Suruhanjaya Sekuriti
Securities Commission
Malaysia

OXFORD CENTRE FOR ISLAMIC STUDIES
Incorporated by Royal Charter

INSOLVENCY, POLICY & SHARIAH: THE MALAYSIAN CONTEXT

SC-OCIS VISITING FELLOWSHIP SCHOLAR IN RESIDENCE PROGRAMME IN ISLAMIC FINANCE 2020-2021

SC-OCIS Scholar in Residence Programme

DISCLAIMER

This paper presents research by the SC-OCIS Visiting Fellow in Islamic Finance under the SC-OCIS Scholar in Residence Programme 2020-2021 on applied and contemporary issues, with respect to global Islamic finance. The views expressed in this paper are those of the author and do not necessarily represent the views of the SC, its Board, or the SC management.

CONTENTS

SC-OCIS Scholar in Residence Programme

The collaboration between the Securities Commission Malaysia (SC) and Oxford Centre for Islamic Studies (OCIS), UK was established in 2010, with the objective of promoting intellectual discourse and research on applied and contemporary issues with respect to global Islamic finance.

The SC-OCIS Scholar in Residence Programme (SIR Programme) is one of the outcomes aimed to pursue further research that complements the flagship programme, which is the annual SC-OCIS Roundtable. A thought leadership platform, the SC-OCIS Roundtable gathers distinguished scholars, academicians, regulators and Islamic finance practitioners to discuss and exchange views on contemporary issues in Islamic finance.

Abdulkader Thomas, the Visiting Fellow of the SC-OCIS SIR Programme for the academic year 2020-2021, brings over four decades of experience in global finance, and was the General Manager of a foreign bank branch in New York. During his tenure in the SIR Programme, Abdulkader conducted a research titled 'Insolvency, Policy & Shariah: The Malaysian Context', which delves into insolvency reforms in Malaysia.

This research aims to contribute to the discourse on insolvency, policy, and Shariah within the Malaysian context. It encompasses analyses of various facets, including the fundamental social contract that shapes Malaysian public policy and an assessment of the alignment of Malaysian insolvency policy with Shariah principles. Beyond this, the paper provides valuable insights and offers recommendations for potential changes in Malaysian insolvency policy. It also demonstrates the compatibility of Shariah principles with effective policymaking in a diverse, multi-faith society such as Malaysia. Furthermore, it illuminates the utilisation of *Maqasid Al-Shariah* for evaluating secular policy initiatives.

Profile of Scholar

ABDULKADER THOMAS
SC-OCIS Scholar in Residence in Islamic Finance 2020-2021

Abdulkader has over 40 years of diversified global financial services experience. He was the Securities Commission Malaysia – Oxford Centre for Islamic Studies Visiting Fellow in Islamic Finance for 2020-2021.

As the general manager of a foreign bank branch in New York, he was responsible for securing the first US banking regulatory approvals of Islamic financial instruments for mortgaging and installment sales as banking instruments as well as Islamic profit sharing deposits. Abdulkader worked on two securitisation projects with Freddie Mac for Islamic home finance products.

Abdulkader has written extensively and consulted on the Islamic capital markets. He is the co-author of Islamic Bonds (Euromoney 2004), Sukuk (Sweet & Maxwell 2009), and Managing Funds Flow Risks and Derivatives: Applications in Islamic Institutions (Sweet & Maxwell 2012) amongst others.

Abdulkader has served as a technical expert on the Shariah board of Bank Muscat Meethaq (Oman) from 2013 to 2017. He has acted as a member of the international advisory board of the Securities Commission Malaysia. He also chairs the Advisory Committee of Experts at Sterling Bank (Nigeria) since 2013 and Algbra's Shariah committee since 2021. He was the lead consultant for University Islamic Financial Corporation (Michigan, USA).

Having served as an independent director of Alkhabeer Capital (Saudi Arabia), Abdulkader now chairs the firm's Board Risk Committee. He is a non-executive director of Strategic Ratings (London) and Technocomm IOT (UK).

Insolvency, Policy & Shariah: The Malaysian Context

Author:

Abdulkader Thomas

ABSTRACT

Insolvency reform is slow and evolving. Two areas of contemporary concern are the ability of the state to interfere in private contracts, and how to provide equitable outcomes for Micro, Small and Medium Enterprise (MSME) operators. The former allows judicially mandated restructuring. The latter requires new thinking in Malaysia's well-developed English-style insolvency system. Since the 1980's, progressive Malaysian reforms have introduced rescue and reorganization features into the corporate insolvency system. The personal system, which affects sole proprietors and MSME operators, remains punitive and largely unreformed.

Insolvency, beyond its direct economic impact, has serious social implications. (Ooi, 2019) explains:

> "A bankrupt person is usually perceived as either a spendthrift or someone who is horrendous at keeping tabs on his or her expenditures."

The fault is personal and not economic. The characterization does not allow for the examination of exculpatory circumstances. As a result, a bankrupted individual endures financial punishment and suffers restrictions on his or her behavior.

This paper excludes special cases like Malaysian Airlines or COVID-19 policies. The first involves rescue-related legislation for a state enterprise serving the national interest. Malaysia addressed the COVID-19 pandemic as a systemic event. Like most countries, Malaysia enacted one-off procedures for the public good.

Although Islam is Malaysia's state religion, its role in law varies. This paper examines the national social contract as a context for reforms that may not align with traditional English law approaches. The historical social contract and role of Islam support the consideration of novel Shariah remedies within existing law. The paper contrasts Malaysian insolvency law with Shariah principles. After discussing the nature of the contrasted legalisms, the paper analyses the *Maqasid Al-Shariah* (MAS) as tools for evaluating Shariah solutions and their prospective benefit to the reform insolvency procedures.

Even if the paper's findings indirectly benefit the capital markets, the most probable impact would be in the arena of crowdfunding, social finance, and impact investing (CSI). Securities in these sectors tend to have small obligors like MSMEs. Unlike large businesses, MSMEs lack the capacity to fend off creditors or renegotiate transactions. It is more problematic for micro-enterprises.

Beneficiaries of CSI may find themselves pushed into personal bankruptcy, suffering personal consequences which rarely afflict the management, board-members or shareholders of large corporations. Insolvency law involving large businesses and special purpose entities (SPEs) is largely established in contemporary Malaysian regulation and case law.

The paper is organized into six segments. The paper investigates the underlying social contract that shapes Malaysian public policy. Then the analysis turns to a review of the contemporary insolvency resolution in Malaysia. This is followed by a comparison of Malaysian insolvency policy and Shariah principles. Based on this analysis, recommendations are made for changes in Malaysian policy. The paper then examines the case for framing policy adjustments in the context of MAS. This makes two contributions. The first is to demonstrate the compatibility of Shariah principles with good policymaking in a modern multi-faith society like Malaysia. The second is how to use MAS to evaluate secular policy initiatives.

Keywords: Social Contract, Bankruptcy, Insolvency, *Maqasid Al-Shariah*, Public Interest, Islamic Finance

0. INTRODUCTION

The general approach to modern commercial policy is to examine global best practices. When it comes to insolvency, this embraces comparisons to English, French and US law. Alternative, model laws and recommendations are proposed by various international bodies and associations. Invariably, these are secular. This paper examines a multi-faith state Malaysia and its insolvency policies. Although Malaysian laws carve out a role for Shariah in financial and family laws, the application of Shariah principles as tools of reform for secular projects like insolvency reform is largely untested. By reviewing the Malaysian social contract and contemporary insolvency law, this paper discovers how Shariah may be helpful in producing more equitable outcomes. This requires an understanding on how to address a number of situations from a policy perspective relating to the authenticity of Shariah-inspired reforms and the application of new principles in Shariah. As a result, the paper will investigate how the *Maqasid Al-Shariah* should be applied to the insolvency reform, generally and in Malaysia.

1. THE SOCIAL CONTRACT

Malaysia's liberal constitution gives both citizens and states wide liberties. The Malaysian social contract, however, is not explicit. In contrast, the preamble to the US constitution declares that the state is the creation of the people. (Caezar, 2020) discusses how the Malaysian social contract seeks to achieve harmony within a multi-ethnic, multi-faith society. (Caezar, 2020) argues that Malaysia's social contract arises from the consent of the citizens consented to be ruled by the newly formed state. This brings the implicit Malaysian social contract closer to the explicit American social contract. (Mahatir, 1981) adds that removing the causes of strife is a basis of the Malaysian social contract.

