

CORPORATE RESCUE MECHANISMS FOR CO-OPERATIVE SOCIETIES IN MALAYSIA: A PROPOSAL

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ABSTRACT

Business organisation's solvency status might shift to insolvency, thereby granting creditors the power to distribute assets of the debtor. For corporate entities governed by the Companies Act 2016, the statute offers various comprehensive corporate rescue mechanisms, such as Scheme of Arrangement (SA), Corporate Voluntary Agreement (CVA), and Judicial Management (JM), to help companies survive. However, there is no such rescue mechanism for co-operative society under the Co-operative Societies Act 1993. The absence of any similar mechanism has increased the vulnerability of co-operative societies in Malaysia when they are in a state of indebtedness. This article aims to explore the possibility of introducing a rescue mechanism for co-operative societies from being liquidated to promote their viability in Malaysia. This article employed a qualitative legal research method. Relevant legal documents, including textbooks, statutes and case law, were analysed using the content analysis approach. It is submitted that proposing corporate rescue mechanisms for co-operative societies in Malaysia falls under the principle of public interest. The implementation of these new rescue mechanisms is expected to enhance the appeal of co-operative societies

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in Malaysia to potential investors and enable them to remain competitive in the marketplace.

Keywords: Co-Operative Society, Corporate Rescue Mechanism, Co-operative Societies Act 1993, Insolvency Law.

MEKANISME PENYELAMATAN KORPORAT UNTUK KOPERASI DI MALAYSIA: SATU CADANGAN

ABSTRAK

Status kewangan sesebuah organisasi perniagaan itu mungkin beralih kepada insolvensi, di mana ia memberikan hak kepada pemiutang kuasa untuk mengagihkan asset penghutang. Bagi entiti korporat yang ditadbir oleh Akta Syarikat 2016, akta tersebut telah menawarkan pelbagai mekanisme penyelamatan korporat yang komprehensif, seperti Skim Pengaturan, Perjanjian Sukarela Korporat (CVA) dan Pengurusan Kehakiman (JM), untuk membantu syarikat bertahan. Walaubagaimanapun, tiada mekanisme penyelamat yang diperuntukkan kepada koperasi di bawah Akta Koperasi 1993. Ketiadaan mekanisme yang serupa telah meningkatkan kelemahan koperasi di Malaysia apabila mereka berada dalam keadaan berhutang. Makalah ini bertujuan untuk meneroka kebarangkalian dalam memperkenalkan mekanisme penyelamatan untuk koperasi daripada terus dibubarkan untuk mempromosikan daya maju mereka di Malaysia. Makalah ini menggunakan penyelidikan undang-undang kualitatif. Dokumen undang-undang yang berkaitan, termasuk buku teks, statut dan kes undang-undang, dianalisis menggunakan pendekatan analisis kandungan. Ia telah didapati bahawa, adalah menjadi satu keperluan di bawah prinsip kepentingan awam untuk memperkenalkan mekanisme penyelamatan korporat kepada operasi di Malaysia. Melalui mekanisme penyelamatan korporat ini, koperasi di Malaysia akan menjadi lebih menarik kepada pelabur dan lebih berdayasaing di pasaran.

Kata Kunci: Koperasi, Mekanisme Penyelamatan Korporat, Akta Koperasi 1993, Undang-Undang Insolvensi.

INTRODUCTION

The concept of co-operative highlights an autonomous association of people who voluntarily cooperate for their mutual benefit, including economic and cultural benefit *via* a structured business-like organisation. The nature of a co-operative society is different from other types of business entities, whereby it does not only emphasise profit but also focuses on providing service that the market cannot or fails to provide, at a minimum price.²

In an increasingly competitive global market, a co-operative as a business organisation provides a unique instrument to the community in attaining one or more economic objectives regardless of its style, size, location, or purpose. The goals encompassed in these objectives consist of attaining economies of scale, augmenting bargaining power with other businesses, procuring in large quantities to achieve reduced prices, obtaining products or services that would be otherwise inaccessible, accessing or broadening market opportunities, improving product quality, obtaining credit from financial institutions, and augmenting revenue.³

The primary objective of establishing a co-operative is to maximise economic returns for the benefit of the members. As a result, any social benefit derived from the co-operative business activities will be shared equally among members. Therefore, the nature and characteristics of a co-operative society are always associated with the concept of public interest. Apart from the responsibility to the members in general, the management of a co-operative is also accountable to other stakeholders. This public interest value has been accepted as one of the

²Norman Mohd Saleh and Noradiva Hamzah, "Co-operative Governance and the Public Interest: Between Control and Autonomy," *JurnalPengurusan* 51 (2017): 209-224.

³Wahyuningtyas, Ratri, GanjarDisastra, and RisrisRismayani, "Toward Cooperative Competitiveness for Community Development in Economic Society 5.0," *Journal of Enterprising Communities: People and Places in the Global Economy* 17, no. 3 (2023): 594-620; see also Nazura Abdul Manap and Pardis Tehrani, "The Contribution of Cooperative Law to Economic Development in Malaysia," *Asian Social Science* 10, no. 15 (2014): 283-290.

pillars of co-operative societies worldwide.⁴ The operation of a co-operative society is an essential tool for combating social exclusion when it can provide jobs for local communities, increase the level of income, and combat poverty.⁵

As a corporate business entity, co-operative societies in Malaysia also faces market turbulence which might lead to liquidation. Corporate rescue mechanisms were introduced in the Malaysian Companies Act 2016 to save the companies from being liquidated, ensuring the sustainability of the organisation. Among the mechanisms are judicial management (JM), and scheme of arrangement (SA). Unfortunately, such provisional mechanisms do not exist for co-operative societies.

