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Whither the Schemes of Arrangement in Malaysia with the arrival of the corporate rescue mechanisms?

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The main features incorporated in the Schemes of Arrangement (SOA) in Malaysia under the Companies Act 2016 were designed over more than a century ago. For the first time, the company law framework has embraced corporate rescue laws with the introduction of two tailor-made corporate rescue mechanisms, Corporate Voluntary Arrangement and Judicial Management. This paper argues that the SOA, notwithstanding the presence of the corporate rescue mechanisms, may still be employed to achieve the objective of advancing corporate rescue for financially distressed private companies in Malaysia.

1. Introduction

In Malaysia, the corporate insolvency framework is governed by the Companies Act 2016 (CA 2016) which repealed the Companies Act 1965 (CA 1965) on 31 January 2017. For the first time, the framework embedded two novel corporate rescue mechanisms, Corporate Voluntary Arrangement (CVA) and Judicial Management (JM) in line with the world trend in promoting corporate rescue of financially distressed companies.

Previously under the CA 1965, the lack of corporate rescue mechanisms had witnessed a heavy reliance on the SOA for the restructuring of public listed companies especially during the 1997/1998 economic crisis.¹ This is despite the general observation that the purpose of a SOA is not meant specifically as a corporate rescue mechanism.² A SOA may also be used by a financially healthy company which includes a reorganisation of its share capital or a merger of a group of companies or reconstruction of a company involving a cancellation of its shares coupled with issuance of new shares of different

∗Corresponding author: Email: thimwchen@yahoo.com
²Aishah Bidin, ‘Corporate Law Reform and Corporate Governance in Malaysia – Responses to Globalization’ in P M Vasudev and Susan Watson (eds), Corporate Governance After the Financial Crisis (Edward Elgar, 2012) 236.

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classes. The main features of the SOA under the CA 2016 are either identical or similar to those in the CA 1965 which itself were adopted from the UK statute as first appeared in the Joint Stock Companies Arrangement Act 1870 (JSCAA 1870). Since the main features of the SOA in both Acts are identical or similar, the extensive case laws under the CA 1965 are still relevant for the SOA under the CA 2016.

The Company Law Reform Committee (CLRC), in its report, Consultative Document on Reviewing the Corporate Insolvency Regime – The Proposal for a Corporate Rehabilitation Framework [No. 10] (CD No. 10), in recommending the corporate rescue mechanisms to be introduced into the insolvency law framework, observed that the SOA was used by financially distressed public companies as a rescue mechanism. Hence, the SOA was unsuitable for private companies for rescue purposes which is in line with the observations made in the report of the Cork Committee. However, this paper argues that notwithstanding the presence of two tailor-made corporate rescue mechanisms, the SOA, despite having adopted many of its features designed over a century ago, may still be of use for financially distressed private companies in the new corporate rescue era in Malaysia. The type of SOA examined in this paper is also known as a creditors’ SOA. The other type of SOA is broadly known as a members’ SOA.

2. Historical features of the SOA

The provisions of the SOA were introduced into the company laws of Malaysia by the CA 1965. The CA 1965 was modelled on the Australian Uniform Companies Act 1961 (AUCA 1961) which was itself based on the UK Companies Act 1948 (UKCA 1948). An important difference between the CA 1965 or AUCA 1961 and the UKCA 1948 is the absence of a moratorium provision in the latter, which has been noted as a shortcoming. The moratorium provision known
as the restraining order (RO) in both the CA 1965, and the Singapore Companies Act (SCA) was adopted from the AUCA 1961. Apart from this difference, the Australian and the Malaysian statutes are significantly similar to the provisions in the UK statutes which are responsible for introducing the SOA. However, as most of the provisions in both the CA 1965 and the AUCA 1961 were derived from the UK statute, the historical features of the SOA in Malaysia must involve a study of the evolution of the SOA process in the UK.

In the UK, the SOA originated from the JSCAA 1870, in particular section 2. It was enacted to overcome certain deficiencies in the previous statute, the Companies Act 1862 (UKCA 1862). While the UKCA 1862 in section 136 had provided for an arrangement or compromise to be made between a company and its creditors, it was only available to the management of the company if it was in the process of being wound up voluntarily. That arrangement or compromise was binding on the company only with the approval of 75% of all members and binding on its creditors if sanctioned by 75% of their number and in value of their claims. In this instance, a court order was not necessary as section 160 of the Act empowered a liquidator to make the arrangement or compromise with the consenting creditors. On the other hand, in the case of a company being compulsorily wound up, similar arrangement or compromise with its creditors and members may be made by a liquidator subject to the sanction of the court pursuant to

12See section 176(10) of the CA 1965 which is replicated as section 368 of the CA 2016.
13Richard J. Hay, ‘Saving Companies in Difficulties-Alternatives to Liquidation’, (1986) 2 MLJ clv, clx. See also Re Kuala Lumpur Industries Bhd (1990) 2 MLJ 180, 181 where it was also noted that the moratorium provisions do not exist in the UK but such provisions exist in the Australian statute. In the Australian case of Playcorp Pty Ltd v Venture Stores (Retailers) Pty Ltd (1992) 10 ACLC 548, the court observed that the provisions on stay of proceedings had earlier appeared in section 90(6) of the Companies Act 1958, provisions of which were reproduced and are similar to the RO in the CA 1965.
14Payne (n 7) 327, noted that the creditor schemes under the UK Joint Stock Companies Arrangement Act 1870 was first introduced into the New South Wales Act 1899 and the member SOA was introduced into the Australian Companies Act 1936. See also Re Theatre Freeholds Ltd and Others (1996) 20 ACSR 729, 733-734 for a historical development of the law on SOA in Australia and its adoption from the UK statutes.
15Mohamad Illiayas, ‘Schemes of Arrangement under s176 of the Companies Act 1965: The Criticalness of Correct Classification of Creditors and the Lot of Providers of Islamic Credit’, (1999) 1 MLJ xlvi, lxi, where section 2 of the UK Joint Stock Companies Arrangement Act 1870 is observed as the forerunner of the SOA in the CA 1965.
16Paul L. Davies and Sarah Worthington. Gower’s Principles of Modern Company Law (10th edn, Sweet & Maxwell, 2016) 1005. Section 2 of the JSCAA 1870 was described as a ‘rudimentary ancestor’ of the SOA provisions in the UK Companies Act 2006 in Payne (n 7) 7. For a similar observation by the judiciary, see In re T & N Ltd and others (2006) 1 WLR 1728, 1745–1746.
17Payne (n 7) 7.
18Ibid.
19Ibid. The term, member, is used interchangeably with the term, shareholder, see Soh Jiun Jen v Advance Colour Laboratory Sdn Bhd & Ors (2010) 5 MLJ 342, 350.
20Ibid.
section 159 of the Act.\textsuperscript{21} However in both cases, the court lacked the power to bind dissenting creditors.\textsuperscript{22}

That significant deficiency in the UKCA 1862 was remedied by providing in section 2 of the JSCAA 1870 that an arrangement or compromise between a company and its creditors is made where a majority of the creditors in number with a 75 per cent majority in value, have either present in person or by proxy in a meeting approved in its favour, which is then sanctioned by the court.\textsuperscript{23} The binding effect of the majority creditors on the minority in the JSCAA 1870 was recognised in a few judicial observations, one of which was made not long after the Act was passed in an 1871 case, \textit{In re Albert Life Assurance Company, and Other Companies}:\textsuperscript{24}

The 159\textsuperscript{th} and 160\textsuperscript{th} sections seem to me to provide that a company by its official liquidators, with the sanction of the Court, is to have exactly the same power of compromising both with its creditors and its debtors as an individual would have…. There is nothing in the Act which enables one creditor to bind another creditor to accept a compromise, or which enables one debtor to bind another debtor with respect to paying a composition. And that was the difficulty which was felt when the Act of last session, the \textit{Joint Stock Companies Arrangement Act}, 1870, was passed, which I cannot help thinking was passed with a view to this and other companies which were being wound up. That Act says that there shall be a power in the majority to bind the minority.

In addition, it was observed in \textit{Re Dominion of Canada Freehold Estate and Timber Company Limited},\textsuperscript{25} that the JSCAA 1870 was enacted to prevent any single person from obstructing a scheme in order to gain a personal advantage by holding it to ransom notwithstanding that the scheme was beneficial to the majority.

The significance of the JSCAA 1870 as a forerunner of the present SOA is best underlined by reference to the title of the Act and its section 2. The long title of the Act read: ‘An Act to facilitate compromises and arrangements between creditors and shareholders of Joint Stock and other Companies in liquidation’.\textsuperscript{26} Its section 2 provided that:\textsuperscript{27}

Where any compromise or arrangement shall be proposed between a company which is, at the time of the passing of this Act or afterwards, in the course of being wound up, either voluntarily or by or under the supervision of the Court, under the Companies Acts, 1862 and 1867, or either of them, and the creditors of such company, or any class of such creditors, it shall be lawful for the Court, in addition to any other of its powers, on the application in a summary way of any creditor or the liquidator, to order that a meeting of such creditors or class of creditors shall be summoned in such manner as the Court shall direct, and if a majority in number representing three-fourths in value of such creditors or

\textsuperscript{21}Ibid.
\textsuperscript{22}Ibid.
\textsuperscript{23}Ibid, 8.
\textsuperscript{24}(1871) LR 6 Ch App 381, 386. See also \textit{Nicholl v The Eberhardt Company Limited}, (1889) 59 LT 860, 862–863.
\textsuperscript{25}(1886) 55 LT 347, 351.
\textsuperscript{26}See \textit{In re Alabama, New Orleans, Texas and Pacific Junction Railway Company}, (1891) 1 Ch 213, 227, where the title of the JSCAA 1870 was reproduced.
\textsuperscript{27}Ibid, where section 2 of the JSCAA 1870 was reproduced.
class of creditors present either in person or by proxy at such meeting shall agree to any arrangement or compromise, such arrangement or compromise shall, if sanctioned by an order of the Court, be binding on all such creditors or class of creditors, as the case may be, and also on the liquidator and contributories of the said company.

The next major changes made to the law on SOA in the JSCAA 1870 would bring with it recognisable features of the SOA in the CA 1965. First, by section 24 of the Companies Act 1900 the operation of the SOA was extended to members. Section 38 of the Companies Act 1907 then provided that the SOA is also available to companies which was not in the process of being wound up. Other amendments were made by section 53 of the Companies Act 1928 which enabled the creditors’ and members’ approval threshold to be lowered by requiring only those creditors or members ‘present and voting either in person or by proxy’ to be reckoned in the meeting – by introducing the words, ‘and voting’ into the earlier phrase, abstention no longer count as a vote against the scheme. Lastly, by section 40 of the Companies Act 1947, it was required that an explanatory statement must be provided.28

Having incorporated those features, the much changed SOA after the JSCAA 1870 was enacted, was extended as a mechanism to both solvent and insolvent companies for corporate restructuring and amalgamations.29 Those amended features are also part of the Australian legislation on the SOA,30 which were adopted in Malaysia in the CA 1965 and are replicated in the CA 2016.

