

THEORIES, OBJECTIVES AND PRINCIPLES OF CORPORATE INSOLVENCY LAW: A COMPARATIVE STUDY BETWEEN MALAYSIA AND UK

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ABSTRACT

The corporate insolvency affects many parties that have interests in the continued existence of the company or business and those interests may conflict and cause tensions between them. The existence of corporate insolvency law is associated with an attempt to balance the interests of those who are 'stakeholders' in corporate insolvency, such as creditors, employees, local community and the public. Whether the role of insolvency law is to focus on the creditors' interest or whether insolvency law has more roles to play and wider range of interests to be considered under insolvency laws has pointed to the debates on the underlying principles such as the objectives and theoretical foundations of corporate insolvency law. In view of the importance of theories underpinning corporate insolvency law to a proper understanding of the objectives and principles of the law, it is necessary to review various theories of corporate insolvency. These theories are mostly constructed by scholars in the US and UK in their pursuit of finding the objective of corporate insolvency law. In order to uncover the real objectives or purpose and principles of corporate insolvency law by reviewing corporate insolvency law theories, the authors collected information through secondary data analysis. Sources of the data are textbooks, articles from law journal and law review also report of corporate insolvency. Considering that Malaysian law has been significantly influenced by the English common law, the theories and objectives as well as principles of corporate insolvency law in Malaysia is compared to theories and objectives in the UK. It is recognized that the difference in the underlying theories and objectives produced different types of insolvency principles and rules. This paper will examine the theories of corporate insolvency laws. This paper will also analyse and compare the objectives and principles of corporate insolvency law in Malaysia and UK.

Field of Research: *corporate insolvency, theories, objectives and principles, stakeholders' interest*

1. Introduction

Corporate insolvency law is the law concerned with companies who are debtors and who are unable to repay their debts. Insolvency law in the UK (and most Commonwealth countries like Malaysia), or as it is usually referred to, 'bankruptcy law' in the US has had a prominent role for many years (Keay & Walton, 2003 & 2008). According to American law "the term 'bankruptcy' in the sense of a legally declared state of insolvency applies alike to individuals and corporations" (Goode, 2005:p.1). Whereas in the UK and commonwealth countries including Malaysia, individuals become bankrupt or go into bankruptcy; insolvent companies, if they are unable to initiate some procedure for their rescue, might go into liquidation or winding up (Keay and Walton, 2008; Goode, 2005). If a debtor is

a company, corporate insolvency intrudes on an extensive diversity of interests and it affects various parties that have interests in the continued existence of the company or business and those interests may vary from creditors to other victims (like the employees) of corporate insolvency. Accordingly, if a company becomes insolvent, questions are asked regarding the action to be taken and the purpose of that action. Questions raised include should insolvency law be purely used to maximise returns to creditors as well as to protect their rights? Should the primary concern to help out the insolvent company of its difficulties so the company or its business or both could be rescued? Is the main issue to further the creditors' interests as well as to protect interests beyond those of creditors like employees, customers and community? Should the law concern about the fair balance between the right of creditors, debtors and those parties affected by the corporate insolvency? In order to answer all those questions it is necessary to deal with the proper function, objectives and scope of corporate insolvency law. This can be done by addressing the theoretical foundation of law governing corporate insolvency, despite some of the theories might be different from the current position of law, yet they will shed light on the key objectives and principles of insolvency law. This article examined the theories of corporate insolvency laws that have been put forward by US scholars and UK. It also analysed and compared the objectives and principles of corporate insolvency law in Malaysia and UK.

2. Theories of Corporate Insolvency Law

There appears to be a lack of developed comment on the theory underpinning corporate insolvency law in the UK, and it is even less so in Malaysia. One of the reasons for this was because the pragmatic way in which English law has developed (perhaps a similar factor that it is hard to identify theories on corporate insolvency for Commonwealth country like Malaysia). Interestingly, the position in UK and the Commonwealth is in stark contrast with the US where there is voluminous amount of scholarship proposing various approaches (Keay & Walton, 2008). Accordingly, there is a developed body of theory in the US. Such theory could be classified under six broad headings, namely the creditor wealth maximization and creditors' bargain, the communitarian vision, the multiple values/eclectic approach, the enterprise and forum vision, the ethical vision and a menu approach, (Finch, 2009; Rasmussen, 1992). In the UK, the explicit values approach and authentic consent model are the theories advocated by the British scholars. The discussion starts by examining the main theoretical views to include creditor wealth maximization and the creditors' bargain, the communitarian vision, the multiple values and explicit value approach as it is notable that some of the argument or issues advocated by these theories form the heart of the debate on insolvency law. Then the approaches put forward by other theorists that have scrutinized the issue of insolvency law philosophy from other perspectives will be discussed.