This article aims to highlight the need for a corporate rescue mechanism as a substitute for liquidation, in order to enhance the survivability of co-operative societies in Malaysia.

Generally, research in law can be divided into two broad categories, they are: theoretical or known as doctrinal or pure legal research, and second is social legal research.⁶ Nevertheless, this article adopts a doctrinal legal research approach, which involves the analysis of legal provisions and theories related to insolvency. The primary sources for this research are statutes, including the Co-operative Societies Act 1993, Malaysia Co-operative Societies Commission Act 2007, the Companies Act 2016 and the Bankruptcy Act 1967.

Additionally, textbooks and journals serve as secondary sources for the analysis. The aim of this research is to explore the feasibility of introducing corporate rescue mechanisms for co-operative societies in Malaysia.

⁴Sonja Novkovic, "Co-operative Business: The Role of Co-Operative Principles and Values," *Journal of Co-operative Studies* 39, no. 1 (2006): 5-16.

⁵Mark Levin, "The Promotion of Cooperatives," *ILO Cooperative Branch*, 2022 last modified 8 July 2023, <https://www.ica.coop/europe/ra2002/speech>.

⁶Hunud Abia Kadouf, Umar Aimhanosi Oseini, and Ainul Jaria Maidin, "Legal Research at Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia: Trends and Policies," *IIUM Law Journal*, 18, no. 1 (2010): 1-31,

CO-OPERATIVE SOCIETIES IN MALAYSIA

In Malaysia, as of 2020, there were 14626 co-operatives across the nation with more than six million members.⁷ Following the independence of Malaya in 1957, the number of registered co-operative societies grew to 3000 with membership of more than 50000, as a result of the government policy to promote agriculture industries.⁸ Today, the government anticipates that co-operative societies will become the third critical engine of economic growth in the country, behind the public and private sectors.

Therefore, the role of co-operatives is no longer focused on those who are living in rural areas but has been expanded to other geographical areas and is actively involved in various economic sectors such as finance, housing, consumerism, and industry.⁹ It was reported that in 2019, the co-operative society as a business organisation in Malaysia had gained more than RM 37.8 million in profit, from various economic sectors.¹⁰

As the main objective of the co-operative is to fulfill the social economy agenda, many development plans have been introduced to promote the movement and sustainability of the co-operative in Malaysia. For instance, the National Co-operative Policy 2002-2010 was re-developed and continued with the Second National Co-operative Policy 2011-2020, followed by National Co-operative

⁷ Suruhanjaya Koperasi Malaysia, *Laporan Ekonomi 2020*, accessed 8 July 2023, <https://www.skm.gov.my/images/flippingbook/laporan-ekonomi/2020/SKM%20-%20Buku%20Laporan%20Ekonomi%202020.pdf>.

⁸ J. M. Rana and Sten Dahl, "Perspective and Project Planning for Agricultural Cooperative Sector, Malaysia". *New Delhi: International Cooperative Alliance*, 1987.

⁹ Nurul Fadly Habidin, , Sharon Yong Yee Ong, Tuan Waheda Tuan Chik, Ummu Aiman Muhamad, and Nursyazwani Mohd Fuzi. "The Co-Operative Development Ecosystem Model for Micro-Cooperatives in Malaysia." *The Interdisciplinary of Management, Economic and Social Research* (2020): 1.

¹⁰ Suruhanjaya Koperasi Malaysia, *Laporan Ekonomi Sektor Koperasi Tahun 2019*, last access 8 July 2023 <https://www.skm.gov.my/index.php/my/pusat-media/penerbitan/laporan-ekonomi-sektor-koperasi-2019/book/63/1?page=1>.

Transformation 2021-2025, which has been embedded with six thrust strategies. Among them are strengthening the co-operative operation through effective supervision and enforcement and increasing people's confidence in the co-operative movement.¹¹

LEGAL FRAMEWORK FOR CO-OPERATIVE SOCIETIES IN MALAYSIA

Historically, the development of c-operative societies in Malaysia began in 1922 with the introduction of the Federated Malay States Council's Co-operative Societies Enactment. This was followed by the Co-operative Societies Act 1948 before being replaced by the Co-operative Societies Act 1993.

Today, the operation of c-operative societies is supervised by the Malaysian Commission of Co-operatives as a regulatory body and governed by two main statutes; Co-operative Societies Act 1993 and Malaysia Co-operative Societies Commission Act 2007. Several amendments have been made to the statutes to strengthen the operation of co-operative societies in Malaysia.

For example, the Co-operative Regulation 1995 was introduced to promote good governance practices, empowerment of members and allow the establishment of the co-operative subsidiary. The latest amendment was made in 2021 involving nine provisions in the 1993 Act. The purpose of this amendment is to promote and encourage the development of co-operative societies in Malaysia in line with the National Co-operative Transformation Plan 2021-2025.