As a Federal Constitutional Monarchy, Malaysia reserves certain powers to the states. For instance, state Shariah courts address Islamic family law. The governance of Islamic finance, however, is federal. Bank Negara Malaysia and the Securities Commission Malaysia under the *Islamic Financial Services Act 2013* (IFSA) and *Capital Markets and Services Act 2007* (CMSA) respectively have legal and administrative authority over Islamic Finance. This makes Malaysia one of the few jurisdictions in which Shariah is clearly applied as part of commercial law.

(Siow, 2014) posits that policymaking in Malaysia is free from an underlying philosophy which may lead to sub-optimal outcomes. Yet, an examination of pronouncements and initiatives within the Malaysian financial sector demonstrate several highly progressive social initiatives. Given that the Malaysian financial regulators are ultimately headed by political appointees, these initiatives speak to a national consensus. (Shah, 2011) captures this in his analysis of Islam and the manner in which a social contract embodies the duties of a government to its citizens.

This progressive thinking has its roots in Malaysia's 1970 New Economic Policy which promised "poverty eradication regardless of race." Although the Malay majority was most likely to be impoverished (Caezar, 2020) (Shahar, 2021), there has been a consensus social contract that obliges the state to seek the betterment of citizen lives.

Beyond the social contract, Malaysian law inherits much from English law. A pillar of English law is that the state should refrain from intervening in private contracts. The state should uphold lawful contracts. State-mandated reorganization and rescue at the expense of lawful creditors is seen as problematic. Nonetheless, the constitutional construct and its underlying social contract allow for the state to intervene in contracts for the betterment of the citizens. Therefore, the concepts of state-ordered reorganization or rescue have been adopted for large businesses, even at the risk of loss to creditors.

From a public policy perspective, Malaysia has shown a strong interest in the rescue of troubled companies. In both the 1980s and 1990s, Malaysia avoided IMF intervention during financial crises. Malaysia preferred policies that would allow the state to minimize the negative impact on ordinary citizens as stated by (Shahar, 2021): "Under Mahathir's leadership, the Malaysian government had initiated economic policies which safeguarded the social harmony of its citizens..." These included market liberalisation in the 1980s and corporate rescue in the 1990s. The revamped *Companies Act 2016* continues the trend of making rescue easier, even if it is more restrictive than France or the United States.

In conclusion, Malaysia's social contract allows the state to protect social harmony through policies emphasizing economic welfare and reducing economic difficulties. Such policies already include judicial intervention in private financial contracts during corporate insolvency proceedings.

2. CONTEMPORARY MALAYSIAN INSOLVENCY

(Baker Mckenzie, 2017) describes the Malaysian insolvency system as similar to the English system. In Malaysia, insolvency is the inability to pay debts when due. Courts, however, declare a person or business bankrupt when there is a failure to comply with a court order to make a payment.

Tan Sri K.K. Eswaran, former president of the Malaysian Associated Indian Chambers of Commerce and Industry, complained that "…those declared bankrupt should be allowed to start up small businesses, or be gainfully employed, in order to expedite the discharging process." (The Star, 2012). Yet, Malaysia's current insolvency rules impede expeditious paths to discharge and recovery for MSME operators who are disproportionately from Malaysia's low-income group or Bottom 40% (B40).

MSME operators are likely to fall under personal bankruptcy governed by the *Insolvency Act 1967.* Under the act, proceedings "only apply to individual debtors who are unable to pay a judgment debt..."(Chee, 2021) (Legal Smart, 2021) reports that the amendments to the *Bankruptcy Act of 1967*, now called the *Insolvency Act 2017*, took effect on October 6, 2017. These amendments leave important constituencies at risk for punitive treatment during insolvency proceedings. The classical concept of the creditor's absolute priority (the "absolute priority rule" or "APR") remains in place for individuals, even if it has been weakened for large businesses.

(Yap, 2016) Improvements to the process include an automatic discharge after three years. The 2016 reforms also reduce the bankruptcy risks for "social guarantors" who do not profit from guaranteeing certain forms of finance and hire-purchase.

Once adjudged bankrupt, the Director General – Insolvency (DGI) may sell most of the bankrupt's property except certain necessities and tools of trade. An individual who is bankrupted may face the following restrictions in order to protect the public:

- Disqualification from being a judge or magistrate; and
- Barring from nomination or election as a councilor or a member of Parliament or a trustee.

These limitations are clear as any judicial or elected officials in an undischarged bankruptcy may be subject to influences from third parties that cause them to pervert their actions and harm the public interest. Trusteeship might be excluded upon a case-by-case consideration.

The law includes restrictions to assure accountability:

- Restricted in expenditures and obliged to report income and expenses to the DGI;
- Restricted from travel out of Malaysia without permission from the DGI, or court order;
- Restricted to one bank account for crediting monthly income;
- Limited to one credit card line with a limit of up to RM1,000; and

A logical assumption is that a bankrupt may have faced difficulties keeping track of his or her obligations. As a result, efforts to either assure accountability or prevent the bankrupt from fleeing his or her responsibilities are good policy. But, this policy should have some flexibility as the state seeks to optimize recoveries. Such flexibility is present in the *fiqh* literature.

Finally, the person declared bankrupt faces punitive restrictions:

- Restricted from initiating any legal proceedings without permission from the DGI, other than file a claim for damages in case of personal injury;
- Restricted from serving as a director or managing a company or acting as a partner;
- Prevented from employment in any way with a business run by a spouse, child or relative;
- Disqualified from practicing certain professions like lawyer or accountant.

The punitive restrictions are problematic from a policy perspective as these may impede recoveries prior to the end of the discharge period.

The implications of these are discussed in Section 4 onwards when the questions of *fiqh* and MAS, are discussed, and recommendations for further reform are made.

In contrast to personal bankruptcy, the *Companies Act 2016* seeks to enhance existing rescue measures. Prior to the reform, receivership and liquidation were the most common options. The scheme of arrangement was in place, but found to be abused during the 1997 currency crisis. (Yap, 2016) (Nathan – Global Guide, 2018) writes that:

> "There are six main generally applicable corporate insolvency processes under Malaysian law, namely schemes of arrangement, corporate voluntary arrangements (CVA), receivership, judicial management, administration by a conservator and liquidation."

According to (Baker McKenzie, 2017), a court ordered wind-up should have the following payment priorities:

1. Secured creditors, to the value of their collateral;
2. Insured third party claims for which the business has received the insurance amount;
3. Preferential creditors, including certain employee claims, the petitioner and liquidator costs and expenses;

4. Unsecured creditors; and

5. Deferred creditors.

The relative meaning of this payment waterfall will be reviewed in Section 3 in the comparisons of Malaysian procedures to *fiqh*.

According to (Baker McKenzie, 2017), the Act allows for the voiding of antecedent transactions and avoidance of undue preference. Avoidance is when the court looks back at related party and other transactions and determines if they disadvantage creditors. (van Zwieten, 2018)

There are important gaps in the *Companies Act of 2016*. For instance, (LegalSmart n.d.) wrote:

> "The *Companies Act 2016* does not define insolvency, but it settled on the premise that a corporation is commercially insolvent when it cannot pay its current debts when they are due, regardless of whether the corporation has assets that, if realised, could cover the debts."

(Yap, 2016) points out that the *Companies Act 2016* covers business insolvency and provides for a ninety-day moratorium, extendable to an additional 180 days. Malaysian policy is domestically developed and Malaysia does not apply United Nations Commission on International Trade Law (UNCITRAL) models. (Yap, 2016)

(Bidin, 2004) wrote that "Primarily, Malaysia has a creditor-focused system." The 2016 reforms have reduced creditor power in corporate bankruptcy whilst leaving individuals in a punitive, pro-creditor environment. Even still, a company may be forced into proceedings for an unpaid debt as small as MYR 500 and secured creditors continue to have a last word. Despite significant steps taken to facilitate the rehabilitation of ailing companies under the Judicial Management and improved Scheme of Arrangement, the new law has the limitation that secured creditors may veto the Scheme.

One of the important problems outside of Malaysia has been the use of a "Shariah compliance defense" by defaulters. An example of this sort of defense is the highly published Dana Gas case of 2017. The UAE gas producer unilaterally declared its *mudarabah sukuk* to be *ultra vires* because the *mudarabah* did not conform to UAE law. The assertion was litigated in UAE federal court which favored Dana Gas over the principle that Dana Gas' undertakings undermined the *mudarabah*, as well as in London High Court which favored the investors based on English law undertakings in the documents (Ercanbrack, 2019). Dana Gas's position would not have been possible in Malaysia following IFSA 2013.