3. Theoretical underpinning of SOA in Malaysia
Theories on insolvency law have been developed in the US and more recently in the UK.31 The early theories, creditors’ bargain and creditor wealth maximization, have emphasized on maximization of wealth of creditors in disregard to the interests of other stakeholders. It was followed by the multiple values theory with the belief that insolvency law has a role to play in rehabilitating companies. In the absence of any rehabilitation measures, the company would fail, resulting in the loss of jobs and impairment to the community’s economic well-being.32

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28 Rebecca Langley, ‘The future role of creditors’ schemes of arrangement in Australia after the rise of voluntary administrations’, (2009) 27 C&SLJ 70, 72. See also Payne (n 7) 8–10. For similar judicial observations on the series of changes to the Act regarding the SOA, see In re Schweppes, Limited (1914) 1 Ch 322, 328; In re Guardian Assurance Company (1917) 1 Ch 431, 440.
29 Ibid, where it was noted that the definition of arrangement in the UK Companies Act 1928 and Companies Act 1929 was extended to include reorganisation of share capital and thus to allow for reconstruction or amalgamation.
The SOA is not regarded as a mechanism exclusively designed for corporate rescue since it can also be used for solvent companies.\textsuperscript{33} But the SOA with its flexibility, in the absence of corporate rescue mechanisms, has been used for rehabilitation of financially distressed companies. Viewed in this context, the SOA may be regarded as an alternative tool to the tailor-made corporate rescue mechanisms. In a nutshell, the SOA between a distressed company and its creditors would involve an element of ‘give and take’ to enable a creditor to receive something in return for his debt to be compromised. The SOA in the UK operates without any moratorium but in Malaysia the restraining order available to its SOA, is akin to a moratorium even though it is granted at the discretion of the court. In this respect, the SOA with its restraining order is consistent with the bankruptcy theory that a restructuring can only be implemented if the creditors are first prevented from initiating proceedings against the distressed company and its assets.\textsuperscript{34}

In the SOA, it is incumbent on the company to secure the approval of its creditors where a requisite majority is able to bind the dissentients. However, the approval must be obtained in each class of creditors with similar rights. Under English law, the counterfactual approach is adopted. This approach involves the court in evaluating whether the interests of the creditors with restructuring are worse off as against the position of non-restructuring.\textsuperscript{35} Notwithstanding the need to classify creditors, on the whole, the maximization of wealth of creditors is at the core of the SOA process.

4. The SOA in Malaysia

The main features of the SOA under the CA 2016 are replicated from the SOA version under the CA 1965.\textsuperscript{36} The framework of the SOA under the CA 2016 similar to that for the CA 1965 remains ‘barebone’,\textsuperscript{37} and its operation is dependent on the intensive involvement of the court. Thus, cases decided under the CA 1965 are applicable to the SOA under the present framework. Despite the replication, some material changes were made to the present SOA. Thus, the SOA under both Acts are analysed as to its similarities and differences.

4.1. The SOA under the CA 1965

4.1.1. Features of a SOA

The main provision on the SOA in the CA 1965 is section 176, in particular 176(1), and (3), which read as follows:\textsuperscript{38}

\textsuperscript{33}Rebecca Parry, \textit{Corporate Rescue} (Sweet and Maxwell, 2008) 233.
\textsuperscript{37}See text to n 134–138.
\textsuperscript{38}See CA 2016 section 366(1),(2) & (3).
(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them the Court may, on the application in a summary way of the company or of any creditor or member of the company, or in the case of a company being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the Court directs.

(3) If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting or the adjourned meeting agrees to any compromise or arrangement the compromise or arrangement shall, if approved by order of the Court, be binding on all the creditors or class of creditors or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

The SOA under the CA 1965 has a number of features which are in common with those found in the amended version of the JSCAA 1870. First, it is a compromise or arrangement which may be made between a company and its creditors or any of its class or between a company and its members or any of its class. Next, the application to court for sanction may be made by a company or its creditor or its member. The application need not be made during a liquidation process but if it is so made then the application to court is made by the liquidator. For the approval of the SOA by creditors or members, it must be by those present and voting either in person or by proxy at the meeting. A most important feature is that a decision of the creditors or members representing three-fourths in value of the total respective creditors or members, if sanctioned by the court, is binding on the respective dissentients. As for the mandatory requirement of an explanatory statement which was added to the JSCAA 1870, the similarity is found in section 177 of the CA 1965. As explained earlier, the significant difference between the SOA in the CA 1965 and the UK version is the presence of the restraining order in the former which was adopted from the Australian version of the SOA. It is contained in section 176(10) of the CA 1965.

In general, the SOA procedure to restructure a financially distressed private company would briefly involve three stages by which it becomes binding on all dissentients: first, an application is made by the company to the court for the summoning of one or more meetings of creditors and/or members including each respective class where the interests of the creditors and/or members are dissimilar; secondly, the proposals supported by an explanatory statement must be placed before those meetings and approved by the requisite majority; and thirdly, if the proposals are approved, then the court may exercise its discretion to sanction

39 See text to n 28.
40 Ibid.
41 See CA 2016 section 369.
42 See text to n 11–13.
43 See CA 2016 section 368.
them. During the application to the court, it is usual to also seek an order of court to restrain further proceedings or actions against the company pursuant to section 176(10) of the CA 1965.

4.1.2. Compromise or arrangement

The SOA is a statutory scheme arising out of a compromise or arrangement made by a company with its creditors or their classes and/or members or their classes but the term, ‘compromise’ is not defined in the CA 1965, and the term, ‘arrangement’ as defined in section 176(11), ‘includes a reorganization of the share capital of a company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both these methods’.

The courts have interpreted the term, ‘compromise’ to involve some form of dispute over rights of parties, whether, actual or potential. In a compromised SOA, the creditors either agree to accept a sum lesser than their claims against the scheme company as full and final settlement of their claims or agree to convert their claims into shares of the scheme company. Upon the satisfaction of the agreed compromise, the scheme company is able to continue its business free of those claims. On the other hand, although a statutory definition is given for the term ‘arrangement’, it is regarded as a ‘partial definition’ only. This is confirmed in a judicial observation in the UK case of Re Lehman Brothers International (Europe). Similar observations on the partial definition of ‘arrangement’ have been made in Australia with the view that it must be given a liberal construction, and that it is not restricted in its meaning although it is

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46 K V Padmanabha Rau, Company Law of Malaysia – Shares, Meetings, Receivers and Managers (International Law Book Services, 2003) 346. See also Azmi and Abd Razak (n 1) 623. A similar situation exists for CA 2016.
47 Payne (n 7) 20 footnote 10.
49 Shanthi Rachagan, Janine Pascoe and Anil Joshi, Principles of Company Law in Malaysia (Malayan Law Journal 2002) 624. See also Azmi and Abd Razak (n 1) 624.
50 Ibid.
51 Payne (n 7) 20 footnote 10.
52 (2010) 1 BCLC 496, 519 where Lord Neuberger MR observed that the term ‘arrangement’ should be given a wide meaning.
53 Re Capilano Honey Ltd (2018) 131 ACSR 1, 21; Re Lehman Brothers Australia Ltd (in liq) and Others (No. 2) (2013) 95 ACSR 685, 690.
associated with the term ‘compromise’ in the provisions governing SOA. Both the academic and judicial observations are fortified with the use of the word, ‘includes’ in the definition of the term, ‘arrangement’. The Court of Appeal, speaking through Gopal Sri Ram JCA (as he then was), in Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd, stated that:

Particular emphasis is to be placed upon the word ‘includes’ in this definition. On settled principles of statutory interpretation, it is clear that when an Act of Parliament employs the expression ‘includes’ to define some other word or expression, the intention is to leave the meaning of the expression defined open ended. By contrast, when the word ‘means’ is employed to define something, there is a rebuttable presumption of statutory interpretation that Parliament intends to restrict the meaning of the expression defined.

Other cases have described the word, ‘includes’, as a word of enlargement rather than of restriction which is capable of extended meaning other than the given defined meaning in a statute.

Given that one term, ‘compromise’ is not defined and the other term, ‘arrangement’ is partially defined in the statute, these statutory gaps were filled in by the courts, with greater details this time with the decision in the UK case of Re NFU Development Trust Ltd, where Brightman J expressed it as follows:

The word ‘compromise’ implies some element of accommodation on each side. It is not apt to describe total surrender. A claimant who abandons his claim is not compromising it. Similarly, I think that the word ‘arrangement’ in this section implies some element of give and take. Confiscation is not my idea of an arrangement. A member whose rights are expropriated without any compensating advantage is not, in my view, having his rights rearranged in any legitimate sense of that expression.

That passage by Brightman J was cited with approval by Siti Norma Yaakob J (as she then was) in Sri Hartamas Development Sdn Bhd v MBf Finance Bhd, for the definition of ‘compromise’ and ‘arrangement’ in the provisions on SOA in the CA 1965. Given the openness of the statutory definition for ‘compromise’ and ‘arrangement’ subject to certain restrictions imposed by the courts, for instance, that there must be a ‘give and take’ by the parties involved in the SOA, the

56 Ibid 714.
58 (1973) 1 All ER 135.
59 Ibid 140.
60 (1990) 2 MLJ 31, 35.
purpose of the provisions on SOA affords flexibility in facilitating a scheme which can overcome the difficulties of securing the unanimous consent of all creditors and prevent minority creditors from frustrating a beneficial creditors’ scheme. The same observation was made on the SOA in Singapore which is said to ‘offer companies great leeway to negotiate commercially acceptable solutions on debt restructuring’ The courts have further contributed to the flexibility of the SOA for instance, by holding that the pari passu principle does not apply to SOA, and that guarantees given by directors of the applicant company to the scheme creditors as a security for its debts may be waived.

