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The Role of Receivership in Malaysian Corporate Insolvency Framework

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ABSTRACT

UK and US legislators shows an inherent divide on the understanding of the purpose of insolvency law. US scholars agreed with corporate insolvency law's role in maximising value; while UK scholars concern itself with how value is distributed. We find this departure stems from the unique finance structure of two countries. Under Corporate Law Reform Committee's recommendation, two clarification of laws are made: (1) receivers now are agent of appointed company without fiduciary duties (2) appointment of liquidator does not vacate receiver's office. Receiver now can contract on behalf of the company without incurring liability. Receiver is generally perceived as a financial priest that administer the business's last rites. It is popular perception that receivers hold too much power. In contrary to general conception, we are against the case for receivership law reform. Rather, we argue that creditors and debtors should practice receivership with two aims: (1) to reduce monitoring cost of creditors, in turn reduce debt interest (2) to maximise the value of the company as a whole. Creditor's race to appoint receiver is a zero-sum game which benefits no one. Nash equilibrium finds rearrangement to be preferable when there exists more than one secured creditor.

Keywords: receivership; winding-up; insolvency law; law reform; corporate law.

INTRODUCTION

Creation of wealth depend upon a system founded on credit (Keynes 1919). Corporate insolvency is an important feature of a market economy. Review Committee on Insolvency Law and Practice (1982) described 'credit' as the 'lifeblood of the modern industrialised economy' and the 'cornerstone of the trading community.'[1] Insolvency law recognises there are always casualties in Darwinism market, and this demand a mechanism to limit risks incurred on creditors. With the scale of production increases with Industrial Revolution in 19th century, English business saw a need for credit facilities and subsequently law to resolve credit dispute.

Review Committee on Insolvency Law and Practice (1982) further observed that the law of insolvency surrounded itself with three parties: first, the interest of the creditors in obtaining as far as possible what is due to him; second, the interests of the debtor in providing for his or her relief from harassment or rehabilitation; and third, the public interest in ensuring dishonest and reckless debtor is punished. The balance of interest among these three parties is a fundamental issue as illustrated in the latter part of this paper.

This introductory chapter will summarise the historical origin of insolvency law and illustrate all available corporate insolvency remedies under Companies Act 2016 (Act 777) ("CA 2016").

ECONOMICS AND PHILOSOPHIES OF INSOLVENCY LAW

Traditionally, if a company is in financial distress, individual creditors have an

incentive to enforce their claims as quickly as possible before the other creditors gobble up the asset. Ferris J emphasised this concern in *Jaber v Science and Info Tech Ltd*. 'Placing a solvent company into receivership could be the kiss of death by destroying its goodwill of the outside world.' The creditors' concerns are not unwarranted, insolvency in a company signifies high risk to failure of loan repayment. The individual creditors who won the debt race are better off than the rest of the creditors because they are figuratively writing off check from the limited pool of money ("common-pool philosophy"). In welfare economics, the common-pool resources are goods in nature rivalrous (limited supply) and non-excludable (non-exclusive to certain individuals).[2] Self-interested market players will always seek to internalize the common goods to themselves. The welfares of interested parties e.g., employees, shareholders and suppliers without proper claim are then neglected.

Consequently, the company will be hived off and sold on piecemeal basis notwithstanding that the company might fetch a higher price as a business investment rather than an individual asset. The UK and US legislators shows an inherent divide on the understanding of the purpose of insolvency law. Paterson (2016) succinctly illustrated this divide in her metaphor. US scholars agreed with corporate insolvency law's role in maximising value (the size of pie); while UK scholars concern itself with how value is distributed (how the pie is shared). Academically, Professor Jackson sees the purpose of insolvency law as debt collection and coordinate claims from creditors; Professor Warren, on the other hand, advocates to widen the lens of interest to other stakeholders (Goode 2007).

We see this departure as a reflection of the country's finance market structure: banks made up the vast bulk of finance players in the UK market (Paterson 2016), these major players could coordinate their debts at the earliest sign of distress, the process are mostly informal hence law is unnecessary; the same cannot be argued for US. US early market consists mainly dispersed traders; they must rely on the supervision of law. Counterintuitively, UK legislation deliberately did not make law for restructuring to leave room for negotiation while US must lay down all remedies (soft and harsh) available to creditors. In the latter part of this paper, we find ourselves in agreement with a rehabilitative approach to maximise the economic value of a company. Finance and economy are just a mean to an end, and the end should always be the social welfare of society.

