Corporate Law Reform and Corporate Governance in Malaysia: 
Responses to Globalization
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Introduction
Reforming company law is an important agenda in the corporate law programme in Malaysia. The objectives of the corporate law reform programme in Malaysia are the creation of a legal and regulatory structure that will facilitate business and the promotion of accountability and protection of corporate directors and members taking into account the interest of other stakeholders in line with international standards. Malaysian Corporate law reform has undergone a different dimension lately.

Since the Malaysian Companies Act 1965 came into force, it has been amended more than 30 times. Nevertheless, the approach taken was always on a “piece meal basis” and it lacked a systematic and coherent review on current corporate law and practice. To ensure that the reform program will be conducted effectively and objectively, cross jurisdictional studies were made in terms of identifying international corporate initiatives and trends. Further this will ensure the reform will be done in tandem with the global scene and enable Malaysian businesses to compete internationally.

This paper will give an insight of the approach taken by the Malaysian Corporate Law Reform Committee (CLRC) in its process of modernizing corporate law reform and practice in Malaysia. It will feature the basis, justifications and effect as to how corporate law reforms in other jurisdiction
among others such as United Kingdom, Australia, New Zealand, Hong Kong plays an important benchmark in determining changes and responses to corporate law reform in Malaysia. Finally this paper will also establish within the context of globalization, the focus of modernization of core corporate law would not be complete without reviewing the advancement and impact of information and communication technology (ICT).

**Modern Company Law**

The modern company is the most important form of business vehicle in Malaysia. It has facilitated economic development of our country for more than a century by permitting these incorporated businesses to raise capital hence, enabling it to attain economies of scale. In Malaysia, such vehicles are incorporated under the Companies Act 1965. Company law in Malaysia allows a person to invest his money in a company and become joint owners of the company together with other persons who have similarly invested their money in the company without imposing unlimited liability and management responsibilities.

The limited liability company remains the primary vehicle for commercial expansion and economic advancement. The three basic elements which have made the modern limited companies more popular and successful as vehicles for generating capital are limited liability, perpetual succession and transferability of securities.

The number of companies incorporated over the years has also increased tremendously. Thirty years ago there were less than 20,000 companies registered in the country. Today, the total numbers of companies on the SSM’s register stands at 702,136\(^1\). In the 80’s, the annual increase in the number of

\(^1\) Data - as at 31 July 2005
new companies incorporated ranged from 9,000 to 15,000. In the last two years, i.e. 2003 and 2004, the annual increase exceeded 38,000.

**Regulatory Law for Corporation in Malaysia**

The first law on companies implemented in this country was the Companies Enactment 1897 which was largely borrowed from the UK law. This enactment was then repealed and replaced by the Companies Enactment No.20 of 1917. Ten years later, a new enactment known as the Companies Enactment 1927 was introduced to replace the 1917 enactment.

The 1927 enactment continued to be enforced until 1946 when the companies Ordinance 1940 of the Straits Settlement was extended to apply to all Federated Malay States. This ordinance was enforced until 15 April 1966 when the Companies Act 1965 was implemented. The Companies Act 1965 in Malaysia is not an exclusive legislation in regulating corporate activities in this country. In Malaysia, we have a generally comprehensive legal framework which govern corporate activities. Other than the Companies Act 1965, the corporate legal framework includes:

- a. Securities Industry Act 1983 (repealed);
- b. Securities Commission Act 1993;
- d. Take-Over Code;
- e. Bursa Malaysia Listing Requirements; and
- f. The Common Laws.

The English common law which was derived from the decisions of the English courts has been adopted by the Malaysian courts being a member of the
Commonwealth countries. The evolution of the British commercial revolution in the last 160 years saw a considerable development in the principles of common law and equity relating to companies. Some examples of the basic common law principles include, the rule governing the exceptional cases when a member may sue to enforce a right vested in his company as laid down in that famous case of *Foss v. Harbottle*\(^2\) in 1843.

The duty of directors to act *bona fide* in the interest of the company in *Allen v. Gold Reefs of West Africa Ltd.*\(^3\), the rule which required a company’s share capital to be kept intact for the benefit of its creditors as laid down in *Trevor v. Whitworth* in 1887\(^4\) and the rules which worked out the full implications of the separate legal personality of the company and the circumstances in which it could be disregarded as propounded by the English court in the celebrated case of *Solomon v. Solomon*\(^5\) in 1850.