Furthermore, co-operative societies in Malaysia are operating as corporate business entity similar to other corporate business entities such as company and limited liability partnership.

Section 9 of Co-operatives Societies Act states:

“The registration of a society shall render it a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary for the purposes for which it is constituted.”

¹¹Suruhanjaya Koperasi Malaysia, *Laporan Ekonomi 2020*.

For the formation and operation of a co-operative society, a minimum of 20 individuals who share a common interest are required, except for special cases under section 8 of the Act, where the commission may grant permission for registration if the co-operative comprises five people.

After its incorporation, a co-operative society is considered a body corporate that functions as a company.¹² The liability of its members is limited, and it may also continue to exist in the event of bankruptcy, death, or change of membership.¹³ Furthermore, as a corporate entity, a co-operative society is granted the ability to initiate legal proceedings and be subject to legal action under its own name.¹⁴ Additionally, due to the corporate structure, co-operative societies have more intricate operations than unincorporated business organisation.¹⁵

The dissolution of a co-operative society can only be carried out upon an application made to the commission by three-fourths of its members, subject to inspection by the Registrar General.¹⁶

Several legal cases have affirmed the status of a co-operative society as a body corporate possessing legal power. In the case of *Uda Holdings Berhad v Koperasi Pasaraya Malaysia Berhad*,¹⁷ the court ruled that as a co-operative society, the *koperasi* had perpetual succession and was considered a body corporate. As such, it was anticipated to conduct its business activities permanently.

The case of *Tunku Dato Seri Shahabudin bin Tunku Besar Burhanuddin & Ors v Lee Tak Suan & Anor*,¹⁸ discussed the application of derivative action by co-operative society. The court in the case held that section 9 of the Co-operative Societies Act 1993

¹² Section 9, Co-operative Societies Act 1993.

¹³ Section 71, Co-operative Societies Act 1993.

¹⁴ Khairat Oluwakemi Akanbi, "The Legal Framework for Corporate Liability for Homicide: The Experience in Nigeria and the United Kingdom," *IIUM Law Journal* 22, no. 1 (2014): 115-136,

¹⁵ Zuhairah Ariff Abd Ghadas and Norlia Ibrahim, "Right of Participation in Business as Matrimonial Property: The Malaysian Experience," *IIUM Law Journal* 15, no. 1 (2007): 85-99.

¹⁶ Section 71(1)(b), Co-operative Societies Act 1993.

¹⁷ [2007] MLJU 434.

¹⁸ [2008] 2 MLJ 700.

clearly confers upon a co-operative society registered under the Act the capacity of a body corporate and legal entity to sue or be sued by its name, in the same manner as provided under section 16(5) of the Companies Act 1965 in relation to a company.

Despite having such power, it is to be noted that a co-operative society's autonomy is not absolute. In certain circumstances, the co-operative is still subject to approval by the Malaysian Co-operative Societies Commission, which acts as a regulatory body. This is clearly mentioned in Malaysia Co-operative Societies Commission Act 2007. Section 23 of the Act states:

“The Commission shall have all powers, functions and duties assigned to him under this Act, Co-operatives Act 1993 or any other written law, and without prejudice to the foregoing, the Commission must also have the following functions:

...

(b) to be responsible in monitoring, supervising and regulate co-operatives and the co-operative sector.”

INSOLVENCY UNDER CO-OPERATIVE SOCIETIES ACT 1993

Similar to a company, any co-operative society which is facing financial distress can also be dissolved and liquidated. However, the Co-operative Societies Act 1993 does not explicitly mention the right of a creditor to petition for the winding-up of a co-operative. Nevertheless, section 68 of the Act states that upon the creditor's request, the Commission is authorised to conduct investigations into the co-operative's accounts or other properties belonging to the co-operative and its subsidiaries. Such an application is subject to requirements under subsection 2 of the provision which requires a creditor to:

“(a) satisfies the Commission that the debt is a sum then due and that he has demanded payment thereof and has not received satisfaction within reasonable time; and

(b) deposits with the Commission such sum as the Commission may require as security for the costs of such inspection.”

Section 69 pertains to the Commission's authority to halt the functioning of a co-operative society in instances where it has been

established that such operation is not in the interest of its members or the public, the society is insolvent, has limited capacity to pay off its debts, or has violated any relevant laws including the Co-operative Societies Act 1993, Malaysia Co-operative Societies Commission Act 2007 or any other applicable regulations.

Furthermore, section 71 of the Co-operative Societies Act 1993 empowers the Commissioner to issue an order for the dissolution of a co-operative society if he deems it necessary.

Upon the dissolution of a co-operative society, a liquidator shall be appointed to manage the process of the liquidation (section 74, Co-operative Societies Act 1993). The power of the liquidator has been clearly mentioned in section 75 of the Act, but such powers are subject to the power of the Commission to control the liquidator.¹⁹

Despite the fact that the authority to revoke and liquidate lies within the Commissioner's jurisdiction, this does not prevent a creditor from pursuing a legal action against a debtor in court for the purposes of recovering outstanding debts and seeking compensation for damages.