Upon its inheritance of English law in Companies Ordinance 1946, Malaysian insolvency law has collectively remodelled into its own flavour with Companies Act 2016 today. Corporate insolvency law in Malaysia is a combination of distributive, penal and rehabilitative philosophies (Aishah Bidin 2015; International Insolvency Institute 2000). This is in line with the foundation of the entire credit world as pointed out by the Review Committee on Insolvency Law and Practice (1982). The trust for corporate borrowing rests on belief in sanctity of contract; such a belief required effective sanction against dishonest or reckless insolvent; it recognised some debtors were in misfortune rather than dishonesty.

Pragmatically, insolvency law prior to Companies Act 2016 has been primarily creditor-bias (Aishah Bidin 2015) to safeguard the interest of creditors in enforcing their debts. Corporate Law Reform Committee ("CLRC") (2013) published a working paper in 2013 argued for fundamental reforms in moving toward rehabilitative approach in corporate insolvency. The purpose was to preserve the economic value of the company as a going concern for stakeholders including employees. Judicial management and corporate voluntary arrangement are

introduced in the latest statute by referring to Singapore and UK legislation (Corporate Law Reform Committee 2013).

EXISTING CORPORATE INSOLVENCY FRAMEWORK IN MALAYSIA

Malaysian corporate insolvency laws are modelled following English laws with complement to Australia and Singapore. CA 2016 does not govern all corporate insolvency processes. Among all, there are specialised regimes under Financial Services Act 2013 ("FSA"), Danaharta Act 1998 ("Danaharta") and Deposit Insurance Corporation Act 2011 ("MDICA"). The regimes also can be industry specific: the Malaysian Airline System Berhad (Administration) Act 2015. Besides receivership, there are five corporate insolvency processes for general application: (1) Schemes of arrangement (2) Corporate Voluntary Arrangement ("CVA") (3) Judicial Management (4) Compulsory or Voluntary Liquidation (5) Administration by a conservator.

(1) Scheme of arrangement

All companies, solvent or insolvent, are eligible to opt for scheme of arrangement. However, to initiate this process, Section 366 of CA 2016 requires at least 75 percent creditors to agree to an arrangement. This allows the company to impose the said arrangement onto dissenting creditors, provided the arrangement obtained majority votes.

(2) Corporate Voluntary Arrangement ("CVA")

CVAs are introduced under CA 2016 as a corporate rescue mechanism. It shares some similarity with schemes of arrangement, where it allow a voluntary arrangement to bind all creditors. Differ from schemes of arrangement, CVA does not require a court order for moratorium to be effective. Corporate voluntary arrangement only applies to private companies which is not a licensed institution regulated by the Central Bank of Malaysia, a company subject to the Capital Markets and Services Act 2007 ("CMSA"), or a company which creates a charge over its property.

(3) Judicial Management

Either company or creditor may apply for judicial management process. It requires evidence that the creditor's interest is better preserved for the company as a going concern. At the same time, there is reasonable prospect for the company to survive. In a moratorium of 6 months, judicial manager will replace directors and propose a restructuring agreement to creditors.

(4) Mandatory and Voluntary Liquidation

Mandatory liquidation is court-based and typically started by creditors for non-performing debts. Voluntary liquidation commences when the company's members passed resolution to wind up a company. Both liquidation procedures proceed with the appointment of a liquidator. The liquidator oversees distribution of asset and repayment of debt.

(5) Conservatorship

MDICA replaced Malaysia Deposit Insurance Corporation Act 2005 to acquire assets from the members (financial institutions) and vest the assets in it. Non-performing loan account under its member is among the asset acquired. Conservatorship serves to maintain domestic financial stability by insured the banks' solvency.

LAW WITH RECEIVERSHIP

In modern legal regime, there are two basic routes to be followed when a company is insolvent: liquidation and corporate rescue (Bo Xie 2016). Liquidation winds up an ailing company to distribute assets in an orderly manner; on the other hand, corporate rescue procedures seek to provide companies a period of respite for reconstruction and rearrangement. Receivership procedure is a liquidation, where it involves debenture holders appoint a receiver to realise company's asset in their interest. It does not concern on the economic viability of the financial company to regenerate profit; the focus is on getting the debt back as soon as possible. In the New South Wales case of *Duffy v Super Centre Development Corps Ltd* [1967] 1 NSWR 382, Street J (as he then was) in discussing the role of receiver said that such a receiver to some extent attempts to restore the financial prosperity of the company. This perception, with all due respect, is a rosy picture. The publicity usually attaching to what the press refers to as 'calling in receiver' is inevitably damaging (Picarda 2000). Far from being the company doctor they probably think him is more as the financial priest coming to administer last rites.