The above English common law principles have been the foundation of the decisions in the Malaysian courts. The Companies Act 1965 is a piece of legislation that comprises of 374 sections which are divided into various subsections with nine (9) accompanying schedules. The Act prescribes that companies must maintain certain registers with SSM. These are:

- Register of members\(^6\);
- Register of substantial shareholders\(^7\);
- Register of debenture holders\(^8\);
- register of holders of interests other than shares and debentures\(^9\);

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\(^2\) (1843) 2 Hare 461 (Vice-Chancellor’s Court, England)
\(^3\) (1900) 1 CH 656.
\(^4\) (1887) 12 App Cas 409, [1886-90] All ER Rep 46.
\(^5\) (1897) AC 22, [1895-9] All ER Rep 33.
\(^6\) S.158(1)
\(^7\) Division 3A of Part IV and S.69L
\(^8\) S.70(1)
\(^9\) S.84(1)
• Register of directors, managers and secretaries\textsuperscript{10};
• Register of director’ shareholdings\textsuperscript{11}; and
• register of charges\textsuperscript{12}.

Apart from the above registers that must be maintained\textsuperscript{13}, all companies are required to lodge an annual return, signed by a director, manager or secretary with the Registrar within one month of its annual general meeting.\textsuperscript{14} The matters to be stated in the annual return are prescribed in the 8\textsuperscript{th} Schedule (for companies with share capital) or in Section 165(6) (for companies without share capital). A company having a share capital is required to attach a copy of its last audited balance sheet and profit and loss account, unless it is an exempt private company\textsuperscript{15}

The Evolution of the Corporate Governance Provisions in the Companies Act 1965

The Companies Act 1965 since it was implemented in 1966, has been amended more than 30 times to keep in tandem with the latest development in the corporate sector. In the past, the ROC officers in drafting the proposal for amendments have relied, to a certain extent, on the works and recommendations of the Jenkins’ Committee in the UK and the Eggleston’s Committee in Australia. Many of their recommendations particularly those dealing with accounts and audit, disclosure of interests by directors and substantial shareholders, substantial property transaction with directors and insider trading were adopted through amendments to the Companies Act in

\begin{itemize}
\item [\textsuperscript{10}] S.141(9), S.4, S.141
\item [\textsuperscript{11}] S.134(1)
\item [\textsuperscript{12}] S.115(2) including a foreign company registered in Malaysia S.118. This register is to be distinguished from the register of charges maintained by SSM under S.111
\item [\textsuperscript{13}] not every company need to maintain all the registers as stated above, for eg. a private company is not required by the Act to maintain a register of substantial shareholders.
\item [\textsuperscript{14}] S.165(4) & (5)
\item [\textsuperscript{15}] 8\textsuperscript{th} Schedule, PartII – definition of ‘exempt private company’ is stipulated in S.4 of the Act.
\end{itemize}
the form of sections 132A, 132B, 132C, 132D and 132E as well as Division 3A of Part IV relating to disclosure by substantial shareholders.

The above provisions are generally to prevent corporate abuses in connection with related party transactions involving substantial acquisitions or disposals of property\textsuperscript{16} and substantial property transactions\textsuperscript{17}. The controversial Section 132G was incorporated in 1992 in an environment where asset shuffling was a common practice where recently acquired assets were injected into companies in which the acquirers (being shareholders or directors or persons connected with them) had and interest for huge gains, usually at excessively over priced market value.

Section 132G has been branded as “\textit{inhibiting genuine transactions}” by lawyers, accountants, corporate planners, consultants as well as merchant bankers. The SSM (ROC, then) were not totally unaware that Section 132G may prevent some genuine transactions, but the policy has been made to strike a balance between protecting minority shareholders and investors and allowing genuine transactions to proceed, which led to the introduction of a new Subsection (6) to the Section to provide clear cut exemptions from the prohibitions of section 132G.