3. SHARIAH, MALAYSIA AND INSOLVENCY POLICY

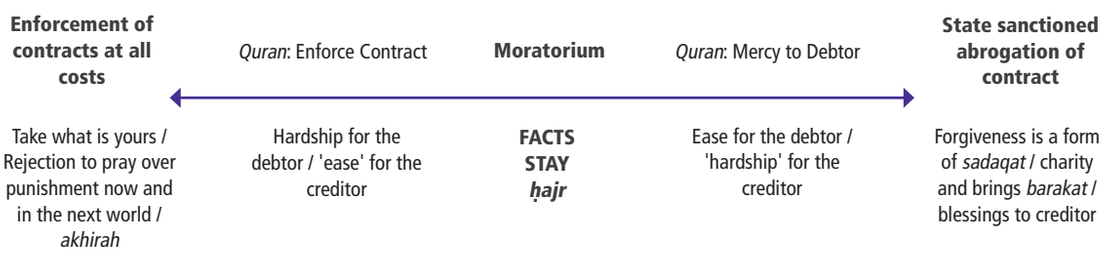
Important features of Malaysian law are inherited from English law, itself a form of customary law. This is not necessarily offensive as a well-known *fiqh* maxim states: "Custom is the arbiter". (Laldin, 2013, Maxim, 2424). This legacy is consistent with the *Quran*'s injunction to honor contracts. (Q5:1 and Q2:232). Enforcement of contracts can restore wealth to a creditor, but at a diminished value. Compulsory administration of contracts may result in a second wave of lost value as the debtor, post failure, loses capacity to engage economically.

Honoring contracts (Q5:1), however, should be balanced with the *Quran*'s encouragement to show mercy to debtors (Q2:282). Perhaps such overturning of private contracts is in line with the *fiqh* maxim: "averting harm comes before benefit." (Laldin, 2013, Maxim, 21) In such a case, the policy issue is that enforcement of the contract creates greater harm than the state's intervention. On the one hand, the *Quran* states that "wealth should not only circulate between the rich amongst you." (Q59:7) On the other hand, insolvency is when wealth cannot circulate. Insolvency proceedings establish a state-administered platform for the parties to determine how circulation is revived.

Perhaps for this reason, the *Quran* equally encourages creditors to be merciful to debtors in difficulty. (Q2:280) Granting ease to debtors restores circulation, albeit at a diminished value, for the creditor may lose, and the forgiven debtor will still require time to recover commercial capacity.

The practical problem for either enforcement or forbearance is how to know whether or not a debtor is truly struggling or hiding his capacity to pay. This first arose during the life of the Prophet (PBUH). The balance between enforcing an unenforceable contract because the debtor has no money is the judicial intervention through a moratorium or *ḥajr*. The *fiqh* term *ḥajr* may be translated as either a moratorium, freeze, or stay resulting in a temporary forbearance. Historical cases were biased towards the enforcement of contracts.

Figure 1
Spectrum of Bankruptcy Treatments within Shariah (Author's Own)



In classical jurisprudence, a moratorium is an opportunity to validate creditor claims compared to the debtor's capacity. A freeze protects the bankruptcy estate from plundering by the creditors until the various claims are validated. If necessary, the identified assets may be sequestered (*ḥajr*) and held until claims are verified and distributions can be made. (Abu Ghuddah, 2016) affirms that this practice was known during the classical period.

Malaysian judges have the right to stay claims (*ḥajr*) and/or impose a moratorium (also *ḥajr*) on proceedings in order to protect the bankruptcy estate. In this case, a stay is not the same as a fact-finding moratorium. The stay, nonetheless, allows the court time to investigate matters relating to a specific case or to allow the debtor to dispute the indebtedness.

The benefits of a moratorium, as in classical *fiqh*, include the discovery process and the uncovering of avoidable transactions, concealment and the discovery of fraudulent conveyance or fraudulent trading. Discovery of such actions allows for clawbacks from third party payees in Shariah as well as Malaysian law. Fact-finding requires the determination of a preference period. How far back can one examine the debtor's actions in order to determine the origin of the insolvency and any associated fraudulent behavior.

In defiance of International Monetary Fund recommendations, Malaysia addressed the 1997 Currency Crisis, by creating specialized entities to manage insolvencies. Danaharta Nasional Bhd. was established to acquire or manage the assets and liabilities of troubled companies. Danaharta was closed in 2005 with its role transferred to Prokhas Sdn Bhd. (Shahar, 2021) Danamodal Nasional Bhd. was set up to recapitalize troubled financial companies. And, the Corporate Debt Restructuring Committee (CDRC) was established by the Central Bank "to assist with the voluntary debt restructuring between debtors and creditors in a market orientated and transparent manner." (Abeyratne, 2004) According to (Shahar, 2021), a workout strategy was in the best interest of the country, looking at the poorest communities.

(Wong, 2020) lays out the schemes for rescue available under the reformed Companies Act of 2016. Each imposes a moratorium allowing fact-finding and negotiation (Figure 2).

Figure 2
Corporate Rescue

Questions	Scheme of Arrangement	Corporate Voluntary Arrangement	Judical Management
Scheme initiated by?	Company * / Creditors	Company *	Company * / Creditors
Scheme in charge by?	Directors	Directors	Judicial Manager
Court involvement?	Court Convenes Meeting	Minimal Court Involvement	Judicial Manager appointed by Court
Approval From?	75% in value of Creditors / Members OR class of Creditors/Class of Members	75% in value of Creditors and 50% of Members	75% in value of Creditors without classes unless at a Scheme of Arrangement
Moratorium?	Applicable under restraining order for 3 months Extendable to a maximum of 9 months	Immediate moratorium of 28 days Extendable to a maximum of 60 days	Moratorium of 6 months Extendable by another 6 months

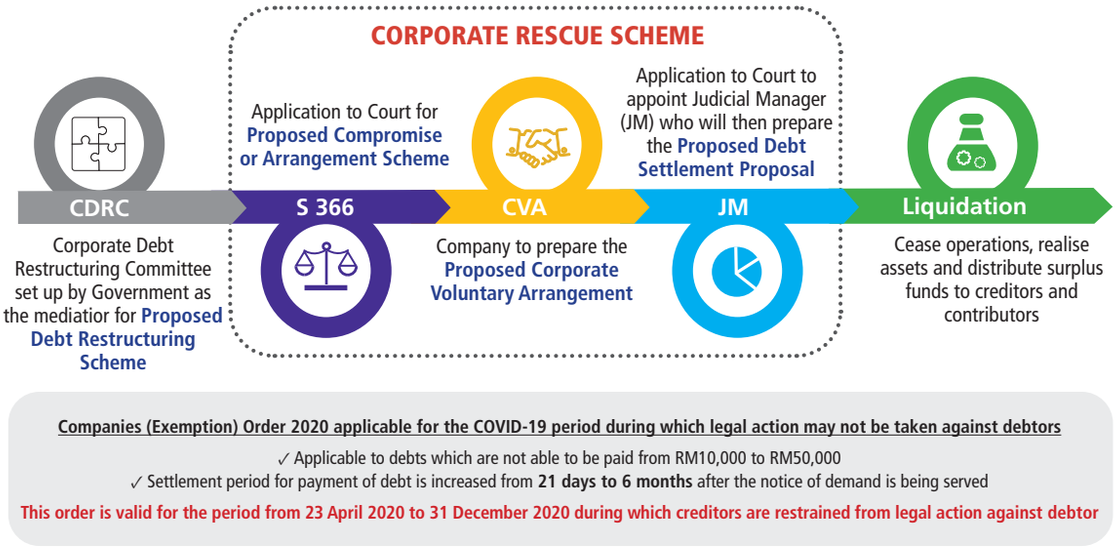
These schemes balance creditor and state interests. The critical element of balance is that these do not require creditor unanimity. Even in classical jurisprudence, judges would find that creditors could not all agree, or might not join together to collect their debts. (Juma'ah, 2005) Malaysian law remains "creditor friendly" by requiring a creditor super majority by value to approve a plan. This means that the "voluntary restructuring" can be imposed on the minority creditors. This is effectively a form of state-supported abrogation of private contracts.

In two schemes (Scheme of Arrangement and Corporate Voluntary Arrangement), the court's role is less than the third (Judicial Management) and the company directors are in charge of the scheme. This makes the first two consensual. In contrast, Judicial Management reveals the absence of trust between the creditors and debtors. What is critical in this reform is that the best outcome is expected to be the modification of contract. Despite the court's role, modification is seen as coming at the creditor's behest. In theory, the state is not modifying the contract. (Yap, 2016) notes that the Corporate Voluntary Arrangement is further restricted by APR as it may not be used by public corporations or businesses with encumbered real estate.

A unique and conservative feature of Malaysian insolvency law is that a proceeding for rescue or liquidation against one member of a group cannot be used to force the whole group or any of its constituents to reorganise or liquidate (Nathan - Asia Pacific, 2018).