CLRC start the revision of receivership law with one purpose in mind: that is to further enhance the efficiency of receivership process. By comparative study into different jurisdiction[3] of receivership, New Zealand, and Australia legislation (differ from UK) allow receiver to carry on business even when the company is in liquidation. CLRC is determined to treat receiver as an agent of the company and shall continue realising assets not withstanding that court appointed a liquidator. This is also a legislative move to rectify a judicial decision in *Kimlin Housing Sdn Bhd (Receiver and Manager) (in liquidation) v Bank Bumiputera Malaysia Berhad & 3 Ors* [1997] 2 MLJ 805 ("the Kimlin case").

A. Qualification of Receiver or Receiver and Manager

Section 372 of CA 206 set out that the qualification of receiver is similar to the qualification of liquidator in Section 433. This section is derived from Section 182 of Companies Act 1965 (Act 125) ("CA 1965"). Section 433 stipulates persons not qualified to act as a receiver of the property of a company. Under the section 435(5), the definition for 'approved liquidator', and consequently definition for 'receiver or receiver and manager' is widened to include members appointed by the Minister.

On that note, New Zealand had recently introduced Insolvency Practitioner Bill to further restrict certain individuals from providing corporate insolvency services.

We see this as a legislative effort to complement the current negative qualification[4] in Receiverships Act 1993. It aims to combat the problems and risks associated with practitioners who are dishonest or lack independence (Commerce Select Committee 2011). We are not clear if this effort will prevent (rather than salvage) damages caused by individual and institutional dishonesty.

B. Private and Court-Appointed Receiver

The right to appoint a receiver is usually derived from a debenture, save where the court makes an order for such appointment. However, courts only able to appoint receiver under applications of the aggravated parties. The mode of application for an appointment of a receiver by the court is governed by the Rules of Court 2012, Order 30. The right to appoint a receiver is not a cause of action and cannot stand on its own as stipulated in the case of *Bank of*

Commerce v Tanjung Petri Enterprise [1992] 2 MLJ 322, HC.

C. Power and Status of Receiver

The new codified position under Section 375(2) (a) grant receiver a status of an agency of the company unless the appointment instrument provided otherwise. This reflects the position taken by the Court of Appeal in Abu Bakar Rajudin (*from Abu Bakar Rajudin & Co acting as receiver and manager for Syrkt Usahasama Km-Ldah Sdn Bhd*) v Sykt Perumahan Negara Bhd [2017] 1 MLJ 115, CA.

This is in contrast with the conventional judicial position on receivers' agency status. The courts previously had held that 'in absence of any express or implied terms to the contrary, receivers appointed out of court are not agents of the company' CLRC recommends agency status of a receiver to be codified under CA 2016 as stated by Wan Yahya J (as then he was) in *Tan Ah Teck (t/a Pumcon Plumbing & Construction Co) v Coffral (Malaysia) Sdn Bhd* [1992] 1 MLJ 553 at 558, HC. By granting receiver an agency status, he can contract on behalf of the company or do any act as an agent of the company on performing his function as a receiver.

D. Obligation of Director under Receivership

Under CA 2016, director under receivership shall make available to the receiver all information he reasonably requires. This includes books, documents and information relating to the undertaking or property in the company's possession. The position in Australia is different: instead of the company makes information available to receiver; receiver may request to have information.

E. Liability of Receiver

Section 381 is derived from Section 183 of CA 1965, provides a receiver is personally liable for debt incurred by him. Upon its recommendation, CLRC has correctly identified receiver as a professional, carrying out management of an insolvent company. He does not receive commercial gain nor suffer a commercial loss. The amended position now is that receiver shall be liable unless otherwise provided in appointment instrument (Corporate Law Reform Committee 2013).

Receiver is mostly liable only to his appointing creditor's interest. The only exception happens when there are competing claims between employees' wages and creditor's debt. The High Court in *Perwaja Steel Sdn Bhd v RHB Bank Berhad & 789 Others* [2019] MLJU 698, HC decides when there is competing claims between Employment Act or the CA 2016, Employment Act always takes priority.