The case of *Bank Kerjasama Rakyat Malaysia v Koperasi Belia Islam Malaysia Bhd.*²⁰ involved a question of whether the civil court had the jurisdiction to hear a dispute between co-operative societies, despite section 82 of the Co-operative Societies Act 1993 requiring such disputes to be brought before the Commission. The court determined that while the provision expressly states that disputes between co-operatives should be resolved before the Commission, it does not prevent the court from hearing the case where the plaintiff and defendant have a creditor-debtor relationship.

In the context of co-operative societies, creditors are not entitled to petition for the winding up due to the debtor's default payment of debts. Instead, they are only allowed to request an investigation by the Commission as specified in section 68 of the Act, and take a legal action against the co-operative society in a civil court.

¹⁹Section 76, Co-operative Societies Act 1993.

²⁰ [2017] 1 LNS 1682.

RESCUE MECHANISMS UNDER MALAYSIAN INSOLVENCY LAW

Over the years, numerous trends and effective approaches have emerged in the management of insolvency for commercial and corporate entities, leading many countries to enact laws aimed at streamlining their processes. These countries have achieved this by adopting the internationally recognised standards for creditor rights and insolvency, which were developed by the World Bank and the United Nations Commission on International Trade Law (UNCITRAL).²¹ Majority of these best practices involve establishing specialised courts, creating legislative frameworks for out-of-court settlements, involving creditors in decision-making processes via statutory provisions, enforcing strict regulations on insolvency practitioners, and imposing time limits on insolvency proceedings.²²

In Malaysia, there are two main statutes that govern insolvency: the Insolvency Act 1967 (formerly known as the Bankruptcy Act 1967) and the Companies Act 2016, which is supplemented by the Company Regulations 2017 and the Companies Winding Up Rules 2017. The Insolvency Act is specifically designed to apply to individuals, while the Companies Act 2016 is intended to govern the insolvency of companies.

It is worth noting that both legal frameworks have undergone significant amendments to better align with the current circumstances surrounding bankruptcy. For example, the Insolvency Act 1967 has been updated in several ways, including the change of name from the Bankruptcy Act and the amendment of sections 2A to 2Q to introduce voluntary arrangements as a means of rescue for individuals.

²¹ S.Khan., Olivia, T., & Bidin, A. "Recent Developments of Insolvency and Restructuring in Malaysia". *Australian J. Basic Appl. Sci*, No 8 (1) (2014): 508-512.

²² Chen, Thim Wai, Ruzita Azmi, and Rohana Abdul Rahman. "Paradigm Shift from A Liquidation Culture To A Corporate Rescue Culture In Malaysia: A Legal Review," *International Insolvency Review* 29, no. 2 (2020): 181-203; See also Shaari, Sharija Che, Ida Shafinaz Mohamed Kamil, and Junaidah Zeno. "Mayday! Mayday! Mayday! Saving Companies in Financial Distress," *Accounting Centre Research Series (Volume 3, 2021)*: 12.

Additionally, the threshold for bankruptcy was raised to RM50,000.00 via section 5. Similarly, the Companies Act 2016 provides a corporate rescue mechanism for companies known as judicial management and scheme of arrangement and corporate voluntary arrangement to better facilitate their financial recovery.

Rescue mechanisms are essentially interventions aimed at preventing the liquidation or bankruptcy of an individual or company and avoiding the ultimate failure of the entity.²³ Under the Insolvency Act 1967, sections 2A to 2Q provide individuals with the right to propose their own voluntary arrangement plan to creditors before bankruptcy proceedings commence. As for the Companies Act 2016, there are several rescue mechanisms available, including Schemes of Arrangement (SA), Voluntary Arrangements (VA), and Judicial Management (JM), collectively known as “corporate rescue mechanisms.”²⁴ These mechanisms are designed to preserve the economic value of the company and ensure its continued operation for the benefit of all stakeholders.²⁵

INSOLVENCY THEORIES

The primary purpose of insolvency law is to establish a comprehensive framework that maximises the value of a debtor’s assets while protecting the rights of creditors and promoting economic stability.²⁶ Two distinct schools of thought exist within the insolvency law realm: the procedural school and the traditional school.

²³ Alice Belcher, *Corporate Rescue: A Conceptual Approach to Insolvency Law* (London: Sweet & Maxwell, 1997), 155-156.

²⁴ Sections 394-430, Companies Act 2016.

²⁵ Chen, Thim Wai, Ruzita Azmi, and Rohana Abdul Rahman. “Theories of Corporate Insolvency: A Philosophical Analysis of the Corporate Rescue Mechanisms under the Companies Act 2016,” *UUM Journal of Legal Studies (UUMJLS)*, 12(02), (2021): 167-202.

²⁶ Gita Randhkrishna, *Insolvency Law: Bankruptcy and Companies Winding Up* (Ampang: CLJ Publication, 2020).