(Wong, 2020) illustrates the options (Figure 3).

Figure 3
Corporate Rescue



Companies (Exemption) Order 2020 applicable for the COVID-19 period during which legal action may not be taken against debtors

✓ Applicable to debts which are not able to be paid from RM10,000 to RM50,000
✓ Settlement period for payment of debt is increased from **21 days to 6 months** after the notice of demand is being served

This order is valid for the period from 23 April 2020 to 31 December 2020 during which creditors are restrained from legal action against debtor

Apart from the three approaches to reorganize and rescue the debtor, there are two other solutions. For specialized cases, there is the Corporate Debt Restructuring Committee and liquidation. The former is unique to government-linked or large systemically important companies. The latter is the outcome of full business failure. Liquidation harkens to the *hadith* which encourages the creditor to take what is his and call it a day. (Siddiqui 1992, p. 820)

4. ALIGNMENT WITH FIQH

Malaysia's reorganization schemes may be seen as efforts to preserve as much as practicable the creditor's priority whilst easing terms for debtors. The objective is to secure a better comprehensive recovery. The latter is consistent with the Q2:280, which states "… if the [debtor] is in difficulty, give respite until he is in a better situation…". In fact, the easing of difficulties is a form of reconciliation which is consistent with the *hadith* "The Muslims have their conditions, and reconciliation between them is permitted." (Daralqutni 2001, p. 606)

In modern times, the court queries whether or not a business is a going concern. There is an equivalence in classical *fiqh* as some bankrupts were allowed to continue trading, even to travel for trade as it was deemed that they would trade to support themselves whilst earning to payoff their debts. For Ibn Taymiyya, this is a creditor's option, subject to judicial consent. (Juma'ah, 2005) Our contemporary understanding of a going concern, however, is agreed based upon the valuation of a business. A preliminary survey of Malaysian practice reveals that there is no established valuation norm. Even in classical Shariah cases, there was no discussion of valuation. In both, this is a weakness.

The trend in Malaysian policy-making has been to ease corporate insolvency through restructuring and rescue negotiations. One might say that this is in line with the Prophetic advice "Give good news, do not drive people away. Make things easy. Do not make them difficult." (Laldin, 2013, p. 86) Yet, the overall processes remain challenging as a 75% creditor super-majority to arrive at a rescue can be daunting to achieve.

When the process of segregation is complete, the debtor's assets may include claims on creditors. In the classical period, the debtor might have had multiple trade relationships with a creditor. These might include amounts due from a creditor to the insolvent debtor. In our contemporary period, one can imagine the debtor having bank accounts with lenders or receivables due from trading partners. The unwieldy approach would be to leave each contract undisturbed subject to enforcement on its own terms. The efficient approach, sanctioned during the classical period by no less than Ibn Taymiyyah, is to allow set-off. (Juma'ah, 2005) (Practical Law, undated) defines set-off as "Where a debtor has a claim against a creditor, the creditor's claim is reduced or extinguished by the amount of the debtor's claim." This is not the same as netting, which is a voluntary process outside of insolvency whereby the counterparties never intend to pay the full amount of their countervailing debts, rather only to settle the difference.

Classical *fiqh* understands two preferences, collateral and time. A secured creditor should be allowed to claim his collateral, subject to the Prophet's restrictive advice. (Siddiqui, p. 343) This is enshrined in Malaysia's original and contemporary code. Yet, the prophetic instruction has a second corollary: 'that is all that you will have.' This has survived in several modern collateral rules, such as California's single action rule whereby a seizure of real estate collateral estops a deficiency claim. (Stimmel, undated).

The second preference is time, which gives preference to the first contract that was executed. Yet, most classical cases take the view that once the insolvency is realized, then the acknowledged unsecured claimants are *pari passu*. (Abu Ghuddah, 2016) Contemporary Malaysian debt markets, including the Islamic capital market, recognize preferred claims which are not defined by time alone. Capital market preferences are sustained in Malaysia's mandated bankruptcy payment waterfalls.

As discussed in Section 2, secured Malaysian creditors have a priority to the value of their collateral. This is consistent with the *hadith* "Take what you find, you will have nothing but alms.". (Siddiqui, p. 343) Then, insured creditors follow with a claim on insured sums paid to the failing company. Next, come preferential creditors, employees and the costs of the petitioner and liquidator. This is particularly challenging as the *hadith* supports the priority of labor claims. (Ibn Majah undated) (Suleiman undated) (Khan undated p. 258) There is precedent to pay officers of the court or those harmed by initiating a court proceeding in different parts of the social finance literature with the priority of the *mutawally* to collect his fees ahead of *waqf* disbursements. (AAOIFI, 2020) The ranking of deferred creditors behind unsecured creditors raises the problem of tradesmen following financial creditors. The approach to ranking disadvantages weaker members of society, namely labor and MSME tradesmen who are unpaid at the time of the insolvency.

Although one might raise arguments about disqualification from public office, an independent and apolitical process governing judicial and elected offices is in the public interest. In some countries, bankruptcy has been weaponized in politics. One would wish to avoid cases like the disenfranchisement of the former Singapore opposition leader Jeyaretnam. (Bryan, 2004). Malaysia's own Constitution prevents one from serving in parliament if one is an undischarged bankrupt.

(Constitution 48 b and Part 1 Final Provisions 6.1.b.). The political question, then, is not about the right to participate as a voter, but the right to serve as an elected official free from undue influence. The former should not be restricted. The latter is a valid concern. The *fiqh* provides a completely different approach. Even though the Prophet did not lead the funeral prayers for undischarged bankrupts, (Khan undated) he did appoint Mu'adh governor of Yemen when his debts were not fully settled. (Darulqutni, 2001). By extension, Mu'adh's reliability and leadership skills trumped his discharged, but unpaid debts.

The same public interest may be better served when the DGI or court has more latitude to lift certain restrictions on accountability and to lessen punitive restrictions. The primary argument to lift restrictions is that these may make it more difficult for the bankrupt to discharge the debt thereby reducing the possible recovery.

Within the wider context, restrictions on business leaders are less onerous than on sole proprietors or MSME operators. This is true in almost all countries. This demonstrates the challenges before MSMEs. Some of the other important bankruptcy practices include:

1. Service or Notice of Proceedings: Creditors may apply a substituted service by publishing in a newspaper or advertisement. A substituted service may prove not to be a service at all. With the transition of new media to the internet, and its subsequent expansion, an overburdened MSME operator may no longer read a physical paper and lack access to an online version with the published service. In our contemporary media cacophony, this is susceptible to the highest form of *gharar* as creditors need not serve the debtor directly. The result could well be undefended insolvency case and the demise of an otherwise solvent MSME.

2. Debtor-in-Possession (Protective Settlement): As noted above, classical jurists allowed some insolvent merchants to continue trading. This creates a clear analogy to debtor-in-possession procedures. Malaysia's debtor-in-possession options include a workout with standstill, a non-judicial arrangement and the Scheme of Arrangement (Companies Act, 176). The latter is a court sanctioned compromise and can include restraint of proceedings until an order is issued.

3. Disclaiming a contract is traditionally viewed as the creditor's option. In some cases, it is imposed by a judge. The resulting debt forgiveness, when ordered by a court represents the state attempting to act in the best interest of as many stakeholders as possible. Disclaiming may be seen as the creditor taking a voluntary "haircut".

4. Haircuts: The concept of a "haircut" is supported in the *hadith* of the debtor who could not meet his obligations: "Take what you find, you will have nothing but alms." (Siddiqi, 1992, p. 820.) In another *hadith*, the Prophet encourages a creditor to accept half of a debt. (Khan undated, p. 358, and Siddiqi, 1992, p. 821.) A haircut is fundamentally a contract modification or a contract substitution. In the classical period, a contract was more likely to be disclaimed. (Shaqa, 2002) raises the issue that partial settlement of a debt risks the introduction of *riba* if there is any form of profit on the unpaid balance. This is why reorganizations like Arcapita replaced existing debts with new transactions. (Johnson, 2014)

5. Debt-to-Equity Conversion is a modern practice. It would not have been known in the classical period as one either had a trading debt or a trading partnership. The former had to be settled, modified or forgiven. The latter, if insolvent in its own right, would be subject to dissolution. But, a number of contemporary insolvencies have been resolved with debt-to-equity conversions. The Arcapita case, for instance, included a novel issuance of equity *sukuk* to

specified creditors which were effectively funded by the liquidation of the same creditors' debt instruments. (McMillen, 2015 p. 13)

6. Preference Period. A preference period is required to determine when insolvency began and to determine if transactions are bona fide or fraudulent efforts to hide wealth from creditors. In classical fiqh, the use of a preference period appears to have been ad hoc.