F. Powers of Receiver on Liquidation

CLRC introduced Section 386 as a new provision to allow the continuation in office of the receiver under supervision of liquidator or court. The law now codifies receivership to continue even if the company falls into liquidation. However, the appointed liquidator must consent for receiver to continue. If liquidator does not consent, receiver may seek for consent from court. This is in line with Section 31 of the New Zealand Receiverships Act 1993. Section 31 has reversed the long-standing rule that appointment of a liquidator terminated a receiver's right to continue to act as agent of the company as stated in *Petterson v Gothard (No 3)* [2012] NZHC 666 at para 52, HC.

PROBLEMS (NON-PROBLEMS) WITH RECEIVERSHIP

19,535 companies were compulsory wind up in year 2009, the numbers starkly increase to 24,320 companies in year 2018.[5] For the lack of local surveys and empirical studies, we do not know how many of the companies attempted restructuring procedures or receivership before liquidation (Armour & Frisby 2001). In UK, Society of Practitioner of Insolvency estimates 1800-2100 firms received informal restructuring and 2982 companies go into receivership in year 1995. In this chapter, we aim to examine the problems of receivership laws in the background of law and economic literatures.

Typically, when a company defaulted on its debt, it defaults more than one secured creditor. Hence, multiple creditors trigger their right to call for receivership. The call for receivership will turn become a race among creditors to assert their rights. From a creditor's perspective, we will always try to claim our debt as much as possible to limit our credit losses. So are other creditors.

Jackson (1984) described this situation succinctly in analogy of 'creditors dilemma'. In his hypothetical scenario, D has a small printing business that will become insolvent. The business will be sold for 80,000$ if sold as a going concern; 60,000$ if sold as piecemeal. D defaulted on two creditors, C1 and C2. C1 and C2 have each loaned D 50,000$. Each of C1 and C2 knows, if the other creditor gets to the courthouse first, then he will get 50,000$, the slower creditor will get 10,000$. In this situation, both creditors will not risk their right by agree jointly on a liquidation agreement. This example presents game theorist's 'prisoner's dilemma'. Prisoner's dilemma happens when rational individual, in the absence of cooperation with other individuals, leads to a 'sub-optimal decision when viewed collectively' (Gilson 1981; Jackson 1984). There is a solution in interest of all individuals, but because of an inability to reach the collective solution, each individual acts out of immediate self-interest solution.

	C2 appoints receiver	C2 calls for restructuring
C1 appoints receiver		50,000, 10,000
C1 calls for restructuring	10,000, 50,000	40,000, 40,000

We build a matrix to represents the zero-sums game based on the illustration above. Since receiver appointment is a single party process, two parties appoint receiver scenario does not exist. The best-case scenario would be for both C1 and C2 call for restructuring and sell the company as a going concern. Under this situation, both creditors end up collecting 40,000$. The worst-case scenario happens when either C1 or C2 appoints receiver whilst the other party calls for restructuring. Under this situation, the party who appoint receiver will collect a full number of debts whilst the other party who calls for restructuring get off with the remaining piecemeal of 10,000$. When we calculate for best game response with Nash equilibrium, the results for both creditors are to appoint receiver. The calculation reflects creditor's motivation to calls for receivership. No creditors are ready to forgive any of their claims by rearrangement if he thinks the other creditor appoint receiver.

The mainstream perception is that receivers and their appointers hold 'too much' power in relation to insolvent companies (Fletcher 2004; Paterson 2016; Warren 1993). The implication of this perception results in a conclusion that legislation should reform receivership law

to redress the balance by transferring powers from receivers. We are against the case for law reform in receivership. We must admit there is no perfect solution to avoid from selling insolvent businesses to on a piecemeal basis while balance the equilibrium between debtors and creditors' right. Receivership functions to safeguard the position of creditors to invest into businesses. The Review Committee on Insolvency Law and Practice (1982) supports the institution of receivership despite its criticisms.

For this discussion, it is useful to start with two salient points: first, institution of receivership reduces creditors' debt monitoring costs which subsequently reduces debtor interest costs; and second, receivership can achieve a sale of company as a whole thus maximizing asset value.

Reducing the Debt Management Cost of Creditors Sixth Schedule of CA 2016 grants receiver a wide range of power to manage company's business. The newly adopted agency status also gives him immunity to debt accrued in receivership process. No rational directors of a company will favour for receivership procedures, this counterintuitively makes receiverships law attractive to creditors to discipline debtor, subsequently gives incentive for directors to repay debenture and avoid company from defaulting. When a debenture-holder entitled for receivership, they are likely to concentrate their investment in the same company. This is because they can always fall back to receivership in the worst-case scenario. In return to security promised, creditors charge lower interest to debtor (Schwartz 1984). At the same time, unsecured creditors charge more to compensate the risk incurred (Levmore 1982). In another word, secured creditors have paid for the additional security.

