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Abuse of Winding Up Proceedings as a Debt Recovery Mechanism in Malaysia and the Judicial Control

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ABSTRACT

The process of winding up implies the termination of the existence of the company's assets being collected, realized and distributed to its creditors. Winding-up is generally considered as a financial collapse of the company. The main objective of this paper is to discuss the abuse of the winding up proceeding as a method of debt recovery mechanism by the judiciary in Malaysia. The analysis presented here will highlight different types of abuse found in winding up proceedings especially when they are utilized for exerting commercial pressures over the debtor companies rather than dealing with their insolvency problems. It also discusses the extent to which the concept of judicial controls can be implemented to curb all these challenges. Qualitative approach was adopted as research methodology with both doctrinal and comparative approaches employed to analyze primary sources (legislations and case laws) together with other secondary source materials namely book and journal articles. Findings revealed that though Malaysian courts had played a great role in curtailing the filing of the abusive petitions as well as misuses of insolvency processes through applying some mechanisms like bona-fide-dispute principle & fortuna jurisdiction, however there are still some measures required to ensure effectiveness of the application of winding-up proceedings as a collective remedies by giving more consideration to judicial interventions.

Keyword: Winding up proceedings, Debt recovery, Judicial control, Creditor protection

Themes: Abuse of winding up proceedings; debt recovery mechanism; judicial control; law reform in Malaysia Insolvency law

INTRODUCTION

Corporate insolvency law plays a special place in the general legal system governing business relationships[1]. Basically, winding up served as a collective remedy for insolvency, that is, the last resort for winding up a company that is truly incapable of meeting its obligations, selling its assets and distributing the proceeds among its creditors equitably[2]. In Malaysia, this system is mainly managed by the Companies Act 2016 (the CA 2016), which reorganises and consolidates the provisions concerning winding up proceedings in statute. However, there is a chronic and worrying trend in Malaysian business circles: that winding up petitions have been deliberately wielded as tools of debt collection, not true attempts to utilise the insolvency jurisdiction of the court.

The coercive power of a winding up petition is undeniable. Unlike civil lawsuits, which may continue over several years, winding up petitions are, upon advertisement, able to cause irreparable damage to the credit-worthiness of a business before they have ever been adjudicated by a court. A business's banking facilities will

[1] Finch, V (2009). *Corporate insolvency law: Perspective and principles* (2nd ed.). Cambridge University Press.
[2] Goode, R. (2011). *Principles of corporate insolvency law* (4th ed.). Sweet & Maxwell.

be immediately terminated, trade finance may be withdrawn, a relationship would be ruptured and confidence shaken-in a manner not achieved even over many years of protracted litigation or arbitration proceedings.

Many creditors, who are unable or unwilling to carry on a legal claim against a business or individuals or who have failed to do so successfully in a protracted civil lawsuit or arbitration, use the specter of bankruptcy proceedings as a means of arm-twisting for recovery. Even the courts are fully cognizant of this phenomenon. The Malaysian courts declared forcefully in Sri Hartamas Development Sdn Bhd v MBF Finance Bhd (1992) 1 MLJ that winding up petitions ought not to be used as devices for forcing companies to satisfy contested claims and in doing so followed the line of English and Singaporean cases to the forefront of which English jurisprudence has been followed extensively in Malaysia.

Based on the foregoing premise, the current article sets out to explore the extent of abuse of winding up procedures by creditors in Malaysian business circles to seek to enforce their debts and to evaluate the judicial remedies available in response to the said problem. It looks at three broad areas. The first part is dedicated to examining the provisions of the CA 2016 related to the winding up regime in Malaysia and more specifically, the ones susceptible to manipulation. Second, it considers cases of misuse of winding up petitions by creditors for the purpose of pressuring a business or its principals to satisfy outstanding claims, ranging from petitions founded on disputed debts to premature advertising of petitions and exploitation of statutory demands[3]. Third, the article critically evaluates the mechanisms of judicial control developed by the Malaysia court including the bona fide dispute doctrine, the Fortuna jurisdiction and the emerging jurisprudence on arbitration agreements and insolvency to assess their effectiveness in safeguarding the integrity of winding up proceedings. The article concludes with recommendations for legislative reform to complement existing judicial oversight.

LITERATURE REVIEW

Winding up is designed as a collective insolvency mechanism to cease the operation of a company and redistribute the assets of the company among creditors. This is regulated in the CA 2016. However, the concern in both case law and academic writing is the abuse of winding up petitions as a method to recover debt as opposed to genuine insolvency remedy. This review explores how Malaysian courts have dealt with this abuse by having judicial control whilst balancing creditor rights and security of debtors.