7. Substitution of Collateral. The fiqh challenge for collateral includes two issues:

    a. The first is that Shariah scholars have been generally unhappy with floating charges, defined as "… a security interest or lien over a group of non-constant assets that change in quantity and value." (Chen, 2021) Because the collateral is not specific, a floating charge prospectively violates the restrictions on excessive *gharar*. (Sharoni, 2018, p. 108) The invocation to "take what is yours" is not feasible when the collateral is not identified.

    b. Substitution is a question of time. On the one hand, the rules of specific collateral are flexible. There are limited restrictions in Shariah on collateral. On the other hand, were the substitution to take place before an agreed preference period, it would probably withstand challenge. After the launch of proceedings, a substitution may well be deemed to have been a release of collateral which might not allow for the grant of a new charge on the substituted collateral.

8. Acceleration: This is the advancing of future claims when an insolvency is identified. Some classical jurists rejected claims from creditors against debts that are either current or current and unmatured. This position, however, has largely faded so that the wholistic position of the debtor is subject to *ḥajr* and resolution. Malaysia has a unique position in that it treats the constituent members of a group of companies as independent when one member is insolvent. As for the company subject to proceedings, all of its debts are brought into the proceedings.

9. True Sale & Bankruptcy Remoteness v Substantive Consolidation: The traditional Shariah definition of a sale is broad. Therefore, the various definitions of "true sale" whether American or Malaysian are accepted in Shariah. True sale of assets leads to a status for the assets called bankruptcy remoteness. American bankruptcy examines control of SPEs. As a result, an American judge can treat an SPE as a subsidiary of a bankrupt company through the doctrine of substantive consolidation. Malaysia explicitly does not apply substantive consolidation. (Nathan - Asia Pacific, 2018) As a result each SPE issuing securities to the benefit of a specific obligor has to be addressed independently in the event of the obligor's bankruptcy. The only protection, however, to prevent the creation of SPEs is the determination of a preference period and the doctrine of fraudulent transfer. In Shariah, the examination of true sale would be subject to preference periods as would be the validation of the independence of SPEs. These are clearly contemporary concepts which require analogy.

10. Managerial Liability: Fraud is among the new burdens that Malaysia laid on board directors. Even without the reform of director duties, Malaysia already restricted managers of bankrupt companies from occupying board and executive roles. Directors can be liable for allowing the company to incur debt without the capacity to repay and may be personally responsible if court deems that director sanctioned "Fraudulent Trading". During the classical period, business operators were tested with fraud, and subject to jail or corporal punishment if they were believed to be hiding assets from their creditors. (Abu Ghuddah, 2016) (Juma'ah, 2005).

At first blush, the application of high-level Shariah tests to Malaysian bankruptcy and companies laws shows a general alignment. Rather than overhauling the Malaysian system, adjustments may be recommended.

5. POTENTIAL ADJUSTMENTS

There are important divergences between insolvency administration in Malaysia and other public policies mandating economic betterment. Current public policy is regressive for MSME operators and sole traders. As a result, bankruptcy is more likely to hold them back economically and harm a wider universe of people who are dependent upon them without necessarily enhancing recovery.

Figure 4
Practical Protective Controls on Bankrupted Persons (Author's Own)

Action	Fiqh View	Comment	Recommendation
Reporting expenditures and income to DGI	Similar to legal measures in classical cases	• A logical protection for creditors. • Helpful to the bankrupt to understand better how to manage his or her funds. • In classical cases, judges sought to track income and expenditure of bankrupts in order to assure that they were not living beyond their obligations whilst seeking to discharge their obligations.	Maintain
International travel with DGI permission or court order	Similar to legal measures in classical cases	• During the classical period, judges would determine if an insolvent merchant was to be trusted to trade out of bankruptcy and travel for trading.	Maintain
Restriction to a single bank account	Uniquely modern issue	• Bankruptcy may have come from an inability to track one's accounts. • Assures accountability.	Should allow latitude to resume trade in a separate account
Restriction to a single credit card with MYR 1,000 limit	Uniquely modern issue	• Bankruptcy may have come from an inability to follow one's obligations. • Assures accountability.	Should allow latitude to operate a business credit card account
Restriction on legal proceedings.	Uniquely modern issue	Personal injury claims are allowed.	The DGI should allow non-frivolous claims that may help lighten the bankrupt's burden.

Certain restrictions are sensible and protect the bankrupt and the creditors. But, this policy should permit discretion as the state seeks to optimize recoveries.

In addition to the practical protective controls, Malaysia has punitive restrictions. These are most likely to burden MSME operators or sole traders from supporting their families whilst seeking to discharge their debts. The implications of these actions is exceptionally harsh for the B40 (Abd Rahman, 2016 - the lowest 40% income earners) who are commonly operators of unregistered MSMEs.

Figure 5
Punitive Measures (Author's Own)

Action	Fiqh View	Comment	Recommendation
Restricted from serving as a director or managing a company or acting as a partner.	The cause of a bankruptcy may not be a business leader's failing.	• External liquidity events, sector downturns, and secular events unrelated to the managers skills can take down any business. • Moral turpitude is not the only cause of bankruptcy.	• Business failure is a foundation that helps to understand risk. • Determine the context before imposing the restriction.
No employment by a spouse, child or relative.	• Most MSMEs are family businesses. • The greatest empathy for the bankrupt may come from family members who can offer work.	• Prevents the bankruptcy from work. • Reduces the prospects for recovery.	Should be removed.
Disqualification for licensed, regulated trades.	Denies the right to use training to exit bankruptcy.	• Seen as protecting the public (Biden 2004). • Should only be applied when the skill was abused.	Particularly harmful to lawyers, accountants and trustees.

In the MSME sector, the experience with failure may be highly valuable when seeking to lead a new business or in a partner for a business. In contrast, the much-publicized Silicon Valley model is for the venture capitalist to ask the start-up founder how many times she or he has failed. Failure, which may include bankruptcy, is treated as building experience and capacity. In the absence of moral turpitude, bankruptcy should not disqualify an individual from company leadership just as Mu'adh was not disqualified from assuming the governorship of Yemen.

In the classical period, the practice of one's skill was seen as the best way to speed recovery so long as one was not found guilty of a criminal act. Some examples from US bankruptcies involving the legal and accounting professions shed light on why professional disqualifications should be linked to violations of law other than bankruptcy:

> Coudert Brothers and Lebeouf Lamb & McRae, two leading American law firms, failed in 2007 and 2012 respectively. Both bankruptcies were messy. (Rosen 2007) (Stewart 2012) What is important is that under Malaysian law the managing partners, and perhaps more, would be banned from the practice of law. Yet, in the American context, none were denied their law licenses.
>
> In the case of the accounting firm Arthur Andersen, there was a clear violation of law and securities regulation leading to the firm's conviction and failure. As a result of the wrong-doing, the firm's leadership was banned from the accounting profession. (Hays, 2008)

Each case has a unique context. Where no crime was committed and the business failed, the lawyers were able to continue in their profession. Where there was a crime, the accountants-involved lost their right to practice.

The areas of concern help to highlight opportunities for reform. But, the basis of reform itself should be captured in light of good public policy.

6. A *MAQASID* APPROACH TO REFORM

Aspects of insolvency reform are innovative. The MAS are a tool to support *ijtihad* in novel cases. MAS have also become a common means for delivering Shariah policy in a way that supports stakeholder acceptance. In the Malaysian case, the reforms proposed might lead to government abrogation of private contracts, promote the rescue of MSMEs as compared to the straightforward collection of debts.

Judicial and policy intervention in insolvencies arose quickly following the passing of the Prophet Muhammad. The universe of rulings relating to *iflas* – bankruptcy, *'isar* – financial difficulty or insolvency, and affiliated concepts is wide. Each *madhhab* has offered detailed descriptions of the concepts relating to bankruptcy and insolvency. When examining policies and interventions, the applicable fiqh maxim is that "the basis of things is permissibility" (Laldin, 2013, p. 10). As a commercial and policy intersection, insolvency is typically when the parties to a contract require empowered intervention in their dispute. Their arguments may include disagreements about facts, assets, valuation, locations, amounts, collateral, and counter-parties. They began with freedom of contract under this maxim, but they now need intervention. (Laldin, 2006 pp. 16 - 17) states that "The primary objective of the Shariah is the realization of benefit to the people, concerning to their affairs both in this world and the hereafter."

There is a significant discussion in Malaysia about the application of the MAS to policy formulation. In our prior discussion, many of Malaysia's bankruptcy rules appeared to be in line with classical Shariah rules. The application of MAS to our analysis supports the arguments in favor of adopting specific reforms.