2.1 The creditor wealth maximization and the creditors' bargain (CWM and CB)

According to the CWB and the CB theories the main role and objective of insolvency law is to maximize the collective return to creditors through compulsory collective system and to solve the 'common pool' of assets problem arising from diverse claims to limited assets (Jackson, 1986; Baird & Jackson, 1984). It follows that rehabilitation of the corporate enterprise is not a legitimate goal of bankruptcy law except to the extent that it is intended to maximize returns for the existing creditors' right. The CWM and CB approach highlight that insolvency law should play its role as a collective debt-collection device whereby the company creditors agree to a collective procedure to enforce their claims rather than procedure of individual action (Jackson, 1986; Baird & Jackson, 1984). The collective debt-collection system would increase creditors' returns when the debtors' assets seized by the creditors are more valuable if sold together as a going concern (than if they were disposed of

piecemeal by individual claims). Furthermore, compared to the individual claims the creditors would no longer need to waste resources monitoring the debtors' financial estate, which would allow them to expect a more certain returns on their loans (Mokal, 2001).

These theories emphasize that the insolvency law must respect the existing pre insolvency creditors' rights (Baird & Jackson, 1984). It follows from this argument that the distribution to the creditors should be according to such rights, and new rights should not be formed. Therefore, insolvency law is not considered to concern itself to protect the interests of other than creditors affected by the failure of corporate enterprise (like the employees, managers, suppliers and local community) (Jackson, 1986; Baird & Jackson, 1984). In view of that, it disagrees if instead of secured creditors being awarded the full price of their rights under insolvency law, the state of law should react to the social problems that are caused by a corporate failure, as well as to prevent such outcome is worth the costs of trying to keep the firm in operation and justifies placing burden on a firm's secured creditors.

The CWM and CB theories argue that 'fashioning remedies' for all the damage brought by business collapse is difficult and beyond the competence of bankruptcy court, indeed the wide-ranging effects of the corporate collapse are difficult to measure (Baird & Jackson, 1984). It says that the problems produced by the business collapse are not bankruptcy problems, and if it is significant that failing companies keep running the business to protect interests other than creditors like employees or members of the community such duty to do so should be done outside bankruptcy law not from a special bankruptcy rule (Baird & Jackson, 1984). Therefore, if it is desired to protect non-creditors interests of the corporate decline for instance the employees, this should be done outside bankruptcy law for instance via labour (employment) law instead of the former to create a new right in the bankruptcy, but then the bankruptcy law should respect those rights given by the labour (employment) law (Baird, 1986). It can be seen that CWM and CB advocate a main feature of a market economy, if after all some business go wrong and keeping marginal firms alive may do harm than good. If investors are compelled to keep assets in a relatively unsuccessful business, it may limit the freedom of the same or different investors to use those assets in a different and more productive one. Furthermore, limiting the ability of investors to reclaim their assets may reduce their incentive to invest in the first place (Baird, 1986).

2.2 The communitarian vision (CV)

The communitarian vision emphasizes on a variety of constituent interests especially the public interest (Gross, 1994). This vision does not just take on board the creditors' interests but the interests of others are also considered like employees, suppliers, government, customers and the local community (Keay & Walton, 2003 & 2008). Communitarianism regards individuals as being interdependent on each other and recognizes that it is incumbent on them to act in the best interests of their communities, even if doing so prejudices their own individual freedom (Finch, 2002 & 2009). This approach permits the insolvency procedures to rehabilitate commercial enterprises where this would have a better result for the community in protecting jobs even at the expense of some other rights (Finch, 2002 & 2009). Change of pre-insolvency rights on insolvency was also allowed under the communitarian vision (McKenzie, 1999). The communitarian vision also argues that insolvency law should cater for the survival of organizations and to their proper liquidation. A major setback of this vision is the lack of focus necessary for the design of insolvency law because of the extensiveness of interests to which it refers (Finch, 2002 & 2009). It was said that there are an infinite number of community interests at state in each bankruptcy and their boundaries are limitless and it is not possible to delineate the community. Almost anyone, from local employee to a

distant supplier can claim some remote loss to the failure of once viable local business (Schermer, 1994).

