CD No 10 (n 5) 40–41.

[143](2019) 8 MLJ 473.

[144]ibid 496. The 'exercise in futility' principle was held applicable in the hearing of a JM application by Nadzarin Wok Nordin J in *Taimex Engineering Sdn Bhd v Intelzen Sdn Bhd* (2022) MLJU 1278 paras 16–17.

[145]*The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another appeal* (2012) 2 SLR 213, 236; *Pathfinder Strategic Credit LP and another v Empire Capital Resources Pte Ltd and another appeal* (2019) 2 SLR 77, 90.

[146]*Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* (1990) 2 MLJ 31; *Twenty First Century Oils Sdn Bhd v Bank of Commerce (M) Bhd & Ors* (No 2) (1993) 2 MLJ 353; *Exogenus Factor Sdn Bhd v HG Metal Manufacturing Limited* (2012) MLJU 251.

[147](2016) SGHC 210.

[148](2019) 3 SLR 979.

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collectively holding more than 25% of the company's debt was not necessarily indicative of the final outcome of the proposed scheme, which may still be refined and changed between the period of the RO and the eventual creditors' meeting.[149] As alluded to by Nathan,[150] a similar approach has been taken by the courts in Malaysia. In *Re Kai Peng Bhd*,[151] the court declined to read into the provision on granting leave for a creditors' meeting a requirement for any approval of creditors similar to that required only for the creditors' meeting.[152] Thus, in relation to the SOA, the courts are not uniform in their decision as to whether the 'exercise in futility' principle is applicable either at the initial stage of granting leave to convene a creditors' meeting or in relation to an application for a RO, which in many facets is similar to the triggering of a full moratorium at the stage where a JM order is granted by the court.

In any event, Nathan raised a pertinent question as to whether the 'exercise in futility' principle that has been created and developed by judges in SOA cases is compatible with the JM mechanism.[153] It has been observed that the SOA has a 'barebone' framework,[154] with no prescribed procedures and principles, and that its process is largely dependent on principles developed from time to time by case law.[155]

On the other hand, the JM is a specifically tailored rescue mechanism with detailed provisions embedded in both the CA 2016 and the CCRMR 2018. These provisions for the JM prescribe that in an application for a JM order, the court need only consider whether there is a real prospect for the insolvent applicant company that the appointment of a judicial manager will achieve one or more of the purposes set out in the CA 2016.[156] The Act and Rules also specifically provide that debenture holders and secured creditors have a right of veto over the JM application[157] and that creditors, including those unsecured, may oppose the appointment of the judicial manager nominated by the applicant company.[158] However, the statutory provisions do not expressly provide a *locus standi* for unsecured creditors to oppose the application for a JM order or to justify the application of the 'exercise in futility' principle at this stage of the process.

In addition, as pointed out by Nathan, there are dissimilarities in the court process involved in the SOA and JM.[159] The SOA process is managed throughout by the company with the assistance of its advisers, whereby a scheme is formulated for the consideration of creditors or classes of creditors. The outline of the proposed scheme is available at the outset of the SOA application for leave to convene the creditors' meeting and the application for an RO. The CA 2016, on the other hand, provides for the appointment of a judicial manager to displace the management of the company and come up with a proposal for the creditors' consideration within sixty days from the date of the JM order. According to Chan, the primary objective of the JM order is to appoint a judicial manager who will be given the opportunity to rescue the company.[160] Hence, at the stage of the JM application where the JM order is granted and the judicial manager is appointed by the court, it is premature for the creditors to form a view on the rescue proposal which could justify the application of the 'exercise in futility' principle.

[149] *Pacific Andes* (n 147) para 70; *Re IM Skaugen* (n 148) 1009.

[150] Nathan (n 9) 534.

[151] (2007) 8 MLJ 122.

[152] ibid 129. This approach has been followed in *Baneng Holdings Bhd & Ors v CIMB Bank Bhd* (2013) MLJU 269 para 17.

[153] Nathan (n 9) 534.

[154] Thim Wai Chen, Ruzita Azmi & Rohana Abdul-Rahman, "Whither the Schemes of Arrangement in Malaysia with the arrival of the corporate rescue mechanisms?" (2020) 46 Commonwealth Law Bulletin 537, 554

[155] *Pathfinder Strategic Credit LP and another v Empire Capital Resources Pte Ltd and another appeal* (2019) 2 SLR 77, 90.

[156] CA 2016, s 405(1)(b).

[157] ibid s 409; CCRMR 2018 rules 13–14.

[158] CA 2016, s 407(3).

[159] Nathan (n 9) 536.

[160] Tracey Evans Chan, 'Arrangements and Judicial Management', in Tan Cheng Han (ed), *Walter Woon on Company Law* (revised 3rd edn, The Thomson Corporation Pte Ltd 2009) 683.