In addition, when a creditor concentrates his investment to a company, he is incentivised to constantly scrutinised the company's financial health. Concentrated creditors only have limited companies to monitor, therefore reduce the management costs. Imagine law without receivership, only unsecured creditors exist in debt system. Unsecured creditors will attempt to 'free ride' on other unsecured creditors' monitoring effort. Thus, game theorist suggests all unsecured creditors will end up with less knowledge of their debtor. And no one benefits from a self-interested 'creditor's dilemma' (Armour & Frisby 2001).

Maximizing Aggregate Pool of Asset in Company Secured creditors' entitlement to receivership afford them superior rights against junior creditors. They have the highest ranking in debt priorities and better off to collect their debt as soon as possible to reduce the losses in time value of money. Therefore, secured creditors do not take interest in negotiating an arrangement among unsecured creditors and members of company. They want to claim their debt even on piecemeal basis from the company (Webb 1991). Unsecured creditors, on the other hand, at a disadvantage position, desire for collective arrangement. Unsecured creditors' monetary claims are injured when receiver sold assets of company as piecemeal. They are desperate for a negotiation to sell company as a going concern, or even better, resuscitate the company. If the arrangement succeeded, it would increase the aggregate pool of asset in a company. Taking the example earlier, D' printing business worth 20,000$ more when it is sold as a going concern business and 20,000$ less when it sold as pieces of machineries and lands.

To level the playing field, unsecured creditors must offer some benefits to secured creditors to give up his rights in receivership. This includes priority in payments and additional repayment of debts. Secured creditors are also relieved from procedural costs in court to appoint a receiver or receiver and managers (Akintola & Milman 2020). We find that the unsecured creditors not necessarily at

loss if he manages to increase his initial amount of debt collection. There is nothing 'unfair' to recognize a secured creditor's entitlement in company insolvency. The metaphorical priority ladder granted by receivership serves to facilitate coordination among all creditors.

Thoughts on (Not) Reforming Receivership Law

Receivership is a useful trump card for debenture holder when it is not played out. Instead, debenture holder can use this advantage to leverage his options. When companies default on debts for external factor such as macroeconomic downturn, rational debenture holders are not eager to claim their debts through receiverships. This is because the companies cannot repay them the expected amount of debt as much as they want to. Here, debenture holder would want to have renegotiation rather than enforcing receivership.

CONCLUSIONS AND LIMITATIONS

Receivership at first glance, may be thought of as a 'oppressive' procedure to discharge ownership and control from an 'innocent' debtor. Arguing for law reform is always attractive, but we must be practical on its legislation impact. Receivership exists alongside with other corporate rescue procedures, and acts as a last resort when there are no possibilities to resuscitate. This paper concludes that receivership provides security to creditors while able to facilitate the sale of business as a going concern.

We find no strong consideration to advocate for receivership law reform. We ought not to follow UK legislation reform effort on administration receivership. In all fairness, under the administration receivership only makes the receiver do the same job with a different hat on.

Our findings are also subject to important limitations. Local empirical data on corporate insolvency are admittedly incomplete. We hope for further writings on the application of receivership alongside with the newly enforced corporate rescue mechanism under CA 2016.

NOTES

[1] See also F. Tolmie, *Corporate and Personal Insolvency Law*, 2nd Edn., Routledge, United Kingdom, 2013, chapter 3.

[2] See generally D.L. Weimer & A.R. Vining, *Policy Analysis: Concept and Practice*, Routledge, United Kingdom, 2017, p 1-502.

[3] "The Law Reform Commission (Australia) General Insolvency Inquiry 'Harmer Report,'" vol. 45, 1988 see p. 221 "Power of Receiver after Appointment of Liquidator"; Section 31 Receivership Act 1993 (New Zealand); Section 44(1)(a) Insolvency Act 1986 (United Kingdom).

[4] The listing of persons not qualified to practice.

[5] "Statistik Kes Penggulungan Syarikat (Terpaksa Terkumpul) - Set Data - MAMPU," accessed June 15, 2020, http://www.data.gov.my/data/ms_MY/dataset/statistik-kes-penggulungan-syarikat-terpaksa-terkumpul.

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