However, the restrictions imposed by the courts on the availability of the ‘compromise’ and ‘arrangement’ offered by the SOA provisions meant that the scheme not only must comply with the notion of ‘give and take’ by the parties involved in the scheme but it must not, be in breach of the law or authorise a transaction which exceeds the powers of the company. On the notion of ‘give and take’, the courts have ruled that the scheme creditors must not have surrendered or abandoned all their claims against the scheme company without receiving any compensating advantage or which amount to a confiscation of their

62Mohd Sulaiman and Othman (n 36) 830 in referring to the observations of Street J in Re Norfolk Island v Byron Bay Whaling Co, 1 NSWR 221 (1970) 223 on the equivalent provisions on compromise and arrangement in the Australian Companies Act on its purposes. See also Jason Harris, ‘Class Warfare in Debt Restructuring: Does Australia need cross-class cram down for creditors’ schemes of arrangement’, (2017) 36(1) Univ Qld Law J 73, 81.
64The Federal Court in Francis a/l Augustine Pereira v Dataran Mantin Sdn Bhd & Ors and other appeals (2014) 6 MLJ 56, 73-75 approved of the decision in the Singapore Court of Appeal in Hitachi Plant Engineering & Construction Co Ltd v Eltraco International Pte Ltd (2003) 4 SLR 384, 411–412 [83–84], that the courts are empowered to sanction schemes under the SOA provisions which may potentially be in breach of the pari passu principle where the company is either insolvent or at the risk of liquidation. The pari passu principle is an old equitable principle and a cornerstone of the insolvency law structure which provides for equal distribution of the assets of the wound up company among its unsecured creditors – see Andrew Keay, McPherson, The Law of Company Liquidation (4th edn, LBC Information Services 1999) 574–577; Pembinaan Lagenda Unggul Sdn Bhd (dalam penggulungan volunyari pembiutang-pembiutang) v Geohan Sdn Bhd and another appeal (2018) 196 MLJU, [142–146]; Malaysian Trustees Bhd v Transmile Group Bhd & Ors (2012) 3 MLJ 679, 689.
65In the High Court case of Intrakota Komposit Sdn Bhd & Anor v Soglease Advance (M) Sdn Bhd (2004) 8 CLJ 276, 298, Abdul Malik Ishak J (as he then was) opined that the SOA scheme may be used to discharge third party guarantees given in favour of the scheme creditors as security for the company’s debts in line with Singapore Court of Appeal decision in Daewoo Singapore Pte Ltd v CEL Tractors Pte Ltd (2001) 2 SLR 791, 806-808.
66Re Opes Prime Stockbroking Ltd (2009) 73 ACSR 385, 395; Re NRMA Ltd (2000) 33 ACSR 595, 603. In the case of In Re Maxisegar Sdn Bhd (2010) 7 CLJ 1033, 1045, Hamid Sultan Abu Backer J (as he then was) gave an example where the court will not sanction a scheme where its purpose was to save the company from insolvency due to misappropriation of funds by its directors at the expense of the creditors.
Hence, the parties involved in the scheme must make some concessions and give up something in return for their benefits. It is observed that in a SOA application, the paramount consideration for the court is the ‘safeguarding of the welfare of the creditors’.  

4.1.3. Creditors or class of creditors

4.1.3.1. Lack of a definition. The parties at the core of a SOA, whether it be a compromise or arrangement by a company, are ‘its creditors or any class of them’, but neither the CA 1965 nor the CA 2016 offers any definition on what constitutes a company’s creditors or class of creditors. The reference to a company’s creditors or class of creditors can be traced back to when the SOA was first conceived in section 2 of the JSCAA 1870. The scope of that provision was subsequently enlarged to include its availability to members and solvent companies but it was initially available only in situations where the company was in the process of being wound up.

4.1.3.2. Creditors. Since the SOA was first made available under the JSCAA 1870 as an alternative to winding up, the courts in Re Midland Coal, Coke, and Iron Company (the Midland Coal case), have held that the word, ‘creditors’ must be construed ‘in the widest sense, and that it includes all persons having any pecuniary claims against the company’ whether actual or contingent, a meaning which is consistent with that used for winding up. The rationale for the connotation was explained in the Australian case of Re Glendale Land Development Ltd (in liq) (the Glendale case), as necessary otherwise the SOA in the JSCAA 1870 would have been rendered practically useless since ‘creditors’ for purpose of the SOA would be different from that in a winding up, therefore ‘creditors’ must embrace ‘all persons entitled to prove in the winding up’. This definition of ‘creditors’ in the SOA under the CA 1965 has been adopted by Mohamed Dzaiddin J (as he then was) in Re Butterworth Products & Industries Sdn Bhd (Khaw Saw Mooi & Ors, Petitioners). The word, ‘creditors’ by reference to those persons who are able to prove in a winding up of the scheme company, has been followed by Nallini Pathmanathan J (as she then was) in Transmile Group Berhad & Anor v Malaysian Trustee Berhad & 13 Ors.

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67 Ibid, See also Re NFU Development Trust Ltd (1973) 1 All ER 135, 140; Sri Hartamas Development Sdn Bhd v MBf Finance Bhd (1990) 2 MLJ 31, 35.
68 Re Kai Peng Berhad (2007) 8 MLJ 122, 129. See also Francis a/l Augustine Pereira v Dataran Mantin Sdn Bhd & Ors and other appeals (2014) 6 MLJ 56, 71; Ex parte High-5 Conglomerate Berhad & Anor and another case (2015) MLJU 444 [52].
69 See section 176(1) of the CA 1965 in respect of a creditors’ SOA, which is the focus of this paper as opposed to a member SOA, see text to n 7.
70 Rau (n 46) 347, 352. See also Payne (n 7) 85.
71 See text to n 27.
72 See text to n 28.
73 (1895) 1 Ch 267, 271 (High Court) & 277 (Court of Appeal).
74 (1982) 7 ACLR 171.
75 Ibid, 175.
76 (1992) 1 MLJ 429, 434.
77 (2012) 3 AMR 159, 182.
In line with the wide definition favoured by the courts, the word, ‘creditors’ has been held to encompass a contingent creditor who is the guarantor in respect of a guarantee granted by the scheme company even though action has not been commenced in court.\(^{78}\) It was also construed to include a secured creditor in contrast to an unsecured creditor;\(^{79}\) a creditor in respect of each of his multiple agreements with the scheme company;\(^{80}\) creditors of subsidiaries of the scheme company.\(^{81}\)

However, the inclusion of contingent creditors in the word, ‘creditors’ may pose problems of interpretation for the courts as to its ambit,\(^{82}\) which happened in the UK case of *In re T & N Ltd and others*,\(^{83}\) (the T & N case). In this case, the court noted the expansive meaning to be given to ‘creditors’ which included contingent creditors and held that potential future claimants of asbestos-related tortious claims against the scheme company fell within its ambit even though they did not have a provable debt in a winding up.\(^{84}\)

In Australia where its SOA provisions were the genesis of the SOA under the CA 1965, the majority of the cases have come to a similar conclusion as that in the T & N case that tort claimants are contingent creditors for purpose of SOA even though the claims are not liquidated or not provable in winding up.\(^{85}\) Interestingly, the same judge in the Glendale case, (a decision which has been

\(^{78}\)Re Butterworth Products & Industries Sdn Bhd (Khaw Saw Mooi & Ors, Petitioners) (1992) 1 MLJ 429, 434. It was held that a contingent creditor has a pecuniary claim against the scheme creditor whether the claim is liquidated or not and whether it was subject to a contingency which was in line with the authorities such as *In re Midland Coal, Coke, and Iron Company*, (1895) 1 Ch 267; *Sovereign Life Assurance Company v Dodd*, (1892) 2 QB 573.

\(^{79}\)Sri Hartamas Development Sdn Bhd v MBf Finance Bhd (1990) 2 MLJ 31, 33. See also *Nite Beauty Industries Sdn Bhd & Anor v Bayer (M) Sdn Bhd* (2000) 3 MLJ 314, 317 where the approved SOA comprised unsecured and secured creditors.

\(^{80}\)In *Alias Bin Mohd Salleh v Peninsular Park Sdn Bhd* (2016) MLJU 474 [51–52], a buyer of several housing plots from a scheme company was treated as a creditor for each of the plot agreement and carried with it one vote for each of the separate debt as represented in each agreement. On the other hand, where the buyer of a plot had his agreement validly terminated, then he is no longer a creditor of the scheme company, see *Peninsular Park Sdn Bhd v Ai-Af Holdings Sdn Bhd* (2015) MLJU 745 [31].

\(^{81}\)Wangsini Sdn Bhd (formerly known as Willway Industries Sdn Bhd) v *Grand United Holdings Bhd* (1998) 5 MLJ 345, 361.

\(^{82}\)Payne (n 7) 181.

\(^{83}\)(2006) 1 WLR 1728.

\(^{84}\)Ibid 1747–1749. It was noted in Payne (n 7) 181, that the decision in the T & N case prompted the authorities in the UK to amend the Insolvency Rules 1986 as in r. 13.12(2), to provide that a tortious liability was a provable debt in a winding up if either the cause of action had accrued at the date of winding up or if all the elements for establishment of the cause of action existed at that date except for actionable damage.

\(^{85}\)See *Re Asia Oil & Minerals Ltd* (1986) 10 ACLR 333; *Re BDC Investments Ltd* (1988) 13 ACLR 201, where in both cases, holders of options to purchase its shares as issued earlier by a company seeking a SOA were regarded as contingent creditors for purpose of the SOA. Contrast that with some South Australian cases as reviewed in *Smith v Carr and Others* (1993) 10 ACSR 427, 431 and in *SAAG Oilfield Engineering (S) Pte Ltd (formerly known as Derrick Services Singapore Pte Ltd) v Shaik Abu Bakar bin Abdul Sukol and another and another appeal* (2012) 2 SLR 189, 200–201 that a
followed in Malaysia), McLelland J, has subsequently clarified his earlier observation that ‘creditors’ referred to those parties with ‘claims which would be entitled to be admitted to proof if the company were wound up’, 86 was not to limit the scope of the word, ‘creditors’ but instead to include parties with unliquidated, prospective or contingent claims even though difficulties were encountered in assessing their values. 87 The rationale for the clarification was in view of the absence in the SOA provisions of the anomalous rule which exclude from proof in the winding up of an insolvent company for parties having an unliquidated claim in tort unlike the provisions for winding up. 88 The Court of Appeal in Singapore has endorsed this clarification noting that the anomalous rule is similarly only present in section 327(2) of its Companies Act (which is identical to section 291(2) of the CA 1965), a provision on proof of debts in winding up, 89 and not in its SOA provisions (which is identical to section 176 of the CA 1965). 90

An important distinction between section 2 of the JSCAA 1870 when the Midland Coal case was decided and the SOA provisions in section 176 of the CA 1965 is that in the former, SOA was only applicable to wound up companies while in the latter, SOA is available to both solvent and insolvent companies. This distinction was pointed out by the Court of Appeal in Singapore, 91 which tends to suggest that a broad view of ‘creditors’ without limiting it to the provisions in winding up is preferred and justified as decided in cases such as the T & N case and in the majority of cases in Australia.