As can be seen above, the amendments made to the Companies Act 1965 over the years have further strengthened the governance structure within the corporate sector so as ensure sustainable and healthy continuous growth of companies in this country. Since the beginning of the financial crisis in 1997, The Companies Act 1965 was amended five times and introduced provisions which allowed share buyback\textsuperscript{18}, extend the maximum period of option over

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\item S.132C
\item S.132E
\item S. 67A
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unissued shares from five to ten years\textsuperscript{19}, imposed limitation on payment of dividends\textsuperscript{20}, strengthened requirements on disclosure of substantial shareholdings\textsuperscript{21}, and improved existing provisions to curb abuses of restraining orders under Section 176\textsuperscript{22} of the Companies Act 1965 by financially troubled companies to the disadvantage of creditors and others.

As a regulator responsible for maintaining and regulating the integrity of corporations as vehicles to conduct businesses that form an integral component in today’s economy, SSM is of the view that there is a real need to review the Companies Act 1965. The continuing debate on corporate governance, development of information technology, the financial crisis, existing framework on insolvency law and other related issues have exposed certain weaknesses and inadequacies in the current provisions of the Companies Act 1965.

Current Legal Framework of Corporate Law Remains Relevant and Responsive to the Needs of Today Business Environment

The above has been identified as SSM’s 3\textsuperscript{rd} strategic objective which seeks to “initiate, develop and implement a comprehensive regulatory framework in tandem with the changing business environment.” SSM has adopted a two pronged approach in its attempt to achieve this strategic objective. The first is its near term plan to implement the Recommendations of the High Level Finance Committee on Corporate Governance, whilst the other approach is its long term plan in undertaking a fundamental review programme on the current core company law provisions or currently better known as the SSM’s Corporate Law Review Programme.

\textsuperscript{19} S.68(1)
\textsuperscript{20} S. 365
\textsuperscript{21} S.69D
\textsuperscript{22} S.176(10A)
Corporate Law Reform Programme

Apart from the above near term plan to amend the Companies Act 1965, the SSM has embarked on the corporate law reform programme as part of its comprehensive agenda to modernize the overall company law framework as well as strengthen corporate governance provisions in Malaysia. This initiative will inevitably provide an environment conducive for companies and businesses thus, improve Malaysia’s competitive edge in attracting investment into this country.

The timing is right as we are now able to observe the experience of other jurisdictions and replicate the best for the Malaysian corporate environment. The Corporate Law Economic Reform Program (CLERP) of Australia can show us, amongst others, the way to simplification and modernization in the drafting style as well as creating rules that balances strict legal rules with economic and commercial needs.

The UK Department of Trade and Industry reform program aptly named “Modern Company Law for a Competitive Economy” can lend us valuable insights into reformulation of existing principles found in the Companies Act 1965 which were a legacy of the 1948 UK Companies Act. The Hong Kong and Singapore corporate law reform programs can assist us in designing modern company law that accords with international standards yet suitable for our corporate and business environment.

On 17 December 2004, the SSM has taken the initiative to establish the Corporate Law Reform Committee or otherwise known as the CLRC to undertake the review programme. The objective of this programme is to enable corporate and business activities in Malaysia to function in a cost effective, consistent, transparent and competitive business environment whilst balancing obligations, responsibilities and protection of corporate
participants in line with international standards of good corporate governance. The review will also take into consideration the needs of the domestic business environment, global and international standards.

The CLRC is spearheaded by the Steering Committee that is responsible for the overall supervision of the review to be conducted by CLRC and to ensure that CLRC is able to achieve its objectives within its set timelines. The Steering Committee is assisted by four (4) specific working groups that are chaired by their own respective chairperson. Each working group has been assigned the task of reviewing a specific core area of company law which are as follows –

- Group A is responsible for reviewing the laws and regulations in regards to ‘Company Formation and Private Companies and Alternative Forms of Business vehicles’;
- Group B is responsible for reviewing the law and regulations in regards to ‘Fund Raising and Capital Maintenance’;
- Group C is responsible for reviewing the law and regulations in regards to ‘Corporate Governance and Shareholders Rights’; and
- Group D is responsible for reviewing the law and regulations in regards to ‘Company’s corporate Securities and Insolvency’.

The above working groups are empowered to create sub-working committees. Currently working Group D has seven sub-working committees. The Steering Committee and the working groups under it are supported by a full time secretariat and research team by SSM.
THE APPROACH IN FORMULATING A CORPORATE REHABILITATION FRAMEWORK.