Figure 6
Maqasid Framework & Malaysian Policy Drivers (Author's Own)

Figure 6 lays out the MAS framework with key public policy initiatives applied in Malaysia. Some of the most important revolve the often-stated national goal of community betterment. Since the foundation of the Federation, economic justice has been seen as a cornerstone of harmony and betterment. This takes the form of poverty reduction which is an element of the "preservation of wealth" under the MAS.

The classical scholar Shatibi offered a MAS theory of how *ijtihad* should be used to achieve a public good or *maslahah*. Yet, examining three of Shatibi's principles (Nyazee 2002, p. 322) raises the complexity of balancing issues in bankruptcy case (Figure 7).

Figure 7
Bankruptcy Conflicts in Shatibi's Framework (Author's Own)

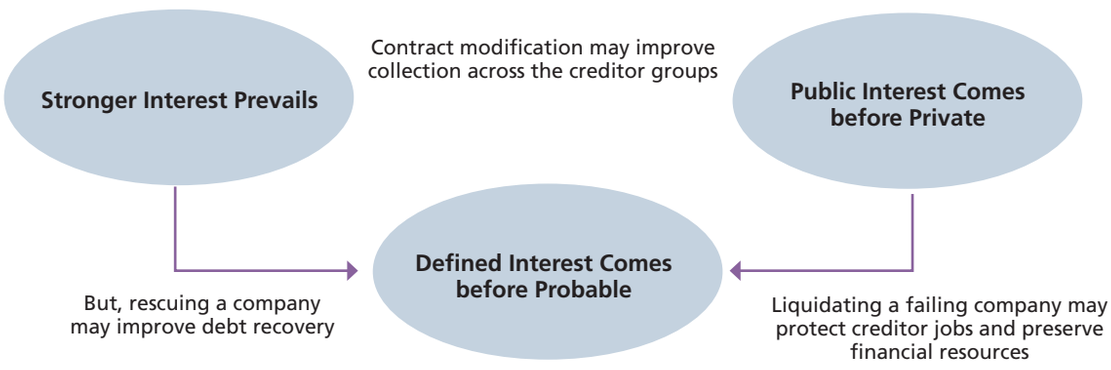


Figure 7 weighs three of Shatibi's maxims against common bankruptcy problems:

The Public Interest comes before the Private Interest: Business rescue may be the public interest. But, business rescue may require the state to intervene in private contracts. The private interest may be in the business' assets. A secured creditor or a group of general creditors may believe that liquidation will lead to a better recovery even if other creditors will lose or the business will be liquidated causing stakeholder harm including job loss. Malaysia's 2016 reforms represent a step towards an enhanced public interest approach to bankruptcy and weakening the creditor's absolute priority.

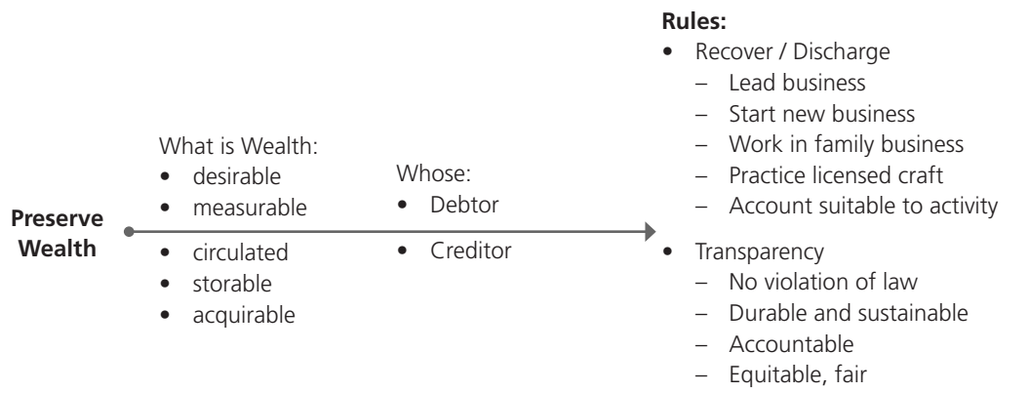
A Defined Interest comes before a Probable Interest: Business rescue is an activity with a probable outcome, hence a probable interest. Both debt and collateral contracts are defined interests. On the one hand, contract modification does not dispense with the defined interests of a creditor. On the other hand, restricting access to collateral in a corporate reorganization is pushing the defined claims of the secured creditor behind the public interest of rescuing the debtor.

A Stronger Interest Prevails: Malaysian bankruptcy reform acknowledges the strength of creditor and secured creditor interests through the super majority approval of reorganization. It fails to achieve a clear policy imperative for corporate rescue. Malaysian reforms have not dispensed with APR and the public interest is not fully viewed as the stronger interest.

The theory of business rescue arises in an effort to achieve two goals in the public interest. The first is to maximize debt recovery by avoiding wealth destruction in a liquidation. The second is to preserve creditor and debtor wealth. Rescue and reorganization necessarily weaken APR. A third goal, historically recognized in France's approach to business insolvency is to rescue the business and, with it, jobs. The American approach, based on the two goals seeks to reduce social costs by reordering private contracts. (Nyazee, p. 263) ranks economic policy under the preservation of wealth, which he calls a "lowest relative priority." Nyazee is creating space for policy flexibility: the old Malaysian, the modified Malaysian, the American and French models can all be justified as fitting under the rubric of preserving wealth: For the latter two, social wealth is more important than the former.

Although classical scholars like Juwaini, Ghazali and Shatibi developed MAS, Ibn Ashur's *Treatise on Maqasid Al-Shariah* puts the MAS into a modern context and yet maintains a conservative approach. Ibn Ashur adapts the preservation of wealth to include the Quran's mandate to circulate wealth. This supports new thinking in the formulation of policy. (El-Mesawi, 2006).

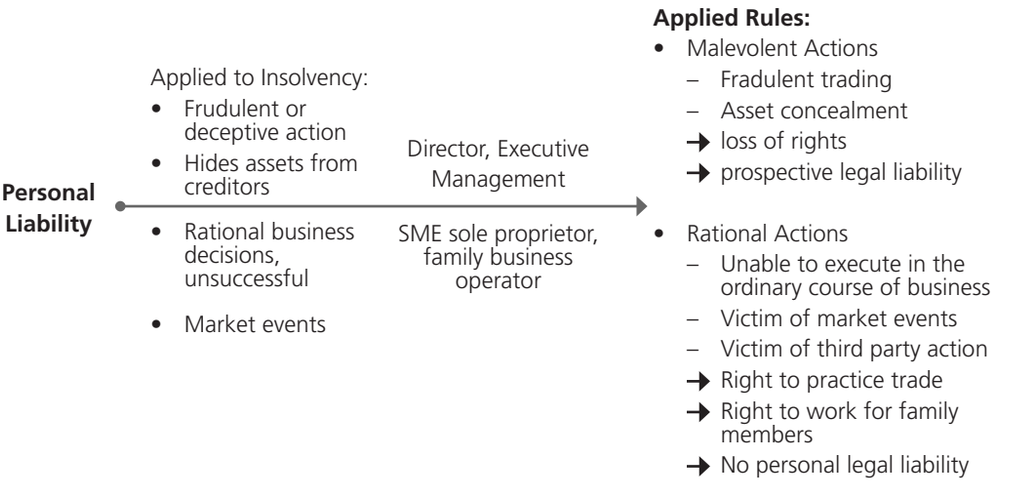
Figure 8
Ibn Ashur's Framework Applied to Insolvency & Bankruptcy (Author's Own)



In Figure 8, Ibn Ashur's framework is repurposed to analyze the preservation of wealth in the light of insolvency resolution. In this examination, recovery and discharge of the bankrupt are fundamental values balanced against the creditor's right to transparency during the pre-discharge period. An important question raised by Ibn Ashur is the measurement of wealth. (El-Mesawi, 2006) Throughout contemporary Malaysian bankruptcy literature, there is limited discussion of business or asset valuation methods. This stands in stark contrast to the UK (liquidation value) and the US (going concern value).

Adapting insolvency policy imperatives to align with other national policy goals will enhance the preservation of wealth in a wholistic manner by protecting the weaker members of the business community in personal cases and enhancing constructive judicial flexibility in corporate cases.

Figure 9
Ibn Ashur's Framework Applied to Insolvency & Bankruptcy (Author's Own)



When applying Ibn Ashur's framework to personal liability, a clear divide can be designed. Malfeasance and malevolence such as fraudulent trading or asset concealment should lead to a loss of rights and legal liability. Bad actors should be stymied. However, rational actors struggling through market downturns or to compete should be free from legal liability. They should not lose either their right to practice their trade or work in a business controlled by close relatives.