A second problem of this vision is that, even though community interests can be identified, there are so many potential interests in every insolvency and choosing the interest worthy of legal protection is bound to create substantial argument (Schermer, 1994). Another drawback of the communitarian vision is that insolvency judges may not be the best person to decide on what should be, or should not be a community problem, and what should be the community's best interest (Schermer, 1994). However communitarians might respond that judges inevitably and in all sectors of the law will have to make a decision on public and community interests, and to have an insolvency law especially for creditor protection is really not viable, and if community interest intrude on judicial decisions then this should be dealt with honestly and completely (Finch, 2002 & 2009). Furthermore, if there are so many community interests that could be taken on board and during such process might be conflicted among those interests it is for the courts to undertake a balancing exercise to resolve such conflicts, as that is what the courts often do in deciding cases (Keay & Walton, 2003 & 2008). The communitarian theory is said suffers from being complex, even though it is only due to insolvency itself is complex (Keay & Walton, 2003 & 2008).

2.3 The multiple values (MV)

The MV theory was made popular by Warren and Korobkin (Warren, 1987; Korobkin, 1991). They challenged Jackson and Baird economic account and their efforts to define bankruptcy law's distinct function as a mechanism to collectivize debt collection and thereby maximize economic returns to creditors as a group (Korobkin, 1991). Unlike the CWM and CB theories that offer a single economic rationale, the MV has argued that "bankruptcy issues reflect various and complex empirical and normative concerns that cannot be reduced to a single theoretical construct" (Korobkin, 1991 p.719). According to Warren (1987, p.811) what she offered is a 'dirty, complex, interconnected view of bankruptcy from which I can neither predict outcomes nor even necessarily fully articulate all the factors relevant to a policy decision', but she believed that her view is more realistic and more likely to yield useful analysis. She also suggested a policy that focuses on the values to be protected in a bankruptcy distribution scheme and on the effective implementation of these values assisting the decision-making process even if it does not dictate specific answers (Warren, 1987). As for Korobkin, what he offered is a competing normative explanation of bankruptcy law, which he called the "value-based account" and it seeks to explain bankruptcy law in all its aspects, both recognising what really makes bankruptcy law distinct and justifying bankruptcy law as a rich and complex system (Korobkin, 1991). According to him, bankruptcy law provides a forum in which competing and various interests and values accompanying financial distress, may be expressed and sometimes recognized (Korobkin, 1991). Bankruptcy law also creates conditions for a special kind of discourse, one that is fundamentally rehabilitative in character (Korobkin, 1991). The MV asserts that insolvency law should consider the distributional impact of corporate collapse on those who are not technically creditors and who have no formal legal rights to the assets of the business (Korobkin, 1991).

It has been pointed out that the MV approaches take a wider approach than Jackson theory of creditors' bargain; such theory sees the implications of corporate decline are broader than just creditor's interests (Finch, 2002 & 2009; Warren, 1984). Therefore, insolvency process as trying to achieve such ends as apportioning the consequences of financial failure amongst a wide range of actors, establishing priorities between creditors, protecting the interests of future claimants;

offering opportunities for continuation, reorganization, rehabilitation; providing time for adjustments, serving the interests of those who are not technically creditors but who have an interest in continuation of the business and protecting the investing public, jobs, the public and community interests (Korobkin 1991; Warren, 1987). It can be seen from here that the MV incorporates communitarian vision and subscribes to distributive rationales (Finch, 2002 & 2009; Warren, 1987). The multiple values despite its popularity and practicality still gives rise to a few substantial problems. Firstly, limited assistance is given to decision-makers on the managing of tensions and disagreement between different values or on the way trade-offs between various ends should be decided and second, there is always controversy in choosing which values to call upon or concentrate. There was also no core principles that emerge to guide decisions on such trade-offs or to establish weightings. Furthermore, the MV runs the risk of having all arguments as valid and as a result, guideline for practical decision-making is not enough and this could result in chaos and confusion (Frug, 1984). In addition to these similar to communitarian approach there will be inevitable conflicts between ranges of interests.