4.1.3.3. Class of creditors. The CA 1965 in section 176(1) provides for a SOA to be made by a scheme company with its creditors or class of creditors. 92 However, the word, ‘class’ is not defined, 93 and it is left to the courts to formulate a test for it. 94 The Federal Court in Francis a/l Augustine Pereira v Dataran Mantin Sdn Bhd (formerly known as Derrick Services Singapore Pte Ltd) v Shaik Abu Bakar bin Abdul Sukol and another and another appeal (2012) 2 SLR 189, 202, 212.

87 Re R L Child & Co Pty Ltd (1986) 10 ACLR 673, 674. This decision has been followed in Bond Corporation Holdings Ltd v Western Australia (1992) 7 ACSR 472.
88 Ibid. The anomalous rule is present in section 438(2) of the Companies (NSW) Code which governed proof of debts in winding up of insolvent companies.
89 Andrew Hicks and Walter Woon, The Companies Act of Singapore – An Annotation (Butterworth & Co (Asia) Pte Ltd 1989) 597–598 which stated that unliquidated claims in tort are not provable in the winding up of an insolvent company in relation to section 327(2) of the Companies Act of Singapore. An identical view is expressed for section 291(2) of the CA 1965 in The Annotated Statutes of Malaysia – Companies Act 1965 (Malayan Law Journal Sdn Bhd 1995) 688.
90 SAAG Oilfield Engineering (S) Pte Ltd v Shaik Abu Bakar bin Abdul Sukol and another and another appeal (2012) 2 SLR 189, 202, 212.
91 Ibid 199.
92 For CA 2016, see section 366(3).
93 Rau (n 46) 352. See also Iliiayas (n 15) xlix.
94 Payne (n 7) 85. In Sovereign Life Assurance Company v Dodd, (1892) 2 QB 573, 583, the court opined that the word, ‘class’ is ‘vague’. 
Bhd & Ors and other appeals (Dataran Mantin case),\(^{95}\) has approved of the test formulated to determine a ‘class of creditors’ in the UK case of Sovereign Life Assurance Company v Dodd (the Sovereign Life case), that is, a class ‘must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest’.\(^{96}\)

The placement of a creditor in the correct class or group of creditors is significantly important when its vote will determine the outcome at the class meeting on whether to accept or reject the SOA which may result in the failure of the scheme.\(^{97}\) In the case of Baneng Holdings Berhad & Ors v Cimb Bank Berhad,\(^{98}\) the creditors of the scheme company included CIMB Bank Berhad and Maybank, both being banking entities and were not in favour of the scheme.\(^{99}\) However, the High Court held that both banking entities should not be put in the same class of creditors as CIMB Bank Berhad is a secured creditor while Maybank is an unsecured creditor with dissimilar rights against the scheme company.\(^{100}\)

The fate of a SOA may rest on whether the creditor has been wrongfully excluded from the class of creditors which will result in the court not giving its sanction to the scheme.\(^{101}\) In the case of PB Securities Sdn Bhd v Autoways Holding Bhd,\(^{102}\) the scheme company in its scheme application which included a RO had included PB Securities Sdn Bhd (PBSSB) in its proposal as one of its scheme creditors. A creditors’ meeting was called and PBSSB had indicated in the proxy form that it will vote against the scheme. At the creditors’ meeting, PBSSB was excluded from it and hence its vote was excluded. The Court of Appeal held that PBSSB was wrongfully excluded from the scheme since the scheme company had at all material times acknowledged its creditor status with its inclusion in the list of creditors in its scheme proposal and the sending of notices of meetings and proxy forms.\(^{103}\) Under those circumstances, the meeting for unsecured creditors which had although obtained the requisite approval of creditors was declared by the court to be invalid.\(^{104}\)

From an examination of the cases pertaining to class of creditors, it is observed that the classification of creditors in SOA is an important feature which will determine the fate of the scheme. The scheme company bears the burden of placing the creditors into the correct class of creditors.\(^{105}\) In multiple classes, it will need to secure the requisite majority votes in each of those classes.\(^{106}\)

\(^{95}\) (2014) 6 MLJ 56, 68–69 & 75.
\(^{96}\) (1892) 2 QB 573, 583.
\(^{97}\) TH Heavy Engineering Bhd & Ors (2018) MLJU 466 [148].
\(^{98}\) (2013) MLJU 269.
\(^{99}\) Ibid [16].
\(^{100}\) Ibid [20].
\(^{101}\) Mohd Sulaiman and Othman (n 36) 851. See also Illiayas (n 15) xlix.
\(^{102}\) (2000) 4 MLJ 417.
\(^{103}\) Ibid 425–427.
\(^{104}\) Ibid 427.
\(^{105}\) UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin, Final Appeal No. 11 of 2001 (Civil), (3rd December 2001), [27(1)]; 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, 234.
\(^{106}\) Harris (n 62) 85. See also Mohan Gopalan, ‘Creditor Schemes of Arrangement and Dissenting Creditors Protection’, (2018) 30 SAcLJ 902, 906.
The rationale of having a proper class of creditors lies in the power wielded by creditors, which is also their right, to vote in favour of or against the proposed scheme. If the class is drawn too broad, then, it could result in oppression of the minority with dissimilar rights, by the majority,\(^\text{107}\) or in the words expressed in the Sovereign Life case, it will result in ‘confiscation and injustice’\(^\text{108}\). On the other hand, if the class is drawn too narrow, then, a small minority with significant voting powers could frustrate the scheme by vetoing it.\(^\text{109}\)

In addition, a SOA is possible even with a distinct class of unsecured creditors which was approved in the Dataran Mantin case,\(^\text{110}\) where the SOA between a housing developer, and the purchasers of its housing units was sanctioned to the exclusion of other unsecured creditors such as its suppliers. A distinguishing feature of this case is that if the scheme was not approved then the only secured creditor, OCBC Bank could exercise its enforcement rights over the secured land, the subject of the housing development which would not have yielded any surplus from the proceeds of foreclosure to benefit any unsecured creditors let alone settle the Bank.\(^\text{111}\)

With the SOA in place, at least 660 purchasers of the housing units could benefit from its completion and the loan due to OCBC Bank could be settled.\(^\text{112}\)

The test formulated in the Sovereign Life case for classification of creditors, that is, a class ‘must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest’,\(^\text{113}\) also include an element of common interest of the creditors. The reference to common interests of creditors was highlighted in the principles for classification of creditors as summarised by Lord Millett NPJ in delivering the judgment for the Hong Kong Court of Final Appeal in the case of UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin (the UDL case).\(^\text{114}\) His Lordship concluded that ‘persons whose rights are sufficiently similar that they can consult together with a view to their common interest should be summoned to a single meeting’, but added that ‘the test is based on similarity or dissimilarity of
legal rights against the company, not on similarity or dissimilarity of interest not derived from such legal rights.\footnote{115}{Ibid [27(2)] & [27(3)].}

The formulated test is that similarity of legal rights and not interests is crucial to the classification of creditors exercise but a distinction may still have to be made between rights of creditors and their interests.\footnote{116}{\textit{Primacom Holding GmbH v A Group of the Senior Lenders & Credit Agricole} (2011) EWHC (Ch) 3746 [46].} It has been held that creditors who will receive different interest rates or whose debts are repayable at different times merely represent interests that do not affect the rights of creditors and thus did not warrant separate classes of creditors.\footnote{117}{Ibid [52–53].} Similarly, where certain creditors are given once only rights to appoint directors in the restructured company, it does not make the rights of those creditors different from other creditors and affect their ability to consult each other, hence they are not required to be placed in a class different from those who are not given such rights.\footnote{118}{\textit{Nine Entitlement Group Limited (No. 1)} (2012) FCA 1464 [61–64].} Also, it was held that although certain unsecured creditors of a scheme company stood to gain more benefits or interests by virtue of also holding guarantees from a third party, that itself do not warrant placing them in a separate class from the other unsecured creditors provided that they do not gain more than 100\% of their debts.\footnote{119}{\textit{Transmile Group Berhad & Anor v Malaysian Trustee Berhad & 13 Ors} (2012) 3 AMR 159, 176–177.}

While the principles associated with classification of creditors are not in doubt, a commentator,\footnote{120}{Illiayas (n 15) liii.} has cast doubt on the decision in the \textit{Re Butterworth Products & Industries Sdn Bhd (Khaw Saw Mooi & Ors, Petitioners)}.\footnote{121}{(1992) 1 MLJ 429.} In that case, MUI Finance Bhd (MUI) was the holder of a guarantee issued by the scheme creditor as a security for a loan given to a housing development company, Bagan Town Development Sdn Bhd (Bagan Town) which had also given a charge to MUI on its property. Thus, MUI was a contingent creditor (as held by the judge) of the scheme company and a secured creditor of Bagan Town. Having decided that MUI was a contingent creditor of the scheme creditor, the issue before the court was whether its rights were so dissimilar to the judgment creditors as to warrant having a separate class. The judge decided that MUI was in the same class as the judgment creditors on the basis that ‘the word “creditor” should be interpreted in the widest sense’.\footnote{122}{Ibid 434.} On that basis, it appears that the commentator is justified in questioning whether the appropriate test as laid down in the Sovereign Life case was applied, that is, whether MUI as a contingent creditor (holding a guarantee in respect of a loan where a charge over a property is also given to MUI) has similar rights as the judgment creditors of the scheme company so as to be able to consult together with a view to their common interest.\footnote{123}{Illiayas (n 15) liii.}
Another disputable decision on the classification of creditors came up in the case of *Texfibre (Selangor) Sdn Bhd & Ors v Permata Merchant Bank Bhd*.\(^{124}\) This case involved a SOA which had two classes of creditors, secured and unsecured. In an application to amend the scheme, the court had to decide whether a bank which had extended banking facilities to the scheme company based on guarantees given by its directors should be placed in the class of secured creditors. While the principle in the Sovereign Life case was adopted, but the court held that the rights of the bank were similar to that of the secured creditors in that they have foregone their rights to sue in exchange for issued shares.\(^{125}\) However, the rights of the unsecured creditors were not discussed as to whether the rights of the bank was so similar to theirs to be able to consult together with a view to their common interests. In any event, it is unlikely that a bank which is merely holding a guarantee given by the scheme company would be regarded as a secured creditor and would have any similarity to consult together with a view to their common interests.\(^{126}\)

In summary, while the principles for classification of creditors are settled, the issues to be decided by the proposer of the SOA and to be resolved by the courts as to first, whether a party is a ‘creditor’ followed by whether any separate class of creditors should be formed is a matter which involves scrutiny of the facts by the court.\(^{127}\)

4.1.4. Creditors’ meetings

Having determined the status of scheme claimants as ‘creditors’ and whether any ‘class of creditors’ need to be formed, the next important matter is to call for meetings as ordered by the court,\(^{128}\) to be held for the creditors or each class of creditors to seek their approval of the proposed scheme. The approval at the creditors’ meeting for the creditors or each class, if any, must be secured first by a majority in number (the headcount test), and secondly by three-fourths in value of the creditors present and voting in person or by proxy (majority in value test) at their meeting or adjourned meeting.\(^{129}\) Upon securing the required approval, the next step is for the scheme company to apply to the court for its sanction.\(^{130}\) Where the requisite numbers are secured followed by the court’s sanction, then its effect is that the approval is binding on all creditors or creditors for each class, if any, including the dissentients.\(^{131}\)
Payne is critical of the headcount test in making a SOA difficult to achieve by placing veto powers in the hands of a small number of creditors out of proportion to their claims in value especially after securing the requisite numbers in the majority in value test. She added that there are calls both in the UK and in other parts of the world to remove the headcount test which was first introduced in section 2 of the JSCAA 1870 and retained in successor Acts.