The primary aim of corporate rehabilitation regime is to provide alternative mechanisms for the restoration and revival of business of a financially distressed company on the brink of collapse with a view of continuing its existence, keeping trading and maximizing returns to its creditors. A corporate rehabilitation framework has proven to be beneficial as compared to the drastic approach of liquidation as it facilitates the continuation of a business with the hope of achieving the following:

- the preservation of the economic value of the company as a going concern for all stakeholder in that business;
- minimizing the losses for creditors, including employees, and others who deals with the insolvent company from having to re-establish relationships with another entity; and
- may also provide a more measured distribution of assets of a company if it does eventually fail, thus increasing returns to all creditors.

There are nonetheless, costs associated with a corporate rescue regime and these are:

- an increase in the cost of credit as a result of the creditors' inability to enforce the contractual rights during the moratorium period;
- the risk that allowing the company to trade may further erode its value thus further reducing the amount available to pay creditors.

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23 Empirical studies in Australia show that the eventual returns to creditors after voluntary administration are slightly higher than the returns after a company wind ups. The studies were discussed in S. Mc Coll, “Voluntary Administrations: How Well Are They Working?” Australian Journal of Corporate law, LEXIS 2 (2001): 23-24

THE CURRENT CORPORATE INSOLVENCY FRAMEWORK

Under the current corporate insolvency law in Malaysia, there are several methods of dealing with company insolvency:

i. a receivership process where creditors may appoint a receiver and manager. Most often the company will be wound up and company’s assets are hived off and sold separately. The receivership procedures are widely practiced in all jurisdictions. However, the primary purpose of a receivership is not to act in the collective interest of all creditors of the company but to realize the company’s asset under a debenture for the interest of the debenture holder and not primarily to rescue or rehabilitate the company.

ii. A winding up process which is intended to enable proper closure of a company that may not want to or be able to continue its business. The winding up may be made voluntarily (through a members' voluntary or creditors’ voluntary resolution) or by an application to court for winding up order.

iii. A scheme of arrangement under section 176 of the Companies Act 1965- Whilst the section is not intended specifically as a corporate rescue mechanism, it has proved useful for companies facing financial difficulty. Where section 176 of the Companies Act 1965 is concerned, although the procedures under section 176 of the Companies Act 1965 have been amended in 1998 following constant criticisms from the market players, the scheme under section 176 is still seen as costly, cumbersome and slow in its procedures and implementation specially if it is to be used for corporate rehabilitation or rescue purposes. This is because:

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25Malaysian Companies (Amendment) Act (No.2) Act A1043 1998 – the amendments of section 176 was aimed at ensuring the process for obtaining a restraining order is more transparent and that creditors are well protected by providing for more stricter time periods for application for extension of the restraining order and preventing the company from disposing its assets during the period of a restraining order. See Aishah Bidin, (2004) “Insolvencies and Corporate rescues in Malaysia” International Commercial and Company Law Review, 334.
• it is subject to delays within the court system.
• the company must identify and divide the creditors into separate classes, and the court may refuse to approve a scheme if it considers that the creditors have not been properly classified.
• Creditors are restrained from enforcing their security for unduly long periods due to the existence of restraining order for a maximum period of 90 days and the court may extend the period provided the company has fulfilled the requirements under section 176 (10A) of the Companies Act 1965.
• There is also a real lack of protection for the company since the stay is effective only from the date the notice of the proposed compromise was given whereas to be most effective, the stay should apply during the period the proposal is being developed.

iv. Pengurusan Danaharta Nasional Berhad.

In response to the problems faced by the banking sector in Malaysia in the wake of the 1997 financial crisis, a new formal insolvency process that is the “special administration” under the Pengurusan Danaharta Nasional Berhad Act 1998 (the Danaharta Act) was introduced to complement the older insolvency law and the restructuring process.26

One of the remarkable features of the special administration under the Danaharta Act as compared to the process of scheme of

26 Prior to the financial crisis in South-East Asia in 1997, the only formal corporate rescue process in Malaysia was the scheme of arrangement under section 176 of the Companies Act 1965. See also Aishah Bidin (2003) “Review of the Corporate debt restructuring regime and insolvency law in Malaysia” Proceedings from Conference on Companies and Securities Law, organized by Asia Business Forum, JW Merriot, Kuala Lumpur.
arrangement is that it is a non-court based procedure that operates along the commercial principles by adopting the market driven approach despite the fact that it is a government entity. As time is essential in the formulation of a workable restructuring plan, the appointment of a special administrator to devise a workable restructuring plan must ensure that the implementation of the plan has to be carried out within the period of three to six months after the appointment. This is a prompt process as compared to the procedures under section 176 of the Companies Act 1965 where the normal court process usually takes longer time to complete.