Procedural Theory

According to the Procedural theory school of thought, insolvency's primary objective is to prioritise the interests of the creditor, with a focus on addressing issues that arise during the insolvency process. Jackson introduced this theory in 1982, expanding the function of insolvency laws to respect the priority distribution of the debtor's assets to both secured and unsecured creditors.²⁷

He argued that insolvency law should be concerned with resolving the affairs of those with a contractual relationship with the company, rather than fulfilling a communitarian mandate. Baird later explained that this theory was favoured by those who believed in distributing the debtor's assets according to approved procedures between the debtor and the secured creditor.²⁸ This theory was seen as first manifested by the English court in the case of *Re David Lloyd & Co*,²⁹ where Jessen MR stated:

“This is because the subject matter of the security is not available to claims by the general body of unsecured creditors. Here, the liquidator cannot ask the secured creditor to surrender his security unless the secured creditor votes in respect of the whole of his debt and not the balance due from the company after having assessed the value of the security. If the amount realised from the sale of the security is insufficient to cover the whole of the secured debt, the secured creditor joins the general body of unsecured creditors in proving the balance.”

The principle of prioritising the rights of secured creditors was also upheld by the Malaysian courts, as seen in the case of *Emporium Jaya (Bentong) Sdn Bhd v Emporium Jaya Jerantut Sdn Bhd*.³⁰ The court ruled that the secured creditor's rights should be given precedence during the liquidation of the company.

²⁷ Thomas H. Jackson, “Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors’ Bargain,” *The Yale Law Journal* 91, no. 5 (1982): 857-907.

²⁸ Douglas G. Baird, “Bankruptcy’s Uncontested Axioms,” *The Yale Law Journal* 108, no. 3 (1998): 573-599.

²⁹ (1877) 6 Ch D 339 at pa 343.

³⁰ (2002) 1 MLJ 182.

Traditionalist Theory

On the other hand, the traditional school of thought takes a more inclusive approach that aims to protect the interests of all stakeholders involved in the insolvency process. According to this theory, the insolvency law should consider the interests of all parties and not just focus solely on the creditors.³¹ The traditional school of thought emphasises the importance of rehabilitating the company and recognises the dynamic potential of financially distressed corporations. This potential extends beyond just economic interests to include social, political, personal, and moral interests as well.³² Traditionalists argue that the insolvency law should not be used exclusively as a tool for creditors to pursue their own interests, and that there is a need for legislation to find alternative solutions in the liquidation process that take into consideration the interests of other parties, such as employees and the community.³³ Millet J emphasised the importance of a corporation's role in the community and the effect of its liquidation in the case of *Re Barlow Clowes Gild Manager Ltd*.

“The liquidation of an insolvent company can affect many thousand, even tens thousands of innocent people ...in the case of major trading company it can affect its customers and supplier and the livelihood of many thousands of persons employed by other companies whose viability is threatened by the collapse of the company in liquidation. An insolvent liquidation cannot be dismissed as “just a case about money”³⁴

In the Malaysian case of *ReLeadmont Development Sdn Bhd*,³⁵ the High Court's consideration of the public or societal interest is evident in their acceptance of the traditionalist theory during the decision-making process for the company's judicial management.

³¹ Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles* (Cambridge: Cambridge University Press, 2017).

³²Donald R. Korobkin, “Rehabilitating Values: A Jurisprudence of Bankruptcy,” *Colum. L. Rev.* 91 (1991): 717.

³³Karen Gross, “Taking Community Interests into Account in Bankruptcy: An Essay” *Wash. ULQ* 72 (1994): 1031.

³⁴ (1991) BCLC 750, p 760

³⁵ [2018] 10 CLJ 412

CORPORATE RESCUE MECHANISMS UNDER THE COMPANIES ACT 2016

In addition to the corporate voluntary arrangement, the Companies Act 2016 offers an alternative to liquidation called the corporate rescue mechanism. This mechanism is designed to help financially struggling companies recover their business viability by providing options other than liquidation. Furthermore, it may increase the value of the company's assets, which helps to secure the creditor's debts.³⁶ However, the implementation of this rescue mechanism requires the approval of majority of the creditors.

As previously mentioned, the Companies Act 2016 allows a creditor to initiate winding up proceedings if the company fails to fulfil its debt obligations under sections 433 and 464 of the Act. However, despite these provisions, the Companies Act 2016 also provides various corporate rescue mechanisms to assist financially distressed companies while simultaneously safeguarding the rights of creditors.

Scheme of Arrangement

Similar to an individual, a company may utilise the scheme of arrangement to restructure its debts, but the scope of the proposal is not limited to debt restructuring alone. It may encompass modifying members' rights, reorganising the company, merging with another entity, or reconstructing share capital.³⁷

To initiate this scheme, the company must first obtain the court's consent to convene a creditor's meeting.³⁸ Once the meeting is held, the arrangement resolution must be presented to the court for approval and enforcement, binding all parties involved during the rehabilitation process. Additionally, the company must apply to the

³⁶ NorzianaLokman, and Sarina Othman. "Rehabilitating Ailing Malaysia Companies Using the New Corporate Rescue Mechanism." *Journal of Administrative Science* 17, no. 1 (2020): 96-104.

³⁷ NorzianaLokman, and Sarina Othman. "Rehabilitating Ailing Malaysia Companies." 96-104.

³⁸ Section 366 Companies Act 2016

court for a moratorium to restrict creditors from pursuing debt enforcement actions.