Sections 465 to 470 of CA 2016 provide that a company may be wound up when the company was not in the capacity to pay its debts.[4] The statutory intention is not a tactical debt collection method, but it is collective liquidation. The difference has always been highlighted by the Courts. In *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd*,[5] the court found that winding up should not be a method to pressure the Company to payment of a disputed debt. Likewise, the insolvency proceedings are not a substitute to ordinary litigation, which is supported by English and Singaporean precedents, frequently referred and cited in Malaysia (see Stonegate Securities Ltd v Gregory[6]; Re Sim Poh Ping[7]). In the absence of this conceptual base, the concept of “abuse” cannot be well conceptualized.

The coercive effect of a winding up petition makes it attractive to creditors. Unlike civil suits, which may take years, the mere presentation or advertisement of a petition can cause immediate reputational damage, loss of investor confidence, and difficulties in obtaining financing. Section 466 CA 2016 allows creditors to issue a statutory demand, giving the debtor 21 days to pay. Scholars note this “nuclear option” often forces companies to settle even weak claims to avoid commercial harm. This structural incentive explains why abuse occurs.

[3] Rajah & Tann Asia (2021). *Abuse of insolvency proceedings: Regional trends and judicial responses.* Singapore: Rajah & Tann Asia.

[4] Ibid, ss. 465–470

[5] Sri Hartamas Development Sdn Bhd v MBF Finance Bhd [1992] 1 MLJ

[6] Stonegate Securities Ltd v Gregory [1980] 1 All ER 241

[7] Re Sim Poh Ping [2020] SGCA 35

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Malaysian courts have identified that it is an abuse of process to present a winding up petition for an improper purpose. In *Chip Yew Brick Works Sdn Bhd V Chang Heer Enterprise*[8] and *Visage Continental Sdn Bhd v Smooth Track Sdn Bhd*,[9] the courts stated that petitions should not be filed where debts are actually disputed. The logic is clear, where insolvency proceedings are not aimed at solving factual or legal issues, which should be determined by means of civil litigation or arbitration. Allowing petitions on disputed debts overrides procedural protection and unfairly coerces the unfair settlement.

The main judicial safeguard is the fact that the debt must not be bona fide disputed on substantive grounds. Malaysian courts are based on the English and Singaporean model which requires evidence of an actual as opposed to mere assertions. They may be indicated by documentary evidence, pending suits or arbitration, or substantial crossclaims. In *Pacific Recreation Pte Ltd v S Y Technology Inc*,[10] the court strictly established that winding up petitions should not be initiated where disputes are genuine. According to scholars like Dr. Logarajah[11] this evidential requirement is an indication of a maturing insolvency jurisprudence in Malaysia.

A presumption of inability to pay arises in Section 466 of CA 2016 if a company fails to comply with a statutory demand. Although this mechanism is helpful against insolvent debtors, academics argue this mechanism is subject to abuse as the court does not necessarily have to issue a judgment. In *Sun Soon Heng Coach Works Sdn Bhd V Nima Travel*,[12] the High Court makes it clear that the presumption is rebuttable, and companies may still show a bona fide dispute. This judicial control is essential in order to prevent creditors from exploiting statutory demands as a shortcut to winding up.

The Fortuna injunction, which is based on English law, is a proactive solution to abuse. It suppresses the presentation or advertisement of a petition where the debt is disputed, or the petition is presented for an improper purpose.[13] Malaysian courts have used this remedy to avert irreparable damages, as such advertisement of a petition can ruin a company's reputation. Although it is efficient, commentators observed that such injunctions require speed and evidence, which may disadvantage smaller companies.

Recent cases show a more nuanced approach. The Federal Court in *V Medical Services M Sdn Bhd v Swissray Asia Healthcare Co Ltd [2020]*[14] said that arbitration clauses do not automatically prevent the winding up petitions, the debtors must establish a good faith dispute. This will avoid the use of arbitration as a tactic in order to evade insolvency proceedings. Courts have also denied cross-claims to defeat petitions under the Construction Industry Payment and Adjudication Act 2012 (CIPAA) as claims are speculative. In *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor*,[15] Court determined that adjudication certificates impose statutory debts, and vague allegations of defects could not amount to substantial disputes. These changes indicate a change towards evidence-based judicial control.