The workable restructuring plan initiated by the special administrator requires only the approval of the secured creditors and not the shareholders of the company or its unsecured creditors. Once approved, the workout proposal binds the company, its shareholders and all creditors. This is distinct from the procedure under the scheme of arrangement which requires approval of 75 percent in value and a simple majority in number of each class of creditors and members present and voting. The creditors under the scheme of arrangement are divided into classes according to their communality of interests.

v. The Corporate Debt Restructuring Committee

Another informal corporate rescue workout that has been introduced following the 1997 financial crisis is the Corporate Debt Restructuring Committee (CDRC) under the auspices of the Central Bank of Malaysia. The CDRC sets specific criteria to be met by applicant such as, the company must have a potentially viable business and have more than RM50 million worth of debts with more
than one financial institution. The CDRC acts as a secretariat which supervises and facilitates negotiations between the creditors, banks and debtor.

**Corporate Rescue /Rehabilitation Framework in Other Jurisdictions.**

**Singapore**

Prior to the amendment of Part VIIIA of the Singapore Companies Act (Chapter 50) (the SCA)\(^27\), an insolvent company in Singapore could only rely on section 210 that deals with a procedure for scheme of arrangement to enter into a compromise or arrangement with its creditors or members. Such schemes are often proposed when a company is facing financial difficulties and the members or creditors consider that there are some advantages in the company continuing its business. Otherwise, the creditors may initiate legal proceedings or petition for the winding up of the company. The scope of scheme of arrangement in Singapore is pari materia with the Malaysian approach.

In order to allow a fundamentally viable company some breathing space to reorganize its business approach to be more lucrative and cost-effective, Part VIIIA of the SCA was amended in 1987 by incorporating a new Part VIIIA based on the provision of administration under Part II of the United Kingdom Insolvency Act 1986. The amendment to the SCA in 1987 has given another opportunity to ailing companies to be rehabilitated and turned around to be more profitable by making an application to the court for an order that the companies be placed under a judicial management order. The judicial management order will allow a financially troubled company to get a court’s protection from any threat of liquidation or potential suits from its

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\(^27\) Part VIIIA of the Singapore Companies Act (Chapter 50) was superseded via the Companies (Amendment) Act 1987 which came into effect on 15 May 1987 vide GN No. S 137/1987 and is largely based on Part II (Administration Orders) of the UK Insolvency Act 1986 which came into force on 29 December 1986. See also Aishah Bidin, (2005)“Corporate Debt Restructuring and Corporate Insolvency: Jurisdictional analysis” Proceedings from Corporate debt restructuring Conference, Organized by Asia Business Forum JW Merriot, Kuala Lumpur
creditors during a moratorium period. This is to allow the company to carry out a restructuring scheme of its business affairs so as to revitalize the company’s operation with a view of maximizing its profits.

**Australia**

Prior to the inclusion of Part 5.3A of the Australian Corporation Law in 1993, financially troubled companies in Australia have several options to compromise or arrange its debts with its creditors to avoid the companies being placed under the threat of liquidation. The options are:

- to enter into a scheme of arrangement under section 411 of the Corporations Act (ACA). The key features of a scheme of arrangement are similar with other jurisdictions and are relatively seen as inflexible, expensive and time consuming as the implementation requires sanction from the court;
- to enter into an official management if the company appears to be unable to pay its debts in full. The procedure requires for a resolution of directors to the effect that the company was unable to pay its debts and when they fell due and the convening of a meeting of the creditors to decide by special resolution to place the company into official management. The effect of an official management:
  (i) the resolution are binding on all creditors whether they voted in favour of it or not;
  (ii) a statutory moratorium on legal proceedings against the company will set in; and
  (iii) management functions were transferred to an official manager appointed by the creditors with the aims of restoring the company’s financial health.