Several decided cases have discussed the entitlement to a scheme of arrangement. In the case of *Intrakota Komposit Sdn Bhd & Anor v Sogelease Advance (M) Sdn Bhd*,³⁹ the High Court determined that even if the applicant companies were insolvent, they still had the right to seek a scheme of arrangement. Conversely, in *Sri Hartamas Development Sdn Bhd v MBF Finance*,⁴⁰ the High Court denied the application for a scheme of arrangement by an insolvent company, citing reasons related to commercial morality.

In the case of *Kamuja Corporation Sdn. Bhd v Aras Dimensi Sdn. Bhd*,⁴¹ the court addressed the question of whether a scheme could be approved after liquidation. The High Court ruled that prior to the commencement of winding-up, the company, its creditors, or members could propose a scheme meeting. However, once the winding-up process had begun, the application for a scheme of arrangement should be made by the liquidator.

Corporate Voluntary Arrangement

The Corporate Voluntary Arrangement is intended to facilitate the company's rehabilitation process with minimal court involvement, but it must secure approval of 75 percent of its creditors. The company must aim to complete its rehabilitation within 28 to 60 days, during which it is granted a moratorium, effectively suspending any legal actions by creditors against the company.

In this revised mechanism, the initiation of a corporate voluntary arrangement must come from either the director, liquidator, or official receiver of the company. Additionally, an insolvency practitioner's support is required for the application to ensure its feasibility. The proposal can be implemented without the need for an additional court order. By restructuring debt with creditors, businesses can effectively manage costs as the related legal fees are significantly reduced.

³⁹ [2004] 8 CLJ 276

⁴⁰ [1990]1 CLJ 827

⁴¹ [2015] 1 LNE, 189

Section 395 of the Companies Act 2016 lists the types of companies to which the Scheme of Arrangement is not applicable, including public companies, licensed financial institutions or designated payment system operators regulated under the Central Bank of Malaysia laws, and companies subject to the Capital Market and Services Act 2007 or those that create a charge over their property or undertaking.

Judicial Management

The judicial management scheme allows companies to restructure their debts and management for sustainability. During this recovery process, companies are entitled to certain benefits, such as a moratorium, which protects them from creditor action. This scheme is governed by sections 403 to 430 and the Ninth Schedule of the Companies Act 2016.

Under section 405 of the Companies Act 2016, the court can only issue an order for judicial management if it determines that the company is or will be unable to pay its debts and that the order would likely achieve one of three purposes: (i) to keep the company or part of it operating as a going concern, (ii) to approve a compromise or arrangement under section 366 of the Act, or (iii) to realise the company's assets more advantageous than through liquidation.

Horffman J in the case of *Re Haris Simon Construction's*⁴² emphasised the principles outlined in this provision, stating that if the court believes there is a possibility of achieving one or more of the objectives or purposes, then the test for determining whether judicial management should be appointed is likely to be met.

Once the court approves the order, a judicial manager, who must be a qualified liquidation practitioner, will be assigned to assume full control of the management. The judicial manager has the option to seek relief from their responsibilities if they believe that the objective has been achieved or can be achieved. Similar to a corporate voluntary arrangement, the company will receive a mandatory six-month period of protection (moratorium) from creditors when the application is submitted.

⁴² [1989] BCLC 202

Under section 409(1)(a) of the Companies Act 2016, the court has the discretion to deny the application for judicial management in the following circumstances:

- (a) If a receiver or receiver manager is to be appointed for the entire or a significant portion of the company's assets.
- (b) If secured creditors oppose judicial management .

Moreover, any individual opposing the application for judicial management has the right to file and serve an affidavit within seven days from the date of the hearing of the application.⁴³

Section 410 of the Companies Act 2016 addresses the concept of a moratorium, which entitles the company to an automatic moratorium upon application. Once the order is granted, the company will benefit from a 180-day moratorium, which can be extended for an additional 180 days. Consequently, throughout this timeframe, the company will be safeguarded against any legal proceedings.

Regrettably, while a co-operative society is considered a corporate entity, it is not eligible for corporate rescue mechanisms. As a result, a financially struggling co-operative society in Malaysia may not have the opportunity to continue operating or recover. Therefore, the aim of this article is to investigate the feasibility of implementing a corporate rescue mechanism for co-operative societies as an alternative to winding up, which is crucial for promoting their sustainability in Malaysia.

FINDINGS AND DISCUSSIONS

The corporate rescue mechanisms in Malaysia have been adopted since 2016 from the United Kingdom and Singapore through the Companies Act 2016. Through corporate rescue mechanisms, insolvency rules recognise that not all insolvent businesses should be liquidated unless they are no longer commercially viable.⁴⁴ It is believed that, through this new paradigm, companies could be more sustainable even during an economic crisis.

⁴³ r 15 (1) of the Companies (Corporate Rescue Mechanisms) Rules 2018

⁴⁴ Muir Hunter, "The Nature and Functions of a Rescue Culture," *Com. LJ* 104 (1999): 426.