2.4 Explicit value approach (EVA)

As noted, scholars in the UK have started to concern themselves with the normative theories of insolvency law. An EVA promoted by Finch, is one of the theories that provides an alternative approach to the existing theories. Initially, Finch introduced this approach after examining nearly all of the existing theories on the justification of insolvency processes and decisions. Finch evaluated the theories delivered by the American scholars and concluded that what fails to show from such discussion carried out is any inclusive view of the proper measures of insolvency law (Finch, 2002 & 2009).

Finch suggested that to enhance the search for measures in the light of such divergent visions, it is necessary to analyse further the purpose of a quest for benchmarks for insolvency law. Finch (2002 & 2009) opined that insolvency process do affect the public interest because decisions are made about the survival or demise of the corporation and this decision does affect source of revenue and the public. In addition it was accepted that insolvency process remarkably affects the private rights like pre-insolvency property rights and securities could be frozen and individual attempts to impose other legal rights being restricted. Therefore, on both public and private interest reasoning, the power involved in insolvency process can be seen to be calling for justification (Finch, 2002 & 2009). It follows that Finch emphasizes that these justifications should have aspects for the protection of private rights and public interests. According to Finch the analysis of legitimacy of insolvency law or process one should take into account the propensity of a move to serve creditor interests simultaneously with its communitarian effects and she makes explicit a number of different rationales or grounds for justifying insolvency processes namely efficiency, accountability, fairness and expertise implications (Finch, 2002 & 2009). Finch pointed out that '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 person; 'accountability' refers to the control of insolvency participants by democratic bodies or courts; and 'fairness' considers issue of justice and propensities to respect the interests of the affected parties by allowing such parties access to, and respect within, decision and policy processes (Finch, 2009).

The evaluation on the legitimacy of insolvency processes offered by the explicit value approach is distinct from the series of different visions discussed earlier. First, unlike CWM theory, which is only concerned with creditors' interest and pre-insolvency rights, EVA takes on board the preference to further communitarian interests and to protect creditor's interests. Second, EVA offers an

identifiable list of justifications that has relevance in assessing the legitimacy of insolvency processes namely efficiency, expertise, accountability and fairness. Such a list is limited as far as the relevant justifying arguments are arranged under the four rationales described by Finch. This differs from MV and CV where the list is open ended as well as lacking in precise benchmarks for justifying insolvency processes. Third, distinct from other visions, EVA makes clear to give legitimacy to the trade-offs of each party's interest, the decision makers must weight and prioritise all the interests.

Finch (2002 & 2009) emphasises that trade-offs therefore takes on board different interests in a host of insolvency processes and decisions. Those decisions must recognize the right and interests as well as the role played in insolvency by array of parties to include creditors (secured and unsecured), employees, company directors, shareholders, suppliers, customers and other commercial groups who are dependents of the company. Finch also admitted that explicit value does not offer a series of primary principles to which others can be seen subservient. However, such approach offers a foundation in the form of structure that provides guidance and direction in the development of insolvency rules and procedures.

2.5 Other Approaches

The authentic consent model (ACM) tries to overcome the problem of the expansive interest inherited from the previous theories. The model advocated by UK's scholar sees that the extensive participation of those other than creditors under the insolvency law can be limited if only those participants who can argue that their interests affected or threatened by the insolvency issues in a way peculiar or special to corporate insolvency are entitled for the protection (Mokal, 2001). It seems that the benchmark to justify whether any parties other than creditors are governed by insolvency principles is by asking what makes insolvency law special to them. Thus, only those who suffer hardship because the company is insolvent and the grounds for insolvency as specified here is the inability to satisfy its obligation as they become due are protected under insolvency law (Mokal, 2001). If those victims are affected not exclusively on this ground even though they suffer the same implication like the employees who lose their job, those claims should be made and protected under general law like labour law rather than the insolvency law itself (Mokal, 2001).