The Harmer Report on “General Insolvency Inquiry” 1988 made recommendation for the introduction of a new procedure for voluntary administration for insolvent companies to be in tandem with the development
of bankruptcy and company law and practice in other jurisdictions.\textsuperscript{28} The official management was abolished by the Corporate Law Reform Act 1992 due to its infrequent use and the potential coincide with the voluntary administration regime. The primary purpose of the voluntary administration (VA) procedure is “to provide a flexible, easily initiated and relatively inexpensive procedure that gives a company the benefit of a debt moratorium. This allows the company to attempt a compromise or arrangement with its creditors aimed at saving the company or the business and maximising the return to creditors. If creditors agree to the arrangement, it will be set out in a deed of company arrangement which binds the company and its creditors. If these attempts fail, the legislation facilitates the transition to winding up”\textsuperscript{29}.

The Australian voluntary administration regime does not require any court’s involvement in the process. Once the administrator is appointed by the board of directors, by a chargee over all or substantially of the property of the company where the charge is enforceable or by a liquidator, the administrator will have control over the company’s business. There is a stay against the company and its property although in some limited situations the secured creditors and the owners or lessors of property possessed, used or occupied by the company are not bound by the stay. A period of 5 days is given for the administrator to call the first creditors’ meeting which is intended to enable the creditor to decide whether or not to appoint a committee of creditors or to replace the administrator. A second creditors’ meeting must be called within 21 days of the appointment of the administrator for the administrator to report to the creditors on the company’s affairs and financial situation. The second creditors’ meeting is to enable the creditors to

\textsuperscript{28} The provision for corporate voluntary administrations came into force on 23 June 1993 in the Australian Corporate Law Reform Act 1992
decide whether the company should execute a deed of company’s arrangements, to end the administration or to wind up the company. The deed is binding on all unsecured creditors, secured creditors who have voted in favour of the deed, owners or lessors of property who have voted or the deed, the company and its officers and members and the deed administrator. However the secured creditors and owners or lessors of property who did not vote in favour of the deed may also be bound by the deed if the court so orders. In actual fact, the VA scheme is an interim form of administration which may be invoked by a company pending a determination by its creditors as to its future. It is not a complete insolvency procedure that provides for the ultimate resolution of the affairs of the company. 30

**United Kingdom.**

The UK CA has a scheme of arrangement similar to sec 176 of the MCA 1965. Sec 425-427 of the UK CA 1985 provides for a procedure where a company to make an arrangement or compromise with its creditors. 31 Prior to the enactment of the UK Insolvency Act 1986, section 425 of the UK Companies Act (UK CA) that deals with scheme of arrangement is the only provision relating to the rehabilitation of an ailing company in the UK CA. Section 425 of the UK CA allows a company to enter into a binding compromise with its creditors provided that the company has obtained consent from each of its creditors which has been proven to be a burdensome and costly procedure.

Unlike CVA, administration order (AO) is a court based procedure. Section 8 of the UK IA 1986 specifies four statutory requirements to be fulfilled by a company before an administration order can to be granted by the court:

- the survival of the company and or its business;
- approval of a voluntary arrangement (CVA);

31 This is similar to section 176 of the MCA 1965.
• entering into a section 425 of the UK CA compromise or a scheme of arrangement with its creditors; or
• the more advantageous realization of the company’s assets than a winding up.

The administration procedures have also been criticised for being expensive and costly right from the initial stage which includes the preparation of affidavits and reports by the prospective administrator up to its implementation. This has been a hindrance for the small and medium-size companies. The attitude of some directors of company in financially difficulty who have not taken early steps to use the administration procedure is also one of the reasons the procedure has not been successful as hoped. To overcome the weaknesses of the administration procedures, the UK Enterprise Act 2002 (UK EA) has made changes to corporate insolvency procedures in the UK.\textsuperscript{32} The UK EA introduces a streamlined system of administration that focus on the following five substantive changes to the administration procedure:
• the purpose of administration;
• the entry route into administration;
• the administrator being authorized to make distributions to creditors;
• clear time-limits; and
• the way to conclude or end the administration.