Developing comprehensive and efficient corporate rescue models is a complex undertaking that requires the government to carefully consider various factors that are suitable for the local context. The government must take into account factors such as the level of involvement of creditors, the impact of foreign investments, the role of directors and liquidators, and the extent of government or court intervention before implementing rescue mechanisms.⁴⁵ In addition, the objectives of insolvency law in the relevant jurisdiction must be taken into account.⁴⁶ Therefore, the government plays a crucial role in determining how the model should be executed for any corporation.

Despite being in a new phase of promoting corporate rescue mechanisms, Malaysia has taken a comprehensive approach that considers the interests of all parties involved. The government has made it clear that there will be no extension to the moratorium if the company is unable to be rehabilitated within the specified period. If this occurs, the company will proceed with the liquidation process.⁴⁷ This is done to prevent any misconduct and safeguard the creditors' interests in relation to their debts.

Upon examining the corporate restructuring schemes mentioned above, it becomes apparent that while they require approval from the majority of creditors, they also leave ample room for public interest considerations, whether directly or indirectly.⁴⁸ For instance, a

⁴⁵ Effendy Othman, "Corporate Rescue Mechanisms under Division 8 of the Companies Act 2016 comes into operation" ZICO Law. Last access 8 July 2023, <https://zico.group/wp-content/uploads/2018/04/ZICO-Law-Malaysia-Legal-Alert-Corporate-Rescue-Mechanisms-under-Division-8-of-the-Companies-Act-2016-comes-int>.

⁴⁶ Andrew Godwin, "Corporate Rescue in Asia - Trends and Challenges," *Sydney Law Review*, 34, no. 1 (2012): 163-187.

⁴⁷ Mohd Rashid Khan & Wan Ain Nabilah, *Liquidation under the Companies Act 2016: Overview & Opportunities*, access 8 July 2023, <https://www.azmilaw.com/insights/liquidation-under-the-companies-act-2016-overview-opportunities>. see also Lokman, Norziana, and Sarina Othman. "Rehabilitating Ailing Malaysia Companies." 96-104

⁴⁸ Chen, Thim Wai, Ruzita Azmi, and Rohana Abdul Rahman. "Theories of Corporate Insolvency: A Philosophical Analysis of the Corporate Rescue Mechanisms under the Companies Act 2016." *UUM Journal of Legal Studies (UUMJLS)* 12, no. 02 (2021): 167-202.

corporate voluntary arrangement indirectly benefits the company by providing a platform for restructuring and ensuring its survival. This can instill hope in employees and all other stakeholders involved. On the other hand, in contrast to corporate voluntary arrangements, judicial management involves active court involvement in insolvency processes to safeguard public interest.

As demonstrated in the case of *Re Leadmont Development Sdn Bhd*,⁴⁹ the Kuala Lumpur High Court has affirmed its authority under section 405(5)(a) of the Companies Act 2016 to grant a judicial management order when it deems necessary in the public interest. In summary, the above corporate rescue mechanisms prioritise the principle of public interest, particularly when the operations of the company have a significant impact on society as a whole.

In the English case of *Re Walter L Jacob Ltd*,⁵⁰ Nicholas LJ delivered a ruling stating that the court must conduct a balancing act by thoroughly evaluating all available evidence. Even if the company has been involved in a significant breach or fraudulent activities, the court must prioritise safeguarding the interests of investors and potential creditors.

The Singapore High Court, in the case of *Re Cosmotron Electronics (Singapore) Pte Ltd*, made a ruling that:

“the court has the power (if it considers that public interest so requires) to make judicial management order even though the making of such order is unlikely to achieve any of the purpose which, by virtue of section 277B(1), are pre requisite to the taking of such order. Such power, therefore, should not be lightly exercised even if it may be in the public interest to do so. The court must be of the view that the public interest so requires; it should not only opportune but only importunate that the power be exercised. Thus, even assuming, as the petitioner’s counsel contended, that it is in the public interest to rescue companies with a decent chance of survival, that alone is not enough.”⁵¹

⁴⁹ [2018] 10 CLJ 412.

⁵⁰ (1989) 5 BCC 244 (CA)

⁵¹ [1989] SLR 251

The court rejected the application for judicial management in the case of *Re Bintan Lagoon Resort*,⁵² as the petitioners were unable to demonstrate to the court that it was necessary in the public interest.

THE CONCEPT OF “PUBLIC INTEREST”

The concept of public interest is not new. It was first described as a common interest⁵³ and later as a public good by Locke,⁵⁴ and it has always been associated with political philosophy.

According to John Dewey, the notion of public interest involves moving from private interests to the shared interests of the public.⁵⁵ This concept is closely tied to the state’s authority to establish policies that reflect society’s fundamental values.

Dewey further explained that the public interest concept is rooted in the collective principle of meeting the needs of communities affected by decisions made on their behalf.⁵⁶ Additionally, the concept of public interest implies that societal participation is essential in determining what constitutes a good life.

The application of public interest in bankruptcy law has triggered a debate among legal scholars. According to Gross, the concept of the public interest should be considered in bankruptcy proceedings without ignoring the rights of creditors.⁵⁷

The importance of the public interest in the bankruptcy process has also been highlighted in the Cork Report (UK):

“The effects of insolvency are not limited to the private interest of the insolvent and his creditor, but that other interest of society or other groups in society are vitally affected by the insolvency and its

⁵² [2005] 4 SLR 336

⁵³ Ernest Barker, *The Politics of Aristotle* (Oxford: Oxford University Press, 1962).