The menu approach promoted quite interesting and different theoretical ideas on the role and purpose of insolvency law compared to the visions discussed earlier. The idea advanced by such approach is that a menu of bankruptcy systems which would require a company when it is formed to select from such menu the specific bankruptcy system it wishes to have if the company is facing financial difficulties (Rasmussen, 1992). It is thought that such a commitment mechanism would guarantee all potential creditors that their rights would be ruled by the same bankruptcy system as the rights of all the firms' other lenders (Rasmussen, 1992). Yet it could be complex when the company opts for different bankruptcy regime from the place the company is formed with different values, system, jurisdictions, judiciary and experts involved that might bring disadvantage rather than benefit to the company. It is also possible that the company in financial distress will discover that the pre bankruptcy system chosen is not up to the expectation in terms of returns to creditors or the protection of shareholder interests or other interest.

Another vision is forum and ethical, the former unlike many theories advanced by bankruptcy and insolvency scholars conceptualised insolvency process in procedural terms with an objective to establish a forum where all interested parties affected by the business failure monetary or not can voice their grievances (Flessner, 1994). However, such terms with the aims to form a forum with too many interested parties affected by corporate collapse whether directly monetary or not can voice

their complaint could be criticised on the infinite number of interests the law should cater under insolvency law and process. Meanwhile, the ethical vision suggested that insolvency laws fail to rest on an adequate philosophical foundation. However, such terms with the aims to form a forum with too many interested parties affected by corporate collapse whether directly monetary or not can voice their complaint could be criticised on the infinite number of interests the law should cater under insolvency law and process. Meanwhile, the ethical vision suggested that insolvency laws fail to rest on an adequate philosophical foundation in so far as the formal rules of insolvency did not take into account issues of greatest moral concern (Shuchman, 1973). It sets a benchmark to justify insolvency process and decision based on moral values (Shuchman, 1973). The ethical vision also argued that in laying the foundations for insolvency law, the moral worthiness of the debt and the size, situation and intent of the creditors should be given due consideration (Shuchman, 1973). The issue here is that moral values could be very subjective and varied; for instance what is considered immoral in one place could be not immoral in another place. It seems that it is difficult to get agreement on the correct moral values. Accordingly, one can argue that the approach that insolvency law fails to rest on sufficient theoretical foundation unless the insolvency rules take on board issues of moral concern is not convincing.

3. Objectives and Principles of Corporate Insolvency

As mentioned previously in view of the importance of theories underpinning corporate insolvency law to a proper understanding of the objective of the law, it is necessary to review various theories of corporate insolvency. These theories are mostly constructed by scholars in the US and UK in their pursuit of finding the objective of corporate insolvency law. It also has been pointed out that the objectives of insolvency law "have never been carefully and systematically articulated in case-law or by commentators" (Keay & Walter, 2003 p.22). As it is recognized that the purposes or objectives "depend somewhat on what theory of insolvency law is adopted" (Keay & Walter, 2003 p.22). Furthermore, those objectives developed the underlying principles on the approach to insolvency law. The following discussions analyze and compare the theories and objectives as well as the principles of corporate insolvency between UK and Malaysia.

3.1 United Kingdom

3.1.1 Cork Committee Report

The starting point of the objectives of modern English corporate insolvency law can be found in the statement of aims contained in the Cork Committee Report of 1982 chaired by Sir Kenneth Cork amongst others their task is to review the law and practice relating to insolvency in the UK which can be outlined as follows: (Cork Report, 1982; Finch, 2002 & 2009).