Applying a MAS analysis offers greater flexibility to Malaysia to pursue wider reforms.

7. RECOMMENDATIONS FOR MALAYSIA

Key features of Malaysia's personal insolvency law run contrary to important national initiatives to reduce poverty, particularly among the "B40". This is because the B40 are more likely to operate an MSME. Such individual operators might suffer business failure and undergo personal bankruptcy.

The current insolvency legislation is not fully in line with public policies addressing the B40. Malaysian corporate and personal insolvency law places a high value on deterring bad actors. This is structured for corporates to fit with a strengthened corporate governance regime. Nonetheless, the rigidity of law may trap MSME operators in poverty through personal bankruptcy. Therefore, certain adaptations are recommended (Figure 10).

Figure 10
Recommendations (Author's Own)

	Feature of Law	Issue	Solution
1	Labor ranks third in the payment waterfall	Labor is the weakest link in the hierarchy	Labor should rank first.
2	May not serve as director, manager or partner	Presumes bankruptcy is a moral failure	Treat bankruptcy as a contextual failure
3	No employment by first degree relatives	Presumes that close family may collude in unlawful trading	Allow such employment unless unlawful trading has been proven
4	No practice of trusteeship, law or accountancy	Presumes moral turpitude.	Allow practice of profession unless unlawful act has been proven
5	Restrictions on bank accounts and credit cards	Restricts capacity to trade if solo trader	Allow separate supervised personal accounts for sustenance and trading
6	Service is announced or indirect	Inability to defend against bankruptcy proceedings	Require direct, acknowledged service
7	No Substantive Consolidation	Allows undisclosed affiliated entities to escape proceedings.	Establish a threshold for substantive consolidation
8	Valuation is not explicitly guided.	Risk of further dispute	Establish a procedure for valuation to be applied consistently across cases

Of these eight recommendations, Substantive Consolidation is only relevant to large businesses. Valuation is relevant to personal and commercial cases.

The remaining recommendations are more important to the B40 and the MSMEs that they operate. MSME failure usually has one of three outcomes: self-liquidation, "amicable" settlement or personal bankruptcy because corporate insolvency procedures for SMEs are usually too costly. (Waldrock, 2021) Yet given the importance of SMEs to the economy, the procedures and costs should be simplified. A personal bankruptcy arising from a failed sole proprietorship, family partnership or other form of small business requires a simplified procedure. Such a procedure should incorporate factors including determinations of law that insolvency itself does not disqualify a person as "fit and proper" unless the person has also violated law or proved incompetent. The first five recommendations create a space for commercial reinvention and possibly enhanced recovery. The fifth recommendation protects the businessperson from an undefended bankruptcy event.

In France, *l'entrepreneur individuel à responsabilité limitée* (EIRL) was established in 2010 as a tool to allow entrepreneurs, sole traders or professional service providers to operate as a limited liability company and treat them as a business. The French code even allows the same person to operate a new EIRL whilst the first is in administration. The operations of the second are subject to judicial review to assure that the rights of claimants on the first are not disadvantaged. (Delpech, 2022) This might prove a useful innovation for Malaysia with its significant MSME sector.

With larger businesses, the procedures continue to support the role of APR through supermajorities. Directors and company officers may be barred from leadership in industry, ignoring whether the insolvency arose from criminal action or business circumstances. Again, the question of "fit and proper" arises. Shouldn't legal latitude be given to establish if directors are competent to lead and the experience of an insolvency with no violation of law be treated differently?

8. CONCLUSION

The paper contributes to the discussion of insolvency policy in Malaysia. Applying a MAS analysis, one may understand the benefits of the state in intervening in contracts and deem it to be in the public interest. It further allows for the embrace of adjustments to the recent reforms in order to arrive at insolvency management in line with MAS and wider public policy.

(Auda, 2008) provided a framework to analyze policy from a MAS perspective. His method may be adapted to the rolling out of initiatives that add the preservation of wealth to our analysis in the context of Malaysia's national policies (Figure 11).

Figure 11
Auda's Hierarchy (Author's Own)

Specific *Maqasid al-Shariah*: Protection of Wealth			
	Prevent theft / fraud	**Protect monetary rights**	
Policy Objectives	**Communal Harmony, Economic Growth, Poverty Eradications and Human Development**		
Policy Actions	**Social Welfare**	**Economic Development**	**Poverty Reduction**
Public Benefits		• **Reduce suffering** • **Reduce theft / fraud** • **Increase opportunity**	

Malaysia's public policy objectives to reduce poverty and achieve widespread social betterment fit under the objective of preserving wealth. This has two corollaries that are important in bankruptcy policy: preventing theft or fraud and protecting monetary rights. The public policies seeking to enhance economic development have provided for specialized bankruptcy procedures in the case of businesses that operate in the public interest, secular events like COVID-19, or financial market integrity. They do not embrace individuals who are acting in good faith. They do not support the MSME sector which is most likely affected by personal bankruptcy and its punitive approach. At this level, the current procedures do not maximize either poverty reduction or social welfare. Indeed, they may increase suffering and reduce opportunities without reducing theft or fraud.

There are areas for further study including which intra-group debt should be treated, what forms of valuation should be applied, and how can pre-insolvency tools be used to achieve better outcomes in managing failures by MSME operators.

BIBLIOGRAPHY

Abd Rahman, Zarina, Measuring Financial Inclusion in Malaysia 2016 accessible at https://www.bis.org/ifc/events/ifc_isi_2017/06_abdrahman_presentation.pdf.

Abu Ghuddah, Abdus Sattar, Bankruptcy in Studies of the Shariah Standards – The full text of the researches and studies presented in preparation for preparation of the Shariah Standards 1-45 (Bahrain: AAOIFI, 1437/2016).

Abeyratne, Sonali, Corporate Insolvency in Malaysia in International Insolvency Review Vol. 9: 177 189 (2000).

Accounting & Auditing Organization for Islamic Financial Institutions, Governance Standard 13: Waqf Governance issued 2020 accessible at http://aaoifi.com/governance-standard13-waqf-governance/?lang=en.

Auda, Jasser, Maqasid Al-Shariah: An Introductory Guide, published by IIIT 2008, accessible at https://www.jasserauda.net/new/pdf/maqasid_guide-Feb_2008.pdf.

Baker McKenzie, Global Restructuring & Insolvency Guide: Malaysia 2017 accessible at https://restructuring.bakermckenzie.com/wp-content/uploads/sites/23/2017/01/Global-Restructuring-Insolvency-Guide-New-Logo-Malaysia.pdf.

Bankruptcy Act of 1967 accessible at https://www.iiiglobal.org/sites/default/files/4-_Malaysia_Bankruptcy_Act.pdf.

Bidin, Aishah, Liabilities of Directors under Malaysian Insolvency Laws and Recovery of Assets During Corporate Insolvency in *Jurnal Undang-Undang dan Masyarakat 8(2004)* accessible at https://ejournal.ukm.my/juum/article/viewFile/26418/8191.

Bryan, Kelley and Howard Rubin, Misuse of bankruptcy law in Singapore posted on October 26, 2004 accessed at http://www.thinkcentre.org/article.php?id=2477 on August 3, 2021.

Caezar, Aiman Mohammad, Towards a Postcolonial Contract: Revisiting Malaysia's Grand Bargain, posted by LSE School of Government 2020, accessible at https://www.lse.ac.uk/government/Assets/Documents/pdf/masters/2020/Aiman-Mohammad-Caezar.pdf.

Chee En Wong and Kar Men Fung Malaysia: Debt Recovery In Malaysia posted on January 13, 2021 accessible at https://www.mondaq.com/insolvencybankruptcy/1025018/debt-recovery-in-malaysia-.

Chen, James, Floating Charge: Definition, How They're Used, and Example, Investopedia, March 12, 2021 accessible at https://www.investopedia.com/terms/f/floating_charge.asp#:~:text=Key.

Constitution of Malaysia accessible at https://www.constituteproject.org/constitution/Malaysia_2007.pdf?lang=en.

Ercanbrack, Jonathan, The Standardization of Islamic Financial Law: Lawmaking in Modern Financial Markets in The American Journal of Comparative Law, Volume 67, Issue 4, December 2019, accessible at https://academic.oup.com/ajcl/article/67/4/825/5739749.

Al-Darulqutni, Ali Omar, Sunun Darulqutni (Beirut: Dar Al-Ma'rifah, 2001).

Delpech, Xavier, Consécration du patrimoine professionnel de l'entrepreneur individuel, March 1, 2022 accessible at https://www.dalloz--actualite.fr/actualite.fr/.