Although there are many case laws, the gaps remain. There are less empirical studies evaluating how frequent petitions are filed with the main aim being for debt recovery. There is limited analysis of whether judicial remedies like Fortuna injunctions effectively deter abuse. Another issue that is discussed by scholars is whether CA 2016 ought to have express anti-abuse provisions, such as the mandate that creditors receive judgments before petitioning on a disputed debt. In addition, little has been given to how winding up abuse interacts with newer corporate rescue mechanisms such as judicial management and corporate voluntary arrangements.

The literature reveals general consensus that winding up should not be used as a debt recovery mechanism where debts are genuinely disputed. Malaysian courts have developed protection measures including the bona fide

[8] Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd [1988] 2 MLJ 447

[9] Visage Continental Sdn Bhd v Smooth Track Sdn Bhd [2008] 1 MLJ 101

[10] Pacific Recreation Pte Ltd v S Y Technology Inc [2008] 2 SLR(R) 491

[11] Logarajah, R., "Judicial Control in Malaysian Insolvency Law" Journal of Malaysian Law (2019)

[12] Sun Soon Heng Coach Works Sdn Bhd v Nima Travel Sdn Bhd [1986] 2 MLJ 374

[13] Fortuna Holdings Pty Ltd v Deputy Commissioner of Taxation [1978] VR 83

[14] V Medical Services M Sdn Bhd v Swissray Asia Healthcare Co Ltd [2020] 2 MLJ 1

[15] UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor [2015] 11 MLJ 499

dispute doctrine, supervision of statutory demands, and Fortuna injunctions. In recent cases, an evidence-based approach has become more common so as to strike a balance between the rights of creditors and protection of debtors. However, gaps in empirical research and statutory clarity remain. With continuous development of insolvency law, the issue is to maintain judicial control without overstepping on the legal access to the winding up proceedings.

METHODOLOGY

This study adopts a qualitative legal research approach. This research design is used to analyse statutory provisions and judicial decisions rather than to collect numerical, statistical data. It incorporates doctrinal legal research, also known as "black-letter law" research, focuses on systematic examination of legal rules derived from authoritative legal sources governing winding up proceedings in Malaysia. As indicated by Hutchinson and Duncan (2012), doctrinal research seeks to identify and analyse legal principles in statutes and case laws to determine the current state of the law and its adequacies.

Essentially, this paper examines the legal framework regulating winding up proceedings in Malaysia and critically analyses how the courts exercise judicial discretion to prevent the abuse or misuse of winding up petitions as debt recovery mechanism. Doctrinal research remains the dominant methodology in legal scholarship as it enables the researchers to ascertain the relevant law, clarify legal concepts and evaluate legal developments systematically.[16] This proposition is supported by Salter and Mason (2007) which describe doctrinal research as a process of locating legal sources, analysing their contents and deriving principles applicable to a particular issue. The doctrinal analysis undertaken in this study focuses on three issues, namely:-

1. Legal framework regulating winding up proceedings in Malaysia;
2. Circumstances in which the creditors misuse winding up proceedings as a means of debt collection; and
3. Judicial control in preventing such misuse of the winding up process.

Through doctrinal analysis, the study further examines how Malaysian courts distinguish between genuine insolvency proceedings and petitions filed primarily to exert commercial pressure on debtor companies.

In addition to doctrinal analysis, this study employs a comparative analysis which is useful to identify and evaluate legal reforms in other jurisdictions. The comparative analysis focuses on jurisdictions that have a significant influence on Malaysian insolvency law such as the United Kingdom and Singapore. The abuse of winding up proceedings and the role of courts in preventing creditors from utilising insolvency procedures as coercive debt recovery methods have been the subject of substantial jurisprudence in these jurisdictions. Lessons from these jurisdictions are used to determine whether our current law sufficiently covers similar issues and whether potential legislative or judicial reforms are necessary.

There are two types of data collection in this study: primary and secondary sources of data. Firstly, primary sources constitute the principal data. These materials consist of legislations, subsidiary legislation and case laws that directly govern winding up proceedings. As far as Malaysia is concerned, the primary legislations examined include the Companies Act 2016 and the Companies (Winding Up) Rules 1972 and the Companies (Amendment) Act 2024. Judicial decisions from the High Court, Court of Appeal and Federal Court are examined to identify and analyse how the courts interpret the abuse of winding up proceedings. The decided cases are sourced from legal databases including the Malayan Law Journal, Current Law Journal and LexisNexis.