Although the creditors’ meeting is integral to the SOA process but the CA 1965 is bereft of provisions on the rules and procedures for convening and conducting the meetings. The structure for SOA has been described as ‘barebone’ in its framework. The Court of Appeal in Singapore in their case noted in particular, the absence of rules on the conduct of creditors’ meeting, a lack of mechanism for proof and adjudication of debts including the resolution of disputed debts, and duties of the chairman of the creditors’ meetings.

The absence of provisions on creditors’ meeting in the SOA under the CA 1965 was evident in the case of Boon Wah Air-Conditioning Engineering Sdn Bhd v Bina Goodyear Bhd, where the dispute was as to whether the requisite approval was obtained at a creditors’ meeting. The court referred to the minutes of the creditors’ meeting as prima facie evidence of the outcome of the meeting by relying on section 156 of the CA 1965. However that provision applies specifically to general meetings, being meetings of shareholders; meetings of directors and its managers only. Thus, the lack of rules governing creditors’ meeting for SOA had led to the court to utilise provisions in the statute expressly meant for other types of meetings.

Thus, it is incumbent on the scheme company in its application to the court to summon a creditors’ meeting to also seek its directions on the procedural aspects of the meeting such as the notice period; parties to decide on the time, date and venue of the meeting; mode of voting whether by poll or show of hand; matters on appointment of proxy; and the chairman’s obligations to submit a report or minutes on the outcome of the meeting. In view of the lack of any standardised rules relating to the creditors’ meeting, the convening and conduct of the creditors’ meetings for each SOA will differ from court to court and posed issues at the sanctioning stage as illustrated above.

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132 Payne (n 7) 64.
133 Ibid 61–63.
134 The description was directed at Singapore’s SOA but given the similarity of its provisions with that in the CA 1965, the description is apt. See also Wee (n 63) 5; Tracey Evans Chan, ‘Schemes of Arrangement as a Corporate Rescue Mechanism: The Singapore Experience’, (2009) 18 International Insolvency Review 37, 40.
135 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.
136 Ibid.
139 (2014) 7 MLJ 679.
140 Ibid 683.
141 Mohd Sulaiman and Othman (n 36) 848–849.
4.1.5. Restraining order (RO)

4.1.5.1. Background. Although the SOA under the CA 1965 is in many aspects similar to the framework in the UK, but significantly the RO is absent from the UK statutes. As explained earlier, the SOA in Malaysia is derived from the Australian statute and shares provisions very similar to that for the Singapore SOA. The law on RO for SOA is governed by section 176(10) of the CA 1965. The purpose of the RO and its extension as granted by the courts is to protect the scheme companies and its assets from pending suits filed by its creditors by restraining those proceedings including winding up except with leave of court, while it is engaged in the process of formulating and effecting a SOA for the benefit of its creditors.

However, the authorities in recognising that the RO could be abused by the scheme companies in repeatedly seeking its extension without any concrete SOA proposal while retaining the same management which may have caused the company its financial predicament thereby delaying the payment of its debts, introduced a limited duration for a RO with a new section 176(10 A), which came into force on 1 November 1998. The new provision empowered the court to grant a RO for a period of not more than ninety days with possible extensions, if and only if the court is satisfied on good reason in the case of the RO or its extension, that certain conditions are met as found in paras (a), (b), (c) and (d) of section 176(10 A). These four new conditions are: (a) the presence of a SOA proposal between a company and involving at least one-half in value of all its creditors or any classes of creditors; (b) the necessity of having a RO for the proposed SOA; (c) a statement of affairs of the company with its current state

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142Payne (n 7) 355.
143See text to n 12–13.
144For CA 2016 see section 368.
145Ex parte High-5 Conglomerate Berhad & Anor and another case (2015) MLJU 444, [45]. See also PECD Bhd & Anor v Merino-OFF Sdn Bhd & Ors (2009) 3 MLJ 362, 367; Mohd Sulaiman and Othman (n 36) 858.
146CD No. 10 (n 4) 63–68. Another form of abuse was revealed in Re Foursea Construction (M) Sdn Bhd (1998) 4 MLJ 99, 103, where the scheme company having obtained a limited period RO but did not seek an extension upon its expiry and instead file a fresh ex parte RO application in another High Court.
147Re Sanda Industries Bhd & Ors (1999) 1 CLJ 459, 460.
148Ibid. The words, ‘good reason’ to satisfy the court are construed to mean a bona fide proposed SOA has been filed and presented with sufficient disclosure of details to enable the creditors to decide on its feasibility and merits; it is also fair and reasonable; the proposed SOA is not bound to fail; and the proposed SOA will provide for the safeguarding of the interests of the creditors of the scheme company – see Re Kai Peng Berhad (2007) 8 MLJ 122, 128; Intrakota Komposit Sdn Bhd & Anor v Sogelease Advance (M) Sdn Bhd (2004) 8 CLJ 276, 300.
149Re Kai Peng Berhad (2007) 8 MLJ 122, 129 where the court opined that this condition is satisfied where the applicant shows that the proposed scheme involves more than 50% of its creditors which include secured and unsecured creditors, irrespective of whether they are subsidiaries or otherwise of the applicant. Further, the court clarified that at this stage, the applicant need not show proof that more than 50% of its creditors have approved the proposed scheme but that they are included in it. See also Baneng Holdings Berhad & Ors v Cimb Bank Berhad (2013) MLJU 269 [11].
150Ibid 130–131.
not exceeding three days before the filing of the SOA application has been filed with the court;\textsuperscript{151} and (d) a person nominated as a director of the company by a majority of its creditors in the SOA application is approved by the court.\textsuperscript{152}

The introduction of the new conditions which are mandatory to an application for an RO is to curb past abuses of applicant companies by requiring them to make a full disclosure of the proposed SOA to their creditors at an early stage so as to prevent injustice to the creditors who are legally entitled to enforce execution proceedings but are suddenly stifled by a RO without any proper prior notice of it.\textsuperscript{153}

\textbf{4.1.5.2. Time for compliance with the RO conditions.} However, the courts have come to divergent views on whether those four mandatory conditions are applicable at the initial and subsequent stages of an application for the RO or only when any application to extend the RO is sought. The latter view was most clearly observed by the High Court in \textit{Chee Teck Fah v Rei Management Sdn Bhd},\textsuperscript{154} that the four conditions are not applicable where the RO is for the initial period of not more than 90 days. The court found support for this observation in two earlier cases, the first of which, was decided by the High Court in \textit{Jin Lin Wood Industries Sdn Bhd and Others v Mulpha International Bhd},\textsuperscript{155} which only alluded to the satisfaction of the four conditions in an application for extension of the RO but did not include it for the initial 90 days RO. The second case again decided by the High Court in \textit{Pelangi Airways Sdn Bhd v Mayban Trustee Bhd},\textsuperscript{156} offered doubtful support since it was concluded by the court that the initial RO application had been irregular due to the failure of the applicant to satisfy the four conditions, notably, para (d) which was consistent with the cited case of \textit{Re Sanda Industries Bhd & Ors},\textsuperscript{157} that no restraining order at any stage can be granted by the court where no proposed director has been approved and appointed by the court.\textsuperscript{157}

On the other hand, in several cases also decided by the High Court,\textsuperscript{158} the four conditions necessary for a RO apply even to the initial application where the RO

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\item \textsuperscript{151}Ibid 130.
\item \textsuperscript{152}Ibid 132 where the court observed that it has the ultimate say in the appointment of the director which will be decided based on his credentials and that he has no interest directly or indirectly in the scheme company and is independent and possess no conflict of interest in representing the creditors. See also \textit{Pelangi Airways Sdn Bhd v Mayban Trustee Bhd} (2001) 6 CLJ 129, 135; \textit{Re Sanda Industries Bhd & Ors} (1999) 1 CLJ 459, 460.
\item \textsuperscript{153}Ranjan Chandran, ‘The Recent Amendments to Section 176 of the Companies Act 1965’, (1999) 1 CLJ i, i. See also CD No. 10 (n 4) 67–68.
\item \textsuperscript{154}(2016) 1 LNS 1221.
\item \textsuperscript{155}(2004) MLJU 497.
\item \textsuperscript{156}(2001) 6 CLJ 129.
\item \textsuperscript{157}Ibid 135–136.
\item \textsuperscript{158}The reported decisions on the conditions necessary for RO have so far been confined to the High Court only. However it is noted that the High Court in \textit{Bina Goodyear Bhd v Ambank (M) Bhd & Anor} (2014) 10 MLJ 603, 609-610 had remarked that the applicant in that case had earlier vide Summons No. 24-NCC-126-04 of 2013 applied for an initial RO which was dismissed by the High Court for its failure to comply with
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is for a period of not more than 90 days. These cases include the above cited *Re Sanda Industries Bhd & Ors*,159 *Re PECD Bhd & Anor (No. 2)*;160 and *Re Sanmatech Sdn Bhd*.161

Those four conditions are replicated in seriatim in the RO provisions under section 368(2)(a), (b), (c) and (d) of the CA 2016. In the case of *Barakah Offshore Petroleum Berhad & Anor v Mersing Construction & Engineering Sdn Bhd & 3 Ors* (Barakah case),162 the High Court had to contend with the issue whether the applicant had to comply with the four conditions at the time of applying the initial RO of not more than 3 months.163 In accepting that the four conditions for obtaining a RO under the CA 2016 have previously appeared under the CA 1965 as an amendment under the Companies (Amendment) (No.2) Bill 1998, the court took judicial notice of the explanatory statement for the amendment introducing the four conditions that ‘restraining orders under that subsection are only granted under specific conditions to avoid any abuse’, and held that the four conditions are required to be satisfied by the applicant when applying for a RO at any time including the initial period.164

In any event, the four conditions must be complied with each time that the applicant applies for an extension of the RO,165 but under the CA 2016 the maximum period for the extension is nine months.166

4.1.5.3. Difficulties in compliance with the RO conditions. Given that the four conditions must be complied with by the applicant each time a fresh application is made for a RO or its extension, the applicant would encounter difficulties in satisfying condition (d) in putting forth a person nominated by a majority of its creditors.167 In attempting to meet this condition, the applicant would have to disclose to at least the majority of its creditors its proposed SOA and its application for a RO in a convincing manner to enable it to garner their support for a nominated director for the court’s approval and appointment. This attempt could backfire on

the conditions in section 176(10A)(c) and (d) of the CA 1965. On appeal to the Court of Appeal, the applicant’s appeal was dismissed on the same grounds.