Under the Enterprise Act 2002, it is now possible to put a company under an administration order without a court order. The appointment will take effect from the date and time that a notice of appointment is filed with the court. The overall limit for the administration order is 1 year in contrast to the former situation where the administration order was open-ended. However the 1 year time limit may be extended by the consent of the creditors or the court. The

\footnotesize{\textsuperscript{32} The amendment of the insolvency procedures in the UK is in Part 10 of the Enterprise Act 2002 which aims at facilitating company rescues wherever possible and seek to achieve this through restricting the use of administrative receivership to shift the balance in favour of administration, a collective procedure which takes account of interests of all creditors.}
rationale for having two entry routes into the administration procedure is that the existing court order route may still be suitable for complicated cases.

• The present framework is inadequate as there has been a lack of focus on rescue mechanism or attempts to rehabilitate companies. For example, where lenders lend to a company without a debenture (it is often in the case of a listed company), there is no recourse to the creditor to force the management to restructure. The option available is usually liquidation. Receivership option is not available where there is no debenture. Court receivership are far and few. Even when receiverships are granted by the court, the purpose are not restructuring of companies, which is more suitable for social purposes, for example, rehabilitation of abandoned housing projects.

• Under current provisions of the Companies Act 1965, a company in financial difficulties can only restructure itself under section 176. Currently, whilst section 176 allows the management of the company to continue to remain in the hands of the board of directors and can be considered to cater to situations where there is confidence in the existing management, there is no scheme that caters for situations where there is a lack of confidence in the management.

• Whilst the Pengurusan Danaharta scheme and the Debt Restructuring Committee efforts have been effective, these schemes were established to deal with a specific set of circumstances arising out of the financial crisis and there is a need to establish corporate rescue mechanisms for company law in general.

It is also of the view that the corporate rehabilitation process should recognize the cause of the financial distress of the companies that has led to the need for a restructuring. There may be cases where there are external
circumstances that is the cause of the financial distress of an otherwise well-run company. There may also be cases where financial distress may be due to mismanagement.

- In situations where there is a lack of confidence in the management of the distressed company, an independent party with sufficient powers should be appointed to manage the company whilst the independent person seeks a suitable restructuring option. Thus it is proposed to introduce a scheme where the aggrieved creditor (secured and unsecured) could make an application to court to place the management of the company in the hands of a qualified independent person and at the same time (while managing the company), the independent person seeks a suitable restructuring option acceptable to creditors. The system should facilitate the rehabilitation process by ensuring the process is managed by a person with the necessary skill and experience and by providing the person with necessary powers to enable the implementation of the process. This scheme is the judicial management scheme.

- In situations where there is confidence in the management of the company, it may be expedient to allow the restructuring to proceed with minimal court intervention. The scheme may be initiated by the company or any of its creditors by filing of notice. This scheme is the company voluntary arrangement scheme (CVA). The CVA provides a company in financial distressed to avail itself for protection whilst the directors manage the company. In the meantime, a qualified insolvency practitioner supervises the restructuring plan. It may be argued that a CVA is somewhat similar to section 176 in that the directors of the company continues to manage the company while a restructuring plan is being worked out.
In addition, in line with international standards\textsuperscript{33}, a corporate rehabilitation system for Malaysia generally should include the following key features:

1. Clear rehabilitation plans- the system should be able to provide for a rehabilitation plan that is easily understood and implemented;

2. Time frame- the system should encourage the rehabilitation of the company by providing a realistic timeframe within which the proposal is to be prepared, approved and implemented;

3. Moratorium- the system should facilitate rehabilitation by providing a moratorium period to enable the proposal to be formulated and implemented without threat of liquidation or creditors’ action that may frustrate the rehabilitation process;

4. Safeguarding of creditors’ interest- the system should have provisions to safeguard creditors interest by providing moratorium against dissipation of company’s assets or funds, by adequately providing for creditors’ voting and by providing creditors the right to receive reliable information concerning the company and the rehabilitation plan;

5. Involvement of insolvency practitioners- The involvement of qualified and competent insolvency practitioners will ensure that there is no unnecessary delay in the process.