Secondly, secondary sources are utilised to supplement the analysis of primary materials. These sources include books, journal articles and conference papers on insolvency law. Academic literatures are accessed from academic and professional databases including LexisNexis, Scopus, ScienceDirect, Web of Science and Google Scholars among others. The review of literature assists in identifying perspectives, policy considerations as well

[16] McConville, M., & Chui, W. H. (Eds.). (2017). *Research methods for law* (2nd ed.). Edinburgh University Press.

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as debates on the effectiveness of winding up proceedings. Insolvency law should function as a collective debt enforcement mechanism rather than a private debt collection tool, besides the courts play a critical role in preventing misuse of insolvency proceedings by creditors.[17] Such perspectives provide an important analytical framework in examining Malaysian law.

Once the data have been collected, the data are analysed using a qualitative data analysis method, namely content analysis. This method involves a systematic examination of the documented information from the primary and secondary sources identified in this study (Cowney, 2013). The documented information is reviewed and analysed to identify the relevant legal principles, judicial approaches and issues relating to the abuse of winding up proceedings as a debt recovery mechanism in Malaysia. This process allowed the researcher to extract significant findings for a thorough examination of the existing legal framework, judicial control mechanism and potential areas for reform.

FINDINGS AND DISCUSSION

Usage of Winding-Up Proceedings as a Debt Recovery Mechanism in Malaysia is an Abuse

Winding up proceedings supposedly is a collective insolvency remedy for creditors against companies that are genuinely unable to pay their debts. It is not intended to serve as a debt collection mechanism or as a means of exerting commercial pressure upon a debtor company. Courts in Malaysia have consistently upheld that the winding-up proceedings should not be abused or the court has the discretion to dismiss, stay, or strike out the petition.

The most widely used form of abuse is where a creditor files a winding-up petition based on disputed debts. Insolvency processes should not be used to resolve disputes concerning liability or the quantum of indebtedness. Where the company can demonstrate that the debt is disputed on substantial and bona fide grounds, the winding-up petition will generally be dismissed. The rationale is that insolvency proceedings are not intended to function as a substitute for ordinary civil litigation. Instead, the parties should first resolve the disputed issues through appropriate legal proceedings. In *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316, the Federal Court emphasized where there exists a bona fide dispute on reasonable grounds, the, a winding up petition should not proceed. The court stressed that the winding-up jurisdiction must not be utilised as a means of pressuring a company into settling a disputed claim.

Another recognised form of abuse concerns the premature or strategic advertisement of winding-up petitions. Once advertised, a winding-up petition can significantly affect a company's commercial reputation, banking facilities, creditworthiness, and relationships with customers, suppliers, and investors. Under the Companies Act 2016 and the relevant Companies (Winding-Up) Rules, advertisement is an important procedural step intended to notify creditors and stakeholders of the proceedings. However, where the court finds that the petition was filed for an ulterior purpose such as damaging the company's reputation or exerting undue pressure, the court may dismiss the petition or grant an injunction restraining advertisement.

A more recent category of abuse arises where a creditor commences winding-up proceedings despite the existence of a valid arbitration agreement governing disputes between the parties. Previously, there was uncertainty as to whether insolvency proceedings could proceed despite an arbitration clause. It is well known that formal rescue mechanism can be pricey and lengthy as well as it can destabilise public faith in the company that lays administrative burden on the debtor[18]. Hence, companies may choose to renegotiate with their creditors directly to solve financial problems without recourse to formal process.[19] The court of Appeal in *Swissray Asia Healthcare Co Ltd v V Medical Services (M) Sdn Bhd* [2024] CLJU 1358 recently held that a petitioner is not obligated to refer a debt claim to arbitration and may instead proceed with a winding up petition if the debt claimed is not genuinely disputed under a contract which is subjected to an arbitration agreement. This case

[17] Finch, V., & Milman, D. (2023). *Corporate insolvency law: Perspectives and principles* (4th ed.). Cambridge University Press.
[18] Neyens, R.L. (2002). Principles of Corporate Restructuring and Asset Resolution. Law and Business Review of the Americas, p.9.
[19] J. Franks, J., & Sussman, O. (2000). The cycle of distress, rescue and dissolution. IFA Working Paper, 306, p.2.

confirms that a creditor has the right to petition to the court to wind up a debtor without having to go through a potentially lengthy arbitration process where there is no genuine dispute of debt.