- i. To recognize that the world in which we live and the creation of wealth depend upon a system founded on credit and that such a system requires, as a correlative, an insolvency procedure to cope with its casualties;
- ii. To diagnose and treat an imminent insolvency at an early rather a late stage;
- iii. To have regard to the rights of creditors whose own position may be at risk because of the insolvency; creditors whose own position may be at risk because of the insolvency;
- iv. To prevent conflicts between individual creditors;
- v. To realise the assets of the insolvent which should properly be taken to satisfy his debts, with the minimum of delay and expenses;
- vi. To distribute the proceeds of the realizations among the creditors in a fair and equitable manner, returning any surplus to the debtor;

- vii. To ensure that the processes of realization and distribution are administered in an honest and competent manner;
- viii. To ascertain the causes of the insolvent's failure and if and in so far as his conduct or in the case of a company, the conduct of its officers or agents, merits criticism or punishment, to decide what measures, if any, require to be taken against him or his associates, or such officers or agents; to establish an investigative process sufficiently full and competent to discourage undesirable conduct by creditors and debtors; to encourage settlement of debts; to uphold business standards and commercial morality; and to sustain confidence in insolvency law by effectively uncovering assets concealed from creditors, ascertaining the validity of creditors' claim and exposing the circumstances attending failure;
- ix. To recognize that 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, for example not only the interests of directors, shareholders; and employees but also those of suppliers, those whose livelihoods depend on the enterprise and community, and to ensure that these public interests are recognized and safeguarded
- x. To provide means for the preservation of viable commercial enterprises capable of making a useful contribution to the economic life of the country;

3.1.2 Fundamental principles of corporate insolvency derived from Cork Report

The underlying principles on the approach to insolvency law that could be derived from Cork's list of aims are as follows:

- i. First, it aimed to promote the protection of communitarian and creditors' interests. Such values can be seen where it is included in Cork's list of aims that insolvency law is to provide the means for survival of viable business and to recognize and safeguard the interests of creditors and those parties who are affected by the corporate insolvency (Cork Report, 1982).
- ii. Second, Cork's list of aims took on board that insolvency law should protect the diversity of interests. This includes not only creditors but also shareholders and employees whose 'livelihoods depend on the enterprise and the community' (Cork Report, 1977). Indeed, Cork's statements of aims recognize that distributional issues involved the insolvent company where it highlights that insolvency has wider repercussions not only for those intimately concerned with the conduct of the business but also to other interests of society (Cork Report, 1982).
- iii. Third, despite no clear guidance being given by Cork on which interests and values to concentrate on and which should take precedence in the insolvency process, where conflicts between different objectives occur, broadly Cork's formulation has made it clear that it emphasized the agenda of survival of the viable enterprise or corporate rescue. As noted, the Cork Report sees the function of insolvency law as being to cater for the continuation or rehabilitation of a viable company. The aim of encouraging the continuation and disposal of a corporate debtor's business as a going concern in order to preserve the jobs of at least some of the employees is considered a starting point on the promotion of 'rescue culture' in the UK (Cork Report, 1982).
- iv. Fourth, the Cork arrangement of aims of the insolvency process and decisions is established according to the four particular rationales to support insolvency rules, namely efficiency, accountability, fairness and expertise (Finch, 2002 & 2009). The application of the explicit

values that emphasize trade offs between different ends revealed that Cork's formulation has no explicit explanation on the need of those objectives to be traded off and weighed up amongst each other, and no clear assertion in terms of the priorities for the protection of different interests in insolvency. However, the tradeoff issues absent in Cork do remain 'a problem and one cannot expect easy answers when dealing with a process whose essence is the balancing of multiple objectives' (Finch, 2002 & 2009).

3.2 MALAYSIA

3.2.1 Philosophy and objectives of insolvency laws in Malaysia

As far as Malaysia's theoretical framework is concerned, the scholars and law practitioners in Malaysia have not given much attention to the normative theories of insolvency law. Moreover, the pragmatic way in which the law in Malaysia in general has developed through the years is among the factors that make it hard to state the Malaysian theoretical framework. Nevertheless, there are reports and studies that identified the underlying principles or philosophy of corporate insolvency law in Malaysia (Nathan, 2000; Kamarul & Little, 1997; Tomasic, 2006). These same reports and studies described the role of Malaysian corporate insolvency law as being similar to the Australian and English equivalents, and suggested that the role of corporate insolvency law of Malaysia would probably be better characterized as follows: (i) to ensure the preservation and ranking of secured creditors' rights and equal treatment of all other creditors where a company cannot be saved; (ii) to provide rehabilitation where possible; (iii) to punish delinquent officers who have contributed to the insolvency. It is claimed that the purpose and principles of insolvency laws in many different Western legal systems has been described by reference to such criteria as fairness, efficiency and impartiality, and it is believed that the role of the Malaysian insolvency law is similar to those jurisdictions (Tomasic & Whitford, 1997).