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Based on a legal review of the court decisions, it appears that some judges have not fully embraced the concept of corporate rescue. Instead, their application or interpretation of the provisions for JM has been intertwined with principles employed in a liquidation culture and influenced by those that are developed for the SOA, which is not a bespoke rescue mechanism and is bereft of statutory procedures and guidelines for its application. As a result, some of these decisions are not compatible with the provisions specifically designed for a corporate rescue mechanism.

Proposed Reforms on Provisions Relating to Conflicting Judicial Decisions

Faced with a number of conflicting judicial decisions regarding the court's power to authorise the administrators in UKAP to make a distribution to creditors who would be regarded as preferential creditors in a winding-up, Lewison J in *Re Cromptons Leisure Machines Ltd* remarked, 'This is a recipe for chaos'.[161]

While the appeal route is available to resolve the conflicting judicial decisions, his lordship, Levinson J, was concerned that 'the need for detailed legal research and argument drives up the cost of administration to the ultimate detriment of the creditors'.[162] It is equally pertinent to note that the uncertainty in the law will result in additional cost and delay to the applicant company seeking rescue. According to Hunter, the debt problems of the insolvent company must be speedily resolved once the rescue mechanism has been utilised, and this momentum should be maintained.[163]

For this reason, this article proposes legislative reforms. The uncertainty in the UKAP law caused by differing judicial interpretations has been remedied by an amendment to the UKIA 1986 introduced by the UKEA 2002.[164] It would be useful for the authorities in Malaysia to adopt similar measures. Legislative intervention would cover, firstly, the rights of unsecured creditors to intervene in the JM application and, secondly, the 'exercise in futility' principle.

While an expert report such as the one from the IP, commending the statutory purpose to be achieved in the JM application, would be of immense assistance to the courts, it should be made clear in the proposed rules that a detailed report is not necessary. A detailed report would add to the cost of the JM mechanism, which is why the adoption of such a report is discouraged.[165] In particular, the experience in the UK of rules requiring a recovery report, such as rule 2.2 of the UKIR 1986, suggests that a detailed report would be counterproductive.

The uncertainty caused by conflicting judicial decisions on the rights of unsecured creditors to intervene and oppose JM applications is not conducive to the cause of corporate rescue. Therefore, this article would advocate legislative reform by including a provision setting out the eligibility of parties to be heard on the JM application. This reform would replicate rule 2.12(1)(j) of the UKIR 1986, which empowers the court at the hearing of a JM application to hear any other person who appears to have an interest justifying his or her appearance.[166]

At the same time, in dealing with the controversial 'exercise in futility' principle, this article would recommend that it be expressly set out in the rules that the eligible person to be heard

[161](2007) BCC 214 para 3.

[162]ibid para 5.

[163]Muir Hunter, 'The Nature and Functions of a Rescue Culture' [1999] Journal of Business Law 491, 504.

[164]Fletcher, Higham & Trower (n 131) 354. See also Andrew Pickin, 'Distributions and payments by administrators' (2003) 16 Insolvency Intelligence 22.

[165]David Milman & Chris Durrant, *Corporate Insolvency: Law and Practice* (3rd edn, Sweet and Maxwell Limited 1999) 35. As noted by the authors, the report referred to in rule 2.2 of the UKIR 1986, although not mandatory, has caused IPs to come up with detailed reports, to the extent that the Vice Chancellor, Sir Donald Nicholls, had to issue a Practice Note (Administration Order Applications: Independent Reports [1994] BCLC 347), stating that such reports should not be detailed. Subsequently, rule 2.2 was removed from the UKIR 1986.

[166]Fletcher, Higham & Trower (n 131) 21, where the rule 2.12(1) is reproduced.

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must justify their reason for intervening in the JM application not merely on the basis of the futility principle. This is because the cases in Malaysia have shown that, in the presence of opposing unsecured creditors, the JM applications have been defeated on the basis of the 'exercise in futility' principle rather than rightfully on their merits based on specific reference to the recovery reports prepared by the IPs.