159(1999) 1 CLJ 459, 460.
162(2019) 3 AMR 673.
163Ibid 687–688. The initial period for the RO under the CA 2016 is not more than 3 months as compared to the period of not more than 90 days under the CA 1965 but save for some slight changes the four conditions under both Acts are substantially the same.
164Ibid 687–689. The court also followed the decisions made previously in the cases of *Re Sanda Industries Bhd & Ors* (1999) 1 CLJ 459, and *Re PECD Bhd & Anor (No. 2)* (2008) 10 CLJ 486.
166Section 368(2) of the CA 2016.
the applicant with the creditors making haste with proceedings to recover its debts and defeat the purpose of any restructuring.\textsuperscript{168}

This condition also appears to be at odds with condition (a) where the applicant need only to submit to the court a proposed SOA involving at least one-half in value of its creditors without having to make any disclosure to them of its SOA proposal. Thus while conditions (a) to (c) do not involve any disclosure of the RO applicant’s proposed SOA to its creditors, condition (d) makes it difficult for a company to have it satisfied once it is in a dire financial position. The judge in the Barakah case,\textsuperscript{169} made an appropriate observation that companies seeking the aid of a RO for its proposed SOA must make adequate preparation at an early stage and not when after legal proceedings have commenced, judgment entered and enforcement proceedings have started or about to be started.\textsuperscript{170}

Notwithstanding the sound and salutary observation but it is far from easy to put it into practice especially on timing the SOA application before the commencement of any legal proceedings. After all, the fact that a company is facing winding up proceedings does not prevent it from availing of the SOA provisions as it has been observed that, ‘the whole point of s176 is to provide a statutory remedy to sort out the problems of ailing companies without letting them go under’.\textsuperscript{171} In any event, the court has held that the application for a RO need only be served on creditors whose actions or proceedings were a subject of the RO to enable them to oppose the application,\textsuperscript{172} but compliance with condition (d) would make this ruling superfluous.

4.1.5.4. Scope of the restraints. Section 176(10) of the CA 1965 provided that the court may restrain ‘further proceedings in any action or proceeding against the company’. The only case in Malaysia which has ruled on this phrase, \textit{Re Panglobal Bhd & Ors} (Panglobal case),\textsuperscript{173} held that it referred to existing actions or proceedings against the company, thus the application for the RO must be served on those creditors where the RO has a restraining effect.\textsuperscript{174} However, ROs in favour of the applicants have been granted by the courts on such terms as: ‘including but not limited to winding up, execution and arbitration proceedings’;\textsuperscript{175} or ‘all legal proceedings’;\textsuperscript{176} or ‘pending actions or commencing new actions’;\textsuperscript{177} or ‘all further action or further proceedings as well as any intended or future proceedings including winding-up, execution or arbitration proceedings’\textsuperscript{178}

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\item \textsuperscript{168}Ibid.
\item \textsuperscript{169}(n 162).
\item \textsuperscript{170}Ibid 689.
\item \textsuperscript{171}\textit{Re Kuala Lumpur Industries Bhd} (1990) 2 MLJ 180, 183. See also \textit{Intrakota Komposit Sdn Bhd & Anor v Sogelease Advance (M) Sdn Bhd} (2004) 8 CLJ 276, 296 for the view of the court that insolvency of the company does not preclude it from utilising the provisions of the SOA.
\item \textsuperscript{172}\textit{Re Panglobal Bhd & Ors} (1999) 1 MLJ 590, 592.
\item \textsuperscript{173}Ibid.
\item \textsuperscript{174}Ibid 591–592.
\item \textsuperscript{175}\textit{Re Kai Peng} (2007) 8 MLJ 122, 126 [3–4].
\item \textsuperscript{176}\textit{PECD Bhd & Anor v Merino-ODD Sdn Bhd & Ors} (2009) 3 MLJ 362, 366 [2].
\item \textsuperscript{177}\textit{YFG Berhad v Insanas Enterprise Sdn Bhd} (2016) MLJU 664 [1].
\item \textsuperscript{178}\textit{Re Foursea Construction (M) Sdn Bhd} (1998) 4 MLJ 99, 101 & 103.
\end{itemize}
or ‘any and all proceedings and/or actions and/or further proceedings in any suits and/or proceedings and/or actions against each of the Applicants and/or in respect of each of the Applicants and/or its assets and/or assets employed in its business, including without limitation any winding-up, execution, arbitration proceedings, act of repossession or purported repossession, the appointment of receivers and managers, liquidators, provisional liquidators or otherwise whatsoever, by any creditors and/or purported creditors or any other persons whatsoever’.\textsuperscript{179}

In Singapore, the identical phrase, ‘further proceedings in any action or proceeding against the company’, \textsuperscript{180}for RO has been interpreted widely by its courts which has been regarded as consistent with a ‘more practical approach’.\textsuperscript{181} The courts were prepared to grant restraints which included a pre-emptive moratorium on proceedings,\textsuperscript{182} or extend it to potential creditors or potential proceedings.\textsuperscript{183}

Notwithstanding the rather restrictive nature of the decision on the scope of the restraint in the Panglobal case,\textsuperscript{184} other courts in both Malaysia and Singapore are quite robust and pragmatic in their approach as to the parameters of the RO. This has led a judge, after a review of several decisions of the courts in Malaysia, to comment that ‘the criteria for granting the orders are not based on uniform principles or parameters. However the overriding consideration appears to be the justice of the case and is not based solely on the strict guide lines stated in the said section’.\textsuperscript{185}

4.1.6. The role of the courts

At first blush, the role of the court may look minimal given that it is involved in two of the three stages of the SOA process, that is, at the first stage of the applicant seeking leave to commence creditors’ meetings and at the third stage of sanctioning the SOA after the creditors have given the requisite majority approval at the second stage. After all, it has been observed judicially that the role of the court is merely to act as a facilitator of the SOA process which is left to the creditors as businessmen to negotiate and decide on whether to accept or reject the proposed scheme.\textsuperscript{186} However, in the same breath, the court has reminded itself that the entire SOA process is under its control in view of the requirement that the scheme company has to refer to the court at every material stage of the process.\textsuperscript{187}

\textsuperscript{179}Ex parte High-5 Conglomerate Berhad & Anor and another case (2015) MLJU 444 [3].
\textsuperscript{180}Section 210(10) of the SCA.
\textsuperscript{182}Ibid 19. See also Re TPC Korea Co Ltd (2010) 2 SLR 617, 620 [8].
\textsuperscript{183}Ibid. See also Re Conchubar Aromatics Ltd and other matters (2015) SGHC 322 [18].
\textsuperscript{184}(n 173).
\textsuperscript{185}In Re Maxisegar Sdn Bhd (2010) 7 CLJ 1033, 1044–1045, per Hamid Sultan Abu Backer J (as he then was).
\textsuperscript{187}Ibid 289.
At the first stage of the SOA process where leave of court is sought for the creditors’ meetings, the law empowers the summoning of the meeting in accordance with the court’s direction.\textsuperscript{188} Save for that requirement, the SOA framework, which has been described as ‘barebone’, does not provide any guidelines other than leaving them to the court’s own discretion.\textsuperscript{189} Other than deciding on the division of creditors into its proper classes on the principle of dissimilar rights, the court is concerned with ensuring that the creditors affected by the proposed SOA are able to be present in person or by proxy to consider and vote in the court-ordered meetings.\textsuperscript{190} This will involve the court providing directions as to the notice of meetings including the time, date and venue of the meeting or meetings as well as proper and adequate disclosure of material information to those creditors.\textsuperscript{191} Those directions are necessary since the court must have control of the meetings as ordered by it.\textsuperscript{192} In addition, the court would be mindful that the meetings should not be ordered if the SOA has no prospect of being accepted by the creditors or is an abuse of process,\textsuperscript{193} where the court may take into account matters of public policy including the issue of commercial morality.\textsuperscript{194} At this stage, the court is often tasked with whether to grant a RO on the application of the scheme company so as to facilitate the SOA process.\textsuperscript{195}

Having said that the second stage of the SOA process lies solely with the decisions of the creditors at the court-ordered meetings, however it by no means merely leave the court with nothing else to do except to rubber stamp the approval of the creditors by sanctioning it at the third stage. At this third stage, the court is concerned with a number of matters. First, the court must consider whether the requirements of the law have been satisfied in that, the meetings for the creditors or classes of creditors have been properly identified, convened and conducted as ordered. It will not grant the sanction unless the proposal is bona fide as well as fair and reasonable to the creditors. The court must also be satisfied that all

\textsuperscript{188}Section 176(1) of the CA 1965.

\textsuperscript{189}See text to n 135. See also Mohd Sulaiman and Othman (n 36) 847; Jennifer Payne (n 7) 19–20.

\textsuperscript{190}Sham Chin Yen & Ors v Mansion Properties Sdn Bhd (2019) 1 LNS 781 [33]. See also 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.

\textsuperscript{191}Ibid. See Mohd Sulaiman and Othman (n 36) 848–849 on the list of procedural components for the meetings to be directed by the court.

\textsuperscript{192}Re Dee Valley Group plc (2017) 2 BCLC 328, 345.


\textsuperscript{194}Ibid. See also Sri Hartamas Development Sdn Bhd v MBf Finance Bhd (1990) 2 MLJ 31, 35–36 where the court was prepared to consider objections by creditors even at the first stage of the SOA application.

\textsuperscript{195}Desa Samudra Sdn Bhd v Autoways Construction Sdn Bhd & 6 Ors (2009) 5 AMR 526, 532. An instance of a proposed SOA been held as against public policy was where the scheme company proposed the distribution of trust moneys in its custody to its creditors – see PECD Bhd & Anor v Merino-ODD Sdn Bhd & Ors (2009) 3 MLJ 362, 373.
material information have been disclosed to the creditors and that the requisite major-ity approval has been secured. To this end, the court will be concerned that the views and interest of dissenting or non-voting creditors have received impartial consideration. The court also takes a dim view of approving a SOA in favour of a hopelessly insolvent company which it regards as being against public policy to allow such a company to trade again. Finally, the court takes the sanction order seriously as once it is given, it has the effect of binding all creditors of the scheme company including those who have dissented.