3.2.2 Corporate Law Reform Committee ("CLRC")

As mentioned above, in Malaysia's context, there might be no clear articulated philosophy on insolvency law. The Malaysian Government, realizing that the changes in insolvency law were based on pragmatism, lacking in a systematic as well as a proper theoretical foundation of corporate insolvency law and practice, finally formed the CLRC (under the umbrella of the Companies Commission of Malaysia (CCM) on 17 December 2003 to review the Malaysian corporate laws (include the law relating to insolvency) and it is the beginning of a comprehensive assessment on such laws in Malaysia. It should be noted that the formation of CLRC is to undertake a fundamental review of the current legislative policies on corporate law (as well as corporate insolvency) in order to propose amendments that are necessary for corporate and business activities to function in a cost-effective, consistent, transparent and competitive business environment in line with international standards of good corporate governance. The CLRC's task and process includes among other things conducting studies in order to consider the existing corporate law and practices in Malaysia as well as other similarly concluded international practices.

3.2.3 The objectives of corporate insolvency

A starting point to look on the Malaysian objectives of corporate insolvency law is in the article entitled *Reforming the Corporate Insolvency Law* (CLRC, 2004) published by the secretariat of CLRC. Not much detail discussion has been articulated. Indeed, only general objectives of corporate insolvency have been articulated and unsurprisingly they are based on the writings of UK's scholars

like Professor Goode and Ian Fletcher as well as Harmer Report of Australia (Harmer, 1988; Good, 1990; Fletcher, 1996).

As noted there is not much deliberate discussion or explanation on those objectives, but it has been argued that most of the general principles of corporate insolvency law mentioned above are found in company's liquidation provision within the Companies Act (CA) 1965 (CLRC, 2004). CLRC acknowledged that the current framework is very much focused on the liquidation /winding up of company and indeed liquidation always is considered as the only viable option for companies facing financial difficulties (CLRC, 2004). CLRC in its attempt to review the current insolvency regime has stated that the underlying objectives and principles of insolvency law in Malaysia pointed out that the corporate insolvency regime should be able (CLRC, 2004):

- i. to wind up company business where there is no viable prospect of the business becoming profitable
- ii. to protect the rights of creditors and members ; especially in cases where the company is wound up on the grounds of insolvency
- iii. to make those responsible for mismanagement accountable for their actions; if the failure of a company's business is due to mismanagement these persons should be prevented in the future from setting up new companies
- iv. to enhance the accountability of those involved in the company's management and liquidation process
- v. to restore the company to profitability: if a company's failure is not contributed by mismanagement but due to temporary financial difficulties or external economic factors a rescue mechanism may enable the company to be rehabilitated and preserve its business as a going concern
- vi. to enable better returns for creditors and shareholders:

In another consultative document released by CLRC (2004) it has been emphasized that the objective of the review of the corporate insolvency law in Malaysia is for the creation of a corporate insolvency framework:

- i. that is facilitative to the winding up of companies where there is no prospect of the business becoming profitable and viable;
- ii. that is able to provide an efficient system to rehabilitate companies where appropriate;
- iii. that is able to ensure the protection of rights of creditors and members by providing enforcement mechanisms that may be accessed without undue delay or difficulty;
- iv. that ensures accountability of the persons involved in the process and transparency of the process itself.

The objectives mentioned above reflected some important elements of principles of corporate insolvency regime in Malaysia, namely to provide the efficient winding up process, to establish a fair and equitable system for the ranking of claims and the distributions of assets among creditors, to provide a framework to make those responsible for mismanagement accountable for their actions and to facilitate rescue/rehabilitation on companies facing financial difficulties.

4. Underlying Principles of Corporate Insolvency: Is CLRC comparable to Cork Report?

It is interesting to note that the arrangements of objectives set down by the CLRC are comparable to the Cork Report published by the Cork Committee. Generally, in some areas it seems that the CLRC

are correspond with the Cork Report. The two appear to be consensus that the aims/objectives of insolvency law are; to restore the company to profitability, to provide provisions of a fair system for the ranking of claims against the company, to ascertain the causes of company's failures and the imposition of liability of those responsible for the failure and to ensure that there is an orderly realization and distribution of company's assets.