By contrast, in the UK cases where creditors are permitted to be heard on the UKAP applications, the courts, eg, Hoffman J in *Re Arrows Ltd (No 3)*,[167] had regarded the futility principle of insufficient creditor support for the administration order as one factor to be considered.[168] Most significantly, his lordship was quick to point out in the same breath that 'the court has a discretion which it can exercise to appoint administrators despite the fact that this is opposed by a majority in value of the creditors'.[169] This view was echoed by Neuberger J in *Re Structures & Computers Ltd*,[170] where his lordship held that he was empowered to make an administration order despite the opposition of creditors holding more than half of the company's unsecured debt because 'their opposition does not mean that there is not a real prospect of the administration order achieving its proposed purposes'.[171]

Although Harman J in *Re Land and Property Trust Co plc*[172] expressed a view on the futility principle similar to that in *Re Arrows Ltd (No 3)*, it is significant that the sketchy report of the IP in that case was not sufficient to convince his lordship that there was a real prospect that any of the statutory purposes would be achieved.[173] On the other hand, in *Re Primlaks (UK) Ltd*, the court was presented with a report containing an elaborate statement of affairs.[174] Despite in-depth challenges made by a creditor on the report, his lordship, Vinelott J, granted the administration order on the basis that there was a real prospect that one or more stated purposes would be achieved. It was also pointed out that during the administration process, it is incumbent on 'the administrator to apply to the court if it appears that there is no longer any real prospect that the purposes stated in the order will be achieved'.[175]

There are similar provisions in the CA 2016, such as in section 424(1), for the judicial manager to apply to the court for the JM order to be discharged if it appears to him that the purpose stated in the order cannot be achieved. Therefore, based on the lessons of the UK cases and the law governing UKAP, it is recommended that an express rule be introduced to allow the court to grant leave to unsecured creditors to oppose the JM application on any grounds it deems fit, but without having to consider the 'exercise in futility' principle as the sole ground of objection.

Third Stage: Threshold for Approval of Proposal in Creditors' Meeting

Once the first two stages of the JM process have been completed, the final stage is to obtain approval of the JM proposal. Following the making of the JM order and the appointment of the judicial manager, the proposal first put to the court for the JM order must be refined and comprehensively prepared by the judicial manager within sixty days or such longer period as allowed by the court.[176]

[167](1992) BCLC 555.
[168]ibid 560.
[169]ibid.
[170](1998) 1 BCLC 292.
[171]ibid 297.
[172](1991) BCC 446, 453.
[173]ibid 451–453.
[174](1989) BCLC 734, 739.
[175]ibid 742.
[176]CA 2016, s 420(1). It was observed in *Monday-Off Development Sdn Bhd v Bumimetro Construction Sdn Bhd & Ors* (2021) MLJU 915 para 46 that the proposal submitted in support of the hearing of a JM application 'is merely a preliminary draft scheme of proposal which can be fine-tuned, amended and/or altered in the finalised Statement of Proposal', to be prepared after the JM order is granted.

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The detailed proposal is then submitted to the company's creditors for their approval. A significant part undertaken at this stage in the rescue framework is that the proposal, once approved by the required majority of creditors, is legally binding on all creditors, whether or not they have voted in favour of the proposal.[177]

Threshold for Approval of Proposal by Creditors

The CA 2016 provides in section 421(2) that the threshold for approval of the JM proposal prepared by the judicial manager is 75% of the total value of the creditors whose claims have been accepted by the judicial manager and who are present and voting at the meeting. However, the statutory threshold for approval by creditors recommended by the CLRC is a majority of the creditors present and voting at the meeting.[178]

In contrast to the JM, the requisite majority for creditors' approval for the SJM[179] is a majority of the creditors in number and value present and voting. As for the UKAP,[180] the requisite majority is a majority in value of the creditors present and voting. According to Woon,[181] since no majority is specified in section 227N(2) of the SCA, the proposals are approved if they are voted in favour by a simple majority in number and value of the creditors present and voting. The headcount test in requiring a majority in number in the SJM appears to be influenced by a similar requirement for Singapore's SOA,[182] which was also present in the SOA in the CA 1965.[183]

Although the SJM was based on the UKAP, which did not have a headcount test, it is unclear why the drafters of the SJM included the headcount test. The headcount test in the UK SOA had been the subject to criticism by Payne for making the SOA difficult to achieve, owing to the possibility that a small number of creditors with low value claims could still veto the scheme proposal.[184]

In its report on the requisite majority for JM, the CLRC had wisely disregarded the headcount test and focused on the majority in value test. For this test, the CLRC had considered two possible majorities, either a three-quarters majority or a majority in value. In its recommendations, the CLRC favoured a majority in value rather than a three-quarters majority in value, which it observed could make the JM proposal difficult to approve because of the opposition of some creditors.[185]

In determining the requisite majority, it should be recognised that the JM as a rescue mechanism is different from the SOA in two significant respects. Firstly, the SOA is a debtor-in-possession mechanism, whereas the JM is in the hands of a professional IP. Secondly, the scheme proposal for the SOA is submitted by the management of the company, albeit with the advice of a professional, but the JM proposal for the creditors' consideration comes from the judicial manager, who is obliged to implement the approved version. Therefore, in order to facilitate the rescue of companies by the judicial manager, a lower threshold for the JM would be preferable. The Cork Committee had also envisaged that the requisite majority of creditors required to approve a rescue arrangement should be a simple majority.[186]