Given that the SOA process is statutory based but without much procedural guidelines, the courts’ involvement in the process as discussed above include having to provide directions to the scheme companies to ensure that the creditors are properly divided into classes and their court-ordered meetings are convened and conducted with adequate disclosure of material information. Thus, the initiation, implementation and supervision of the SOA process, that is, its entirety is extensively handled by the court, and it is therefore not surprising that the SOA process is labelled as court intensive.

4.1.7. Retention of management

Another significant feature of the SOA process is that during the exercise, the management of the company is retained with its powers intact.

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196 Sham Chin Yen & Ors v Mansion Properties Sdn Bhd (2019) 1 LNS 781 [33]. In the case of PB Securities Sdn Bhd v Autoways Holding Bhd (2000) 4 MLJ 417, 426–427, a creditor included in the list for purposes of the RO application was subsequently excluded from voting at the creditors’ meeting which the court viewed as an abuse of process of court and thus rendered null and void the approval obtained at the creditors’ meeting. In the case of In re Sateras Resources (Malaysia) Bhd (2005) 6 CLJ 194, 204–212, the court opined that the creditors’ meeting convened earlier for the whole group of creditors which resulted in the requisite majority approval was null and void on the grounds of inadequate disclosure of information to the creditors and a failure to convene meetings for the different classes of creditors.


201 This feature of the SOA allows the directors to retain control of the company without outsider involvement – Azmi and Abd Razak (n 1) 644. See text to n 214-215 and n 234 for a contrast with the CVA and JM.
4.2. SOA under the CA 2016

The SOA process as appeared in the CA 1965 is replicated in the CA 2016 with some changes, based on the recommendations of the CLRC. The more significant changes are as follows:

1. Duration of RO
   The CA 2016 limit the duration of the RO to an initial period of three months and the total extension period to a period of nine months from the expiry of the initial period, subject to the fulfilment of the same four conditions which appeared in the CA 1965. This is consistent with the recommendations of the CLRC that there ‘must be finality in the moratorium period’.

2. Scope of the RO
   Based on the recommendations of the CLRC, the scope of the RO granted by the court does not extend to any action or proceeding taken against the scheme company by either the Registrar of Companies or the Securities Commission.

3. Independent Assessment by an Approved Liquidator
   The CLRC in its report expressed concern on behalf of the creditors of the scheme company on the absence of any form of independent and professional assessment of the proposed SOA. In line with those concern, it is now provided in the CA 2016 that the court may in the process of considering an SOA application, appoint an approved liquidator to provide an independent and professional assessment of the proposed scheme, as a form of safeguard for the creditors. This is achieved by having the assessment report tabled at the creditors’ meeting, as an additional avenue of information on the viability of the proposed scheme to the creditors.

4. Removal of Headcount Test in Creditors’ Meeting
   The two tier requirement for approval at creditors’ meeting under the CA 1965 was comprised of: first, a majority of seventy-five per cent of the total value of the creditors or class of creditors present and voting (the majority in value test), and secondly a majority of those creditors in number (the headcount test). The headcount test was much criticised by Payne as rendering the SOA process a difficult one to achieve. It has also been regarded as onerous for the scheme companies in

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203 Section 368(2) of the CA 2016. See Bidin and Hussin (n 202) 157.
204 CD No. 10 (n 4) 69 [4.10].
205 Ibid.
206 Section 368(6)(a) of the CA 2016. See Bidin and Hussin (n 202) 157.
207 CD No. 10 (n 4) 68 [4.9].
208 Section 367(1) of the CA 2016. See Bidin and Hussin (n 202) 157; Mohd Sulaiman and Othman (n 36) 849.
209 Section 367(2) of the CA 2016. See Bidin and Hussin (n 202) 157; Mohd Sulaiman and Othman (n 36) 849.
210 See text to n 132-133. Doubts have also been expressed as to the usefulness of the headcount test for the original aim of protecting minority creditors when the SOA at every stage is subject to judicial supervision – see Jo Windsor, ‘The ‘Headcount Test’ in Schemes of Arrangement post-Dee Valley’, (2017) 4 JIBFL 218, 218.
attaining the requisite threshold.\textsuperscript{211} Under the CA 2016, the headcount test is no longer applicable and only the majority in value test remains.\textsuperscript{212}

While under the CA 2016, the removal of the headcount test has made the SOA process more friendly to the scheme company but other significant changes to the law on SOA as enumerated above have been brought in to safeguard the interests of the creditors,\textsuperscript{213} which will make it more onerous to the scheme company.

\section*{5. The SOA and the corporate rescue mechanisms in Malaysia}
This part considers whether the SOA still has a role in corporate rescue exercises for private companies in Malaysia by comparing its features with that of the tailor-made corporate rescue mechanisms under the CA 2016, the CVA and JM, based on their salient features.

\subsection*{5.1. The SOA and CVA}
\paragraph*{5.1.1. Retention of management and IP} The CVA is the first of two corporate rescue mechanisms contained in the CA 2016. While the management of the company under the CVA is retained however the proposal for a CVA is dependent on the opinion of an IP as to its reasonable prospect of success and that sufficient funding is available for the exercise.\textsuperscript{214} The services of an IP is also required for the CVA implementation.\textsuperscript{215} Similarly, in the case of SOA, the management of the scheme company is maintained but the scheme is less dependent on the active participation of the IP except where the court during the SOA application opined that an approved liquidator needs to be appointed to provide an independent and professional assessment of the proposed scheme.\textsuperscript{216}

\paragraph*{5.1.2. Court involvement} The CVA is less court intensive than a SOA,\textsuperscript{217} where in the latter the involvement of the court is significant in ordering the creditors’ meeting or classes of creditors’ meeting; scrutinising the scheme proposal and outcome of the meetings of creditors; and sanctioning the proposed scheme.\textsuperscript{218} The court is also empowered to grant a RO which amounts to a moratorium which is a common feature of a corporate rescue mechanism, but any such order is not automatic and is subject to the discretion of the court.

\textsuperscript{211}Mohd Sulaiman and Othman (n 36) 851.
\textsuperscript{212}Section 366(3) of the CA 2016.
\textsuperscript{214}Section 397 of the CA 2016.
\textsuperscript{215}Section 401 of the CA 2016.
\textsuperscript{216}See text to n 208–209. See also Payne (n 7) 212.
\textsuperscript{218}See text to n 187–196.
5.1.3. Moratorium

It has been noted that with the pre-requisite conditions for a RO under the CA 2016 and the string of cases which held that those pre-requisite conditions must be satisfied before a RO can be given,219 the scheme companies will encounter difficulties in getting its creditors not to object to the application to the court for a RO. In contrast, the moratorium for CVA applies automatically once the documents as required under the CA 2016 are filed in court.220 However the duration and extension of the moratorium for a CVA is first limited to 28 days and then extended for not more than 60 days from the consent of the creditors obtained at its meeting,221 which is shorter than the period of a RO in the SOA which is for an initial period of not more than 3 months with an extension by the court for not more than 9 months.222 Unlike the RO, the effects of the moratorium is extensively spelt out with certainty in the CA 2016 rather than left to the discretion of the court for the RO.223

5.1.4. Publicity

Unlike the SOA where the RO is granted by the court, the CVA at the time when the moratorium is in force, the Act requires the company to place the name of the IP nominee and the fact of the moratorium in its business documents including letters, orders and invoices, website, negotiable instruments, thus announcing to the world of its financial predicament including its business partners.224

5.1.5. Limitation on availability

The CVA has a drawback as compared to the SOA in that it is not available to a public company, a licensed institution under the laws enforced by the Central Bank of Malaysia, a company which is subject to the Capital Markets and Services Act 2007, and a company which creates a charge over its property or any of its undertaking.225 Those limitations would mean that the CVA is not available to a private company which has obtained financing from a secured creditor having a security either as a charge over its property or a debenture which will include a charge over its undertaking.226 In contrast, the SOA is able to bind secured creditors.

5.1.6. Classification of creditors

One of the major limitation for the SOA is that it has to contend with the legal need for classification of creditors. On the other hand, for the CVA there is no such need of creditors’ classification.227

219See text to n 154–172.
220Section 398(1) of the CA 2016.
221Section 398(2) and the Eight Schedule [3] of the CA 2016.
222Section 368(2) of the CA 2016.
223Section 398(2) and the Eight Schedule [17] of the CA 2016.
224Section 398(2) and the Eight Schedule [18] of the CA 2016.
225Section 395 of the CA 2016.
226It was noted in Mohd Sulaiman and Othman (n 36) 922–923 that in Malaysia, financial institutions, would more often than not, require even private companies in seeking loans to provide securities in the form of a charge over its property or undertakings.
227Payne (n 7) 206.
5.1.7. Guidelines for creditors’ meeting

The result of the creditors’ meetings in both the CVA and the SOA are crucial elements in its success and for the CVA, rules of meetings are provided in the CA 2016, but in the case of the SOA, the CA 2016, like its predecessor the CA 1965, is still bereft of any guidelines and left to each court to give directions on the conduct of the meetings in the case before it.

5.1.8. Flexibility and binding effect

A CVA can only involve the company’s unsecured creditors whereas a SOA can accommodate both unsecured and secured creditors but into different classes. The SOA can even be granted by the court involving only one class of unsecured creditors such as the house purchasers of a housing development project in the case of Dataran Mantin case, with the exclusion of the scheme company’s other unsecured creditors such as its suppliers, an example of the flexibility in SOA. However, the CVA only binds those creditors who were entitled to notice of the meeting and to vote unlike the SOA when approved is binding on all creditors.

5.1.9. Finality of corporate rescue

The SOA, subject to grounds of fraud in obtaining the creditors’ approval, offers finality once the court sanctions the scheme which is then registered with the ROC. The CVA is implemented in accordance with such terms as contained in the requisite approval of the creditors. However the CA 2016 does not provide any avenue to challenge the arrangement although there is a provision which only permits the conduct of the supervisor, who is usually the IP nominee, to be challenged. Since the implementation of the arrangement is under the supervision of the supervisor/nominee, the possibility of his acts or decisions remain open to challenge by any of the company’s creditors or any person who is dissatisfied with it.