⁵⁴ John Locke, *Second Treatise of Government* (C.B Macpherson ed, 2005th edn, Hacket Classic, 1689), 143.

⁵⁵ John Dewey, *The Public and Its Problem* (Chicago: Swallow Press, 1954) 214.

⁵⁶ Dewey, *The Public*, 214.

⁵⁷ Gross, “Taking Community Interests,” 1031.

outcomes, and to ensure that these public interests are recognised and safeguarded.”⁵⁸

Insolvency is not separate from society, and many events that occur as a result of an insolvency can have far-reaching consequences and affect the public interest. Insolvency can prejudice communities and harm society’s fundamental values and structures, such as commercial morality in trade, directly or indirectly.⁵⁹

In contrast to the opinions above, it has been contended that insolvency law is a private matter between the debtor and creditor, whereby it involves a group of people working together to distribute assets to creditors based on their pre-liquidation or pre-bankruptcy entitlements.⁶⁰ On top of that, it is also dangerous to consider the public interest in insolvency processes due to their difficulty in measuring and quantifying the existing economic model.⁶¹

The emergence of co-operative societies has made a notable contribution to the development of nations. Unlike conventional business organisations that prioritise personal interests as their primary objective, co-operatives engage in business activities while also promoting community development.

To date, the movement of the co-operative society in Malaysia involves many industrial sectors. It was reported that in 2021 there were more than 10,000 registered co-operatives involving several sectors such as banking, agriculture, transportation, and servicing.⁶² It is important to note that co-operative societies are also subjected to

⁵⁸ *Report of the Review Committee on Insolvency Law and Practice* (1982). See also Chen, Thim Wai, Ruzita Azmi, and Rohana Abdul Rahman. "Theories of Corporate Insolvency", 167-202.

⁵⁹ Godwin, "Corporate Rescue", 163-187.

⁶⁰ Eugenio Vaccari, "Broken Companies or Broken System? Charting The English Insolvency Valuation Framework in Search for Fairness." *Journal of International Banking Law and Regulation* 35, no. 4 (2020): 135-147.

⁶¹ Chen, Thim Wai, Ruzita Azmi, and Rohana Abdul Rahman. "Theories of Corporate Insolvency,". See also Barry S. Schermer, "Response to Professor Gross: Taking the Interests of the Community into Account in Bankruptcy-A Modern-Day Tale of Belling the Cat," *Wash. ULQ* 72 (1994): 1049.

⁶² Suruhanjaya Koperasi Malaysia, "Laporan Ekonomi 2020."

financial distress which can lead to liquidation. This scenario will threaten the national agenda and public interest. Therefore, a special corporate rescue mechanism model should be developed to save those co-operative organisations.

It is believed that the proposed rescue model should be in line with the principles and characteristics of the co-operative itself. Based on the literature above, the combination of traditional and procedural theories is suitable to become the basic idea for the proposal. Through traditional theory, all stakeholders' interest, particularly community and public interest, will be given priority before the liquidation process takes place.

Despite this suggestion, the rights of creditors should not be neglected. Although public interest will be given priority in this new corporate rescue mechanism, some space should also be given to the creditors to involve themselves directly in the process.

The involvement of creditors is not only to secure their loan, but to enhance the spirit of togetherness among stakeholders in promoting social development through co-operative societies. This is in line with what has been contended by Gross,⁶³ whereby although the public interest could not be quantified or be measured into money it does not mean that they lack worth. Therefore, we need to consider the worth in both economic and non-economic value.

⁶³Karen Gross, "Taking Community Interests Into Account In Bankruptcy: An Essay." *Wash. ULQ* 72 (1994): 1031.

CONCLUSION

Based on the above discussion, by introducing corporate rescue mechanisms in the Companies Act 2016, it can be concluded that the development of Malaysia's insolvency law is influenced by traditionalist theory whereby the stakeholder interest is also taken into consideration before liquidation process is held.

Therefore, as one of the business entities, co-operative societies also participate in business activities to generate profit. The involvement of c-operatives in market activities is also subject to the economic motivation to operate. Similar to other corporate entities such as companies and limited liability partnerships, co-operative societies also face financial difficulties and management problems which might lead to the liquidation process.

The emergence of the corporate rescue mechanisms in Companies Act 2016 seems to give new hope for companies to sustain. Regarding co-operative societies, it is essential to implement a distinct model of corporate rescue mechanism that not only supports but also strengthens their day-to-day activities. This will ensure their sustainability and continued contribution to social development and the national agenda.

In order to identify the most suitable corporate rescue mechanism model for co-operative societies, a feasibility study must be conducted that takes into account the characteristics and objectives of the co-operative's establishment. To facilitate this, it is necessary to make significant amendments to the Co-operative Societies Act 1993, which should include specific provisions related to corporate rescue mechanisms.

Additionally, the powers of the tribunal should be revised to function similarly to a conventional court and actively participate in the rehabilitation process. The regulatory body responsible for overseeing co-operative societies in Malaysia, namely the Malaysian Co-operative Societies Commission must also be reformed to achieve this goal.