Thus, in line with the recommendations of the Cork Committee, a lower threshold of a simple majority was adopted for the UKAP and the SJM (except for the headcount test, which is a relic of

[177]CA 2016, s 421(3).
[178]CD No 10 (n 5) paras 2.1, 2.4, 2.16, 2.21.
[179]SCA, s 227N(2); SIRDA 2018, s 108(3).
[180]UKIR 1986, rule 2.28(1); UK Insolvency Rules 2016, rule 15.34(1).
[181]Woon (n 84) 1014.
[182]SCA, s 210(3).
[183]CA 1965, s 176(3). However, under CA 2016, s 366(3), the headcount test for SOA is not required.
[184]Jennifer Payne, *Schemes of Arrangement-Theory, Structure and Operation* (Cambridge University Press 2014) 64.
[185]CD No 10 (n 5) 35.
[186]Cork Report (n 50) 102 para 429(c).

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the SOA). However, the draftsman of the JM in the CA 2016 had seen fit to depart from the recommendations of the CLRC and impose a higher threshold of 75%.

Proposed Reforms Relating to Threshold for Approval in Creditors' Meeting

The present threshold of 75% for creditors' approval is not in line with the comparative JM rescue law in Singapore and the UK. It also runs counter to the recommendations of the CLRC and the Cork Report. This high threshold has underpinned the courts in dismissing the JM application on the basis of the 'exercise in futility' principle. As can be seen, the minimum threshold of 75% is too onerous to achieve a balance between the interests of the majority and minority creditors in supporting a JM rescue.

Accordingly, it is recommended that the minimum threshold for creditors' approval of the JM proposal be lowered to a simple majority of the creditors present and voting. This reform should enhance the viability of the JM as a corporate rescue mechanism.

Conclusion

An examination of the obstacles that await a JM applicant at the three key stages of the JM reveals an ineffective approach by the legislature in establishing a framework for corporate rescue in Malaysia. Although the JM is modelled on Singapore's SJM, some of the weaknesses in the SJM that were identified in 2013, well before the CA 2016 came into force on 31 January 2017, were not addressed. Similarly, the CA 2016 did not take into consideration the reforms made in the UKAP in 2002, which are relevant to the JM.

Foremost among the legislative reforms made to the respective rescue mechanisms in both Singapore and the UK was the removal or dilution of the veto powers of debenture holders. The lack of success of the rescue mechanisms in both countries was attributed to the veto power. Campbell saw the veto power as perhaps the 'greatest stumbling block' for the UKAP, favouring banks and practically 'almost certain to appoint an administrative receiver rather than allow the appointment of an administrator'.[187] On the other hand, in Malaysia, the legislature has not only adopted the earlier unadulterated provisions in the SJM and UKAP in granting veto power to debenture holders, who are likely to be banks, but has also extended it to secured creditors. Given that most loans to companies are accompanied by the granting of securities to the lenders, it would appear that the JM as a rescue mechanism is doomed from the first stage of its application by the exercise of veto powers by these secured lenders. Admittedly, the 'public interest' exception to the veto power offers little to save the JM application.

The legislature has also introduced another obstacle at the third stage, where the creditors are to consider the JM proposal for approval. The required majority for approval of 75% is onerous to achieve. It is disappointing to note that this high threshold bears no resemblance to the recommendations of the CLRC, which were based on its studies of similar rescue mechanisms, such as the SJM and UKAP, and which provided only for a threshold of a simple majority.

The reforms proposed in this article are intended to remedy the weaknesses of the JM at the first and third stages that did not conform to the reforms or provisions made for the SJM and the UKAP. Due to the conflicting judicial decisions that have arisen at the second stage in considering the JM application, reforms to certain provisions regarding JM are recommended in order to refine and clarify their application. These provisions would cover the rights of unsecured creditors to oppose the JM application, the 'exercise in futility' principle, the recovery reports by IPs (which need not be detailed), and the inclusion of illustrations of the 'public interest' exception.

[187] Andrew Campbell, 'Company rescue: the legal response to the potential rescue of insolvent companies' (1994) 5(1) International Company and Commercial Law Review 16, 23.

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Notwithstanding that changes have been made to the mechanisms associated with the liquidation culture, namely winding-up and receivership, to accommodate a new rescue culture,[188] the legislation on JM has been self-defeating in promoting the new culture. With the recommendations proposed in this article, it is hoped that the path of JM will be realigned to enhance its viability as a corporate rescue mechanism.

[188]See generally Chen, Azmi & Abdul Rahman, 'Paradigm shift' (n 1).

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