El-Mesawi, Mohamed El-Tahir, trans., Ibn Ashur: Treatise on Maqasid al-Shari'ah (London: The International Institute of Islamic Thought, 2006).

Hays, Kristen, Andersen partner who audited Enron settles with SEC published in the Houston Chronicle on Jan. 28, 2008 accessible at https://www.chron.com/business/energy/article/Andersen-partner-who-audited-Enron-settles-with-1610488.php.

Johnson, Chris, A Bank, A Bankruptcy and the World of Shariah Law in The American Lawyer, October 2014 accessible at https://www.gibsondunn.com/wp-content/uploads/documents/news/Rosenthal-Arcapita-Global-Legal-Awards-Am-Law-10.01.2014.pdf.

Juma'ah, Aly ed. Fatawa Imam ibn Taymiyyah (Cairo: Dar As Salam, 2005).

Khan, Muhammad Muhsin, tr. Sahib Al-Bukhari, Vol III (Beirut: Dar Al Arabia, undated).

Laldin, Mohammad, Akram, Introduction to Shariah and Islamic Jurisprudence (Kuala Lumpur: CERT Publications, 2006).

Laldin, Mohamad Akram *et al*, Islamic Legal Maxims & Their Application in Islamic Finance (Kuala Lumpur: International Shariah Research Academy for Islamic Finance, 2013).

Laws of Malaysia Act 759, Islamic Financial Services Act 2013 accessible at https://www.bnm.gov.my/documents/20124/8102422b-e6dd-d149-8db0-e3637e89ed5c.

Laws of Malaysia Act 777, Companies Act 2016 accessible at https://www.ssm.com.my/Pages/Legal_Framework/Companies-Act-1965-(Repealed)/aktabi_20160915_companiesact2016act777_0.pdf.

Laws of Malaysia Act 360, Insolvency Act 1967. As at 1 November 2017 accessible at https://www.mdi.gov.my/images/documents/Laws/new/Act360-Reprint2017.pdf.

Legal Smart, Personal Bankruptcy in Malaysia accessible at https://legalsmart.my/personal-bankruptcy-in-malaysia/.

Lim Ching Yong, The Law of Undue Preference, undated, accessible at https://www.cecolaw.com/the-law-of-undue-preference-in-malaysia/.

McMillen, Michael J. T., The Arcapita Group Bankruptcy: A Restructuring Case Study (November 6, 2015). Global Trends in Islamic Commercial Law: International Shari'ah Research Academy for Islamic Finance and Thomson Reuters Report, 2015, accessible at SSRN: https://ssrn.com/abstract=2687239.

Mohamad, Mahathir, The Malay Dilemma (Singapore: Times Books International, 1981 edition).

Nathan, Rabindra, Malaysia Overview in The Asia-Pacific Restructuring Review 2017 accessible at http://www.globalrestructuringreview.com.

Nathan, Rabindra S. Malaysia in The Asia-Pacific Restructuring Review 2018 accessible at https://globalrestructuringreview.com/review/asia-pacific-restructuring-review/2018/article/malaysia.

Nathan, Rabindra, Insolvency and director's duties in Malaysia: overview in Practical Law Global Guide 2018 accessible at https://content.next.westlaw.com/4-607-2687?__lrTS=20201014094327343&transitionType=Default&contextData=(sc.Default)&firstPage=true.

Nyazee, Imran, translator, Ibn Rushd, The Distinguished Jurist's Primer Vol II (Reading, UK: Garnet Publishing Ltd., 1996).

Nyazee, Imran Ahsan Khan, Theories of Islamic Law: The Methodology of *Ijtihad*, (Kuala Lumpur: The Other Press, 2002).

Ooi, Matthew Xian Wei, All about bankruptcy, in University of Malaya Law Review, July 29, 2019 accessible at https://www.umlawreview.com/lex-omnibus/all-about-bankruptcy.

Practical Law, Set-off, Thomson Reuters, undated, accessible at https://uk.practicallaw.thomsonreuters.com/4-107-7242?transitionType=Default&contextData=(sc.Default)&firstPage=true.

Rosen, Ellen, The Complicated End of an Ex-Law Firm published in the New York Times on Feb. 9, 2007 accessible at https://www.nytimes.com/2007/02/09/business/09legal.html.

Shah, HRH Raja Nazrin, Islam, Muslims and Human Rights delivered at the Oxford Centre for Islamic Studies on November 9, 2011 accessible at https://www.kln.gov.my/web/gbr_london/news-from-mission/-/blogs/lecture-by-hrh-raja-dr-nazrin-shah-crown-prince-of-perak-at-university-of-oxford-on-9-november-2011.

Shahar, Mazatul Aini, Malaysia's Policy Responses to the Panic of 1997: An Islamic Perspective accessible at https://repository.uel.ac.uk/item/8990xhttps://repository.uel.ac.uk/item/8990x.

Al Shaqa, Ahmad, Al Bayan fy al fiqh al Imam Al Shafi'i (Beirut: Darul Kitab Al 'ilmiya, 2002).

Sharoni, Syairazi and Rusni Hassan, Floating Charge Debenture as Security from Shariah Perspective in IIUM Al Fiqh 2018 accessible at https://www.researchgate.net/publication/330157739_Floating_Charge_Debenture_as_Security_from_Shariah_Perspective?enrichId=rgreq-f9393f83d822aacc46f6fe4d4991ad8c-XXX&enrichSource=Y292ZXJQYWdlOzMzMDE1NzczOTtBUzo3MTE1MjA2NDQyNTk4NDFAMTU0NjY1MTE0OTg5NA%3D%3D&el=1_x_2&_esc=publicationCoverPdf.

Siow May Ling, Ramachandran, Sridar, Shuib, Ahmad, and Herman, Syamsul, Philosophy and Policy, then and Now: Unfolding the Rural Tourism Policy Perspectives in Malaysia in Global Journal of Management and Business Research: F Real Estate Event & Tourism Management Volume 14 Issue 2 Version 1.0 Year 2014 accessible at https://journalofbusiness.org/index.php/GJMBR/article/view/1587/1490.

Siddiqi, Abdul Hamid, tr. Sahih Muslim, Vol. III (Lahore: Sh. Muhammad Ashraf Publishers & Booksellers, 1992).

The Star, Indian traders all for new rules on bankruptcy laws posted on December 7, 2012 accessible at https://www.thestar.com.my/news/nation/2012/12/07/indian-traders-all-for-new-rules-on-bankruptcy-laws/.

Stewart, James B., The Collapse, published October 7, 2012 in The New Yorker accessible at https://www.newyorker.com/magazine/2013/10/14/the-collapse-2.

Stimmel Roeser, "Single Action Rule" of Code of Civil Procedure Section 726, undated, accessible at https://www.stimmel-law.com/en/articles/single-action-rule-code-civil-procedure-section-726.

Suleiman, Omar, 40 Hadith on Social Justice accessible at https://1pjhft3ggnei4el40qfi16ch-wpengine.netdna-ssl.com/wp-content/uploads/2018/02/hadith-20-Notes.pdf.

Sunan Ibn Majah 2443, Vol. 3, Book 16, Hadith 2443 accessible at https://sunnah.com/ibnmajah:2443.

van Zwieten, Kristin, Related Party Transactions in Insolvency (May 2018). European Corporate Governance Institute (ECGI) - Law Working Paper No. 401/2018, accessible at http://dx.doi.org/10.2139/ssrn.3173629.

Wong Fe Mei, Managing Insolvency in Malaysia (April 10, 2020) https://www.crowe.com/my/insights/corporate-rescue-schemes.

Yap, Elaine, Malaysia: New Malaysian insolvency laws (November 16, 2016) accessible at https://restructuring.bakermckenzie.com/2016/11/06/malaysia-new-malaysian-insolvency-laws/.

APPENDIX 1

Summary of Malaysian Rescue Schemes (Wong 2020)

Questions	Scheme of Arrangement	Corporate Voluntary Arrangement	Judicial Management
Moratorium?	Applicable under restraining order for 3 months Extendable to a maximum of 9 months	Immediate monotorium of 28 days Extendable to a maximum of 60 days	Monotorium of 6 months Extendable by another 6 months
Under what circumstances?	Able to negotiate with creditors and able to obtain approal from classes of credtors	Able to negotiate with creditors and with restructuring plan ready	When creditors do not have trust in Management but company has viable business
Costs and timing	Moderate	Low	High

SECURITIES COMMISSION MALAYSIA
3 Persiaran Bukit Kiara Bukit Kiara 50490 Kuala Lumpur
Tel: 603-6204 8000 Fax: 603-6201 5082
Websites: www.sc.com.my www.investsmartsc.my
@SecComMalaysia