5.2. The SOA and JM

5.2.1. Retention of management and IP

The second corporate rescue mechanism introduced by the CA 2016 is the JM which is adopted from the Singapore JM version. For the JM, the management of the company is displaced by an IP, known as a judicial manager (JMgr) who is empowered by the court to take charge of the affairs, business and property of the

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228Section 399 of the CA 2016.
229See (n 83) and text to n 110–112.
231Mohd Sulaiman and Othman (n 36) 829. See also Choong Kim Meng & Anor v Arena Kencana Sdn Bhd & Ors (Goh Hok Huat, intervener) (2016) MLIU 604 [47 (c)]; The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd (2008) 3 SLR 121, 165. The relevant provision in the CA 2016 is section 366(3), (4) & (5). The finality and binding nature of the SOA allows third parties to confidently deal with the scheme company such as to provide financing to it – see Kamuja Corporation Sdn Bhd v Aras Dimensi Sdn Bhd (Dalam Liquidasi) (2016) 2 AMCR 532, 541.
232Section 401(4) of the CA 2016.
233Mohd Sulaiman and Othman (n 36) 876.
In contrast with the situation for SOA, the management of the company is retained.

5.2.2. Court involvement
The SOA process is court intensive with the involvement of the court in key areas on whether to: order a meeting of creditors, grant a RO on the application of the scheme company, to sanction the proposed scheme after the requisite approval has been secured at the creditors’ meeting. Whereas in JM, the court’s role is to consider whether a JM order is to be granted on an application by a company or its directors or a creditor. If the JM order is granted then the affairs, business and property of the company will be under the hands of a judicial manager (JMgr) who will displace its management. The duration of the JM order is for 6 months which may be extended for another 6 months, who will prepare proposals for the creditors’ approval and then report its outcome to the court and give notice of it to the Companies Commission of Malaysia (CCM) or such other parties as ordered by the court.

5.2.3. Moratorium
Unlike the SOA where a moratorium-like RO is only granted on an application to the court and subject to the court’s discretion, the hallmark of a corporate rescue mechanism is the availability of the moratorium on an automatic basis, in this case, the JM on the granting by the court of a JM order. The scope of the moratorium is more extensively spelt out in the Act as compared to that for the RO.

5.2.4. Publicity
Where a JM order is granted which result in an automatic moratorium and the appointment of a JMgr, the Act requires that notification of the JM order and the JMgr’s position is given in its website, all documents including invoice, order for goods and services, letters. In contrast, when a RO is granted for a SOA, there is no statutory need for such notification.

5.2.5. Limitation on its availability
Unlike the SOA, the JM is not available to a licensed institution under the laws enforced by the Central Bank of Malaysia, and a company which is subject to the Capital Markets and Services Act 2007. Another significant limitation is that the application for a JM order can be vetoed by a secured creditor.

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234 Ibid 875.
235 Section 405 of the CA 2016.
236 Sections 405(3) and 414(2) of the CA 2016.
237 Sections 405(3) and 414(2) of the CA 2016.
238 Sections 420 and 421 of the CA 2016.
239 Section 411 of the CA 2016.
240 Section 412 of the CA 2016.
241 Section 403 of the CA 2016.
242 Section 409 of the CA 2016.
5.2.6. Classification of creditors
In contrast to the JM, a significant feature of the SOA is the requirement to segregate its creditors into classes. For the JM, all creditors are considered in one group.243

5.2.7. Guidelines for creditors’ meeting
In both the JM and the SOA, the creditors’ approval play a significant role in the success of the rescue exercise. For the JM, a set of rules governing the creditors’ meetings such as the notice of meeting, chairman of meeting, proof of debts, quorum and filing of the result of meeting are contained in the Companies (Corporate Rescue Mechanism) Rules 2018. As for the SOA, there is a lack of such rules or guidelines in its framework which is left to the decision of each court.

5.2.8. Flexibility
The JM process may be derailed by a secured creditor because of its veto power,244 but the SOA has no such limitation. In addition, the SOA may even be granted by the court in favour of one class of unsecured creditors, which offers flexibility in its employment for corporate rescue purposes.

5.2.9. Finality of corporate rescue
Finality in the SOA process, save for grounds of fraud in obtaining the creditors’ approval, is achieved once the court sanctions the scheme which is then registered with the CCM.245 In the case of a JM order it may still be challenged by a creditor where the order was obtained ex parte without full disclosure of material facts or obtained mala fide or defective on other substantial grounds so as to invoke the inherent jurisdiction of the court,246 even though it does not fall within the four situations in the CA 2016 for the discharging of the order.247

243Mohd Sulaiman and Othman (n 36) 917.
245Mohd Sulaiman and Othman (n 36) 829. See also Choong Kim Meng & Anor v Arena Kencana Sdn Bhd & Ors (Goh Hok Huat, intervener) (2016) MLJU 604 [47(c)] which has cited the Singapore case of The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd (2008) 3 SLR 121, 165. The relevant provision in the CA 2016 is section 366(3), (4) & (5). The finality and binding nature of the SOA enables third parties to confidently deal with the scheme company such as to provide financing to it – see Kamuja Corporation Sdn Bhd v Aras Dimensi Sdn Bhd (Dalam Liquidasi) (2016) 2 AMCR 532, 541.
247Ibid, 422. See also the relevant provisions of the CA 2016 which refer to the four situations where the JM order can be discharged, that is, sections 421(5) or 424(1) & (2)(a) [where the purpose of the JM order has not been achieved] or 424(10) & (2)(a) [where the purpose of the JM order is incapable of achievement] or 425(1)(a) & 425(3)(d) of the CA 2016. Note that a fifth situation is covered by section 425(1)(b) & 425(3)(d).
6. Conclusion

The SOA has been utilised by public companies rather than for private companies in Malaysia for restructuring purposes. Hence, the lack of any rescue procedures, in general, had led to the introduction of two rescue mechanisms, in particular, the CVA which is exclusively meant for private companies. This paper addresses the question as to whether the SOA may be utilised as a mechanism for the rescue of a financially distressed private company despite the presence of two specially designed corporate rescue mechanisms, the CVA and JM. In this regard, a comparison was made on the features of the SOA, first with that of the CVA followed by those in the JM noting the statutory limitation that the CVA is only applicable to a private company which does not have a secured creditor and in the case of the JM, a secured creditor is able to veto the application for a JM order.

In the case of a financially distressed private company with even a single secured creditor, the law prohibits that company from having recourse to both corporate rescue mechanisms. Under such circumstances, the SOA is the only option left under the CA 2016 which may operate as a corporate rescue tool for the company.

The SOA is flexible enough as a rescue mechanism for private companies to accommodate a compromise even though it is made with only one class of unsecured creditors. This feature is unique to the SOA, and is unavailable in both the CVA and JM since both mechanisms have to include all unsecured creditors.

As for the complex issue of classification of creditors in SOA, it is contended that a private company will often only have to deal with two types of creditors, namely, the unsecured creditors in one class and the secured creditors in another class which should not be controversial. Thus, such a company will not face much issue in the classification exercise in contrast to that of a public company, for instance, in the case of Transmile Group Bhd where contentions were raised as to whether its creditors such as holders of medium term notes which were constituted under a trust deed should have different rights from lenders under syndicated loan agreement and holders of convertible bonds, financial securities which are common to public companies.248 The Court of Appeal in dealing with such issues had to scrutinise the terms of those contractual documents as to the parties’ rights.249 This classification exercise was a concern for the CLRC in the use of the SOA as a corporate rescue tool which led to its recommendations for the corporate rescue mechanisms to be introduced.250

Under those circumstances, this paper argues that the SOA with its flexibility, its ability to tie up all creditors including the secured creditors with the requisite approval, its moratorium-like RO and the unlikelihood of any issue with the classification exercise, may be a viable option as a corporate rescue tool. However, there is still concern for certain drawbacks in the SOA that have been identified in this paper and that have not been addressed which may affect its usefulness.

249 Ibid 690–692.
250 CD No. 10 (n 4) 34 [2.14].
It is noted that a number of cases have concluded that in an application for the moratorium-like RO by a scheme company, certain pre-required RO conditions are needed to be satisfied before the court will give its consideration. The most challenging condition is for the scheme company to disclose its intention to apply for the RO to its creditors with the objective of seeking their approval of a nominee to act as a director of the scheme company, which may trigger off alarm bells to the creditors to commence proceedings or actions against the scheme company, thus defeating the purpose of having a RO. A suggested solution may be to introduce a short term automatic moratorium on the filing of a SOA. After all, the CLRC had acknowledged that a corporate rescue system for Malaysia should include a feature which provides for moratorium, more so in circumstances where the SOA may be the only viable rescue option for a financially distressed private company. In contrast where both corporate rescue mechanisms are applicable, the automatic moratorium is available for the CVA, and the JM.

Another significant drawback as identified in this paper is the framework of the SOA which has been described as ‘barebone’. In this regard, this view is fortified by the recognition in Singapore of this deficiency. Therefore, the uncertainties associated with this drawback may result in additional costs and time spent on the SOA process since there is no guidelines or regulations to govern matters such as disputes as to the conduct of creditors’ meetings, powers of the chairman and adjudication on the proof of debts.

Finally, it is noted that a financially distressed private company seeking a reprieve in the use of SOA may be hampered by the costs, complexity and length of time taken due to the intensive involvement of the court. The remedy for that include the streamlining of certain procedures especially those pertaining to creditors’ meetings and the introduction of a short term automatic moratorium as suggested earlier. The consensus on those factors as to costs, complexity and time consumption in affecting the SOA have been observed by both academics and non-academics such as legal practitioners in the jurisdictions of the UK, Australia, etc.

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251 Section 368(2)(d) of the CA 2016.
252 The purpose of a RO in SOA is to afford protection to the scheme companies and its assets from pending suits filed by its creditors by restraining those proceedings including winding up except with leave of court, while it is engaged in the process of formulating and effecting a SOA for the benefit of its creditors.
253 CD No. 10 (n 4) 25 [1.7 (iii)].
254 See text to n 134–138.
255 Azmi and Abd Razak (n 1) 645. See also Cork Report (n 6) 415; Payne (n 7) 188.
256 Hugh Lyons and John Tillman, ‘Fair Treatment in insolvency compromises’ (2007) 7 JIBFL 477. See also Payne (n 7) 188 footnote 51; Goode (n 230) 28; O’Dea, et al (n 109) 5; Christian Pilkington, Schemes of Arrangement in Corporate Structuring (Sweet & Maxwell, 2013) 11.
and Singapore, with laws having close similarities to that in Malaysia. Likewise, the same opinion is shared in Malaysia.

In conclusion, this paper argues that the SOA may be a viable corporate rescue tool for financially distressed private companies especially where the CVA and JM are not applicable. In addition, it may in spite of the availability of those two corporate rescue mechanisms be a useful addition to the arsenal of corporate rescue tools if certain enhancements as enumerated above were to be introduced into the SOA law.

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