\textsuperscript{33} World Bank, \textit{Principles and Guidelines for Effective Insolvency and Creditors' Rights Systems} (April 2001) Executive Summary and Introduction. Principle 17 states that: “To be commercially and economically effective, the law should establish rehabilitation procedures that permit quick and easy access to the process, assure timely and efficient administration of the proceeding; afford sufficient protection for all those involved in the process, provide a structure that encourages fair negotiation of a commercial plan, enable a suitable majority of creditors in favor of a plan or other course of action to bind all other creditors by the exercise of voting rights (subject to appropriate minority protections and the protection of class rights) and provide for judicial or other supervision to ensure that the process is not subject to manipulation or abuse.” See also Aishah Bidin, “Harmonization of Insolvency law in Asia” (2004) Proceedings from Singapore Asian Law Conference, Organized by ASLI and Law Faculty of National University of Singapore.
6. Involvement and supervision of the Court- the system needs to ascertain the level and extent of court's involvement in the initiation, implementation and supervision of the rehabilitation plan.

Conclusion

Company law that regulates the corporate behavior of its players has been in existence in this country more than a century ago and has since evolved tremendously into a sound legal framework which has worked well before. Undeniably, its meaningful existence has contributed significantly to our strong economic growth so far and that this is only achievable with the existence of a very responsive legal framework to the relevant business environment. The current initiatives by SSM in its near term plan to amend the Companies Act 1965 to implement the recommendations of the High Level Finance Committee On Corporate Governance and its long term plan under the Corporate Law Reform Programme are not to put the system in place, but merely to further develop, strengthen and improve the system to keep pace with the rapid change that is taking place globally. This shall remain to be the primary agenda of SSM, as the economy of the nation is driven by companies which are regarded as engines of growth. The SSM being a statutory body vested with the function primarily to govern, regulate and initiate changes to the corporate laws as well as its registry functions, remains committed in ensuring that corporate vehicles in this country will not only continue to generate profits for economic advancement but at the same time, promotes transparency and accountability that protects shareholders' interests, as rightly stated by the Cadbury Report, “The country’s economy depends on the drive and efficiency of its companies. Thus effectiveness with which their boards discharge their responsibilities determines the country’s competitive position”.
Globalization is influencing legal systems in Asia as elsewhere in the world. Legal change and globalization are integral to the development of market-based societies. This has been recognized in many Asian legal systems where law reform and corporate governance have been major governmental priorities. The Asian economic crisis gave birth to a new international consensus about the need for increased and timely information to sustain developing markets. In the case of Malaysia, the law reforms have been largely led by the state with little evidence of concerted lobbying from business itself. The globalization process in corporate law in Malaysia has taken place in the form of adopting international standards developed by such multilateral bodies such as the World Bank, IMF, OECD, and also UNICITRAL. This can be seen from the massive corporate law review and reform undertaken since the occurrence of the financial crisis until today.

The social, political, and economic environment in Malaysia has resulted in great state influence on business, whether directly as corporate owners, or indirectly through the influence politicians have on companies and business leaders. This has resulted in situation of conflicts of interest. In certain cases it is difficult for the regulators, appointed by the Executive and answerable to the Executive, to apply laws and regulations, which the Executive-dominated Parliament or the regulators themselves have created.

In a way, the Malaysian government has played a very pro-active role in implementing development-oriented policies and using law as an instrument of social change and control. Such events have also led to extensive and widely discretionary powers given to the authorities under the name of transparency and accountability. Nevertheless, the combination of using law and legal reform as a tool of economic development and the complexity between law and economic efficiency has given rise to a more sensitive issue. Differences in shareholding structure as well as economic, political, and
cultural differences mean that the nature of the problems and solutions will vary across markets, in particular, in a corporate framework where the excessive powers of controlling shareholders creates the biggest agency problems. In addition, cultures and value systems, the quality of legal institutions, issues related to access to courts, and the influence of politics in business have affected the development process.

Legal global reform and transplanted laws will evolve as they interact with elements in the local environment. This evolution need not necessarily result in changes in the substantive law. Often, there will be differences in the way the law is used, administered, and enforced. The historical nature and the economic setting in the Malaysian corporate environment is a special case where the government has always played a dominant role in making any legal, social, and economic reform. This can be observed from the setting up of special vehicle mechanisms to protect special interests in society and transplanting authoritative power through legislation. Political and institutional transparency in corporate governance should not be underestimated. As global changes continue to affect Malaysia, developing new laws which are effective in these areas require good understanding of the socio-cultural environment in which these laws are to apply. This and other resistance and constraint discussed suggest that law reform in this region is still a long and winding road yet to be traveled.