There are also situations where CLRC objectives seem to be similar with Cork, but in certain aspects there are some differences;

- i. First, Cork sets down that the objectives of the law is to protect interests of the insolvent and its creditors affected by insolvency while CLRC highlights that the law should protect the rights of creditors and members/shareholders especially in cases where the company is wound up on the grounds of insolvency.
- ii. Second, while Cork aims to recognize and safeguard the interests of society and other groups in society who are affected by insolvency, CLRC targets to protect the public from creditors who might in future engage in improper trading.
- iii. Third, CLRC points up another two measures to impose sanction for culpable management by its directors where it aims to enhance the accountability of those involved in the company's management and liquidation process and the removal of powers of management of the company by its director but there are no equivalent measures under Cork. On the other hand Cork aims the insolvency law to identify and treat an imminent insolvency at an early stage rather than later, the purpose that has not got a place in the CLRC arrangement of insolvency objectives.

Looking at the arrangements of the objectives of insolvency laws in Cork and CLRC it appears that their framework follows the multiple values approach where they point up insolvency law as being multi use. As discussed earlier there is always tension/conflict between those objectives and those tensions are hardly to be eliminated, yet these issues do not make the approach unacceptable. The Cork Report that was published more than twenty years earlier before CLRC embarked their review has strongly influenced CLRC in their comprehensive review on corporate insolvency and rescue in Malaysia. Compared to UK where the 'rescue culture' supported by Cork in the 80's and since then stressed by the Government, Malaysia just started to promote 'rescue culture' but its 'better late than never' for the Government to do so.

5. Conclusion

The most controversial theory is the CWM and CB since these model look upon the role of insolvency law as evolving around the issue of creditors like protection of their interest and pre insolvency rights or distribution of the company' assets among such creditors since they are considered financially directly affected by the corporate failure. Most of the remainder of the theories recognize that the role of insolvency law is not merely confined to maximizing returns to creditors, but to some other distributional role to play, for instance to rehabilitate or rescue businesses in financial difficulty and to protect employment, public interests and other victims' interests affected by the corporation insolvency. It can be seen some thoughts advanced by the visions seem to have been incorporated into the statements of aims contained in the UK's Cork Report and Malaysian CLRC that provide the foundation of the objectives of a good modern insolvency law. For UK and Malaysia, the arrays of Cork\CLRC objectives seem to endorse the aspects of communitarian and multiple values. Cork\ CLRC emphasized that insolvency law has to cater for the private interests of the insolvent, the creditors, the public and employees who are affected by company insolvency, and must give opportunities for continuation or rehabilitation of a

viable company. These concepts are considered a starting point for the promotion of 'rescue culture' in the UK\Malaysia. Indeed, to support such a scheme, Cork proposed the introduction of the administration and Company Voluntary Arrangement (CVA) (the two procedures were then introduced by the UK's Insolvency Act (IA) 1986) to increase the survival chances of ailing companies facing financial difficulties. It should be noted that CLRC has came out with its Final Report in 2008 entitled 'Corporate Law Reform Committee (CLRC) Review of the Companies Act 1965' and amongst others the recommendations are as following; i. the codification of the rights of secured creditors in the CA 1965; ii. the retention of section 292 of CA 1965 to ensure the protection of certain categories of unsecured creditors in a company under liquidation; iii. increasing the quantum for wages and salary of employees entitled to priority in a winding up from the present RM1,500 to RM15,000; and iv. recommended the introduction of new corporate rehabilitation schemes in the forms of a Judicial Management (comparable to UK's administration) and a CVA which has been a carbon copy from UK's CVA. In conclusion, unlike UK and US there is yet to be a body of literature on the theories of corporate insolvency in Malaysia. It is fair to say at this point in time the law shall be developed in such a way to protect the interest of the creditors (secured and unsecured), employees and the survival of the life of the corporation, that is corporate rescue becomes the legitimate objectives of insolvency law.

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