A winding-up petition filed in respect of a debt that falls below the prescribed threshold may be regarded as defective and liable to be dismissed. The imminent threat and severe consequences of a liquidation and a winding up process has often placed significant pressure commercially on debtor companies. This pressure has put the company in a position that it desperately needs to settle the outstanding debts regardless of whether the debts are genuinely disputed. This can be seen based on the observation done recently by Malaysian insolvency practitioners that statutory demand and subsequent winding up petition are normally used due to the fact that they can provide substantial negotiating leverage to creditors.[20] All the hardships that a company will go through from being wound up, not to mention the costs and reputational harm that the company faced will often make debtors choose to enter into settlement negotiations. Due to that, it consequently has made the winding up process to evolve from its traditional function to become a powerful commercial pressure tool which raises concern of it being abused. Courts in Malaysia have stood firmly that insolvency proceedings should be misused and used as a substitute for ordinary debt collection mechanisms. The court will not hesitate to regard a creditor's action to invoke the insolvency jurisdiction to compel payment as an abuse of process and will dismiss the petition with costs.

Small and medium enterprises ("SMEs") are mostly affected by the adverse effects of the abuse of winding up petitions. SMEs operate with limited cash reserves whereby they are highly dependable on their customers, suppliers and financial institutions unlike the bigger corporations that have diversified financing arrangements.[21] The commencement of a winding up petition can have serious consequences for SMEs. The mere filing of a petition may undermine the company's ability to obtain trade credit or secure financing even before a winding up order is issued. When faced with the risk of reputational damage and disruption of operation, SMEs will most likely choose to pay and settle despite having genuine grounds to dispute it. This undoubtedly creates an unequal bargaining power between creditor and debtor companies, as the pressure associated with winding up proceedings may force SMEs to prioritise business survival over pursuing legitimate legal defenses. As a result, concerns have been raised within insolvency practice that winding-up proceedings operate as a form of economic pressure rather than a genuine insolvency remedy in some circumstances.

A particularly damaging consequence of winding up a petition arises from the advertisement of it. Once advertised, the petition becomes public and is well known to customers, suppliers, banks, investors and other business stakeholders.[22] Although the purpose of it is to notify the creditors, the reputational impact of such publicity extends way beyond the objective of it. This in practice, will lead banks to freeze or suspend banking facilities, will cause suppliers to withdraw trade credit, termination of contractual relationships and customers to lose confidence in the company. These consequences may occur even before the court has determined whether the company is in fact insolvent.

The Role of Judicial Control in Preventing Abuse

Due to the increase of abuse of winding-up proceedings as a debt recovery mechanism, the courts have taken up an important supervisory role in winding-up proceedings. The courts aim to ensure that these proceedings serve their intended purpose and are not used as tools for oppression or commercial pressure.

Judicial control over the abusive winding-up proceedings began with the understanding that these processes are meant for companies that are genuinely unable to pay their debts and should not be employed as a substitute for

[20] Experts, G. L. (2026, May 26). Statutory demand vs winding up Malaysia | Global Law Experts. *Global Law Experts*. https://globallawexperts.com/statutory-demand-vs-winding-up-malaysia/

[21] Z. Zairani, Z.A. Zaimah (2013). Difficulties in Securing Funding from Banks: Success Factors for Small and Medium Enterprises (SMEs). *Journal of Advanced Management Science Vol. 1, No. 4, December 2013.*

[22] Shih, L. (2012, February 28). *Injunction to restrain filing of a winding up petition*. Of Counsel. https://leeshih.com/2007/12/05/injunction-to-restrain-filing-of-a-winding-up-petition/

ordinary civil litigation. Therefore, if a debt is bona fide disputed on substantial grounds, the winding-up proceeding should not be initiated.

The basis of this can be traced back to the English case of *Stonegate Securities Ltd v Gregory* [1980] Ch 576,[23] where the court held that it is a well established principle that a winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed. Singapore adopted this principle through the case of *Re Mechanised Construction Pte Ltd* [1989] 1 MLJ 183,[24] where the court did not think that, in light of the dispute between the parties on the sum claimed, a filing of a winding-petition was a proper course to pursue. Instead, an action should have been instituted to establish the amount due. Collectively, these cases established the bona fide dispute principle and laid the foundation for subsequent judicial control against the abuse of winding-up petitions.

Judicial control in Malaysia further evolved with the recognition of the *Fortuna* injunction, which authorised the courts to restrain the presentation or continuation of winding-up proceedings where doing so would amount to an abuse of process. Unlike the bona fide dispute principle, which focuses mainly on whether the debt is disputed, the *Fortuna* injunction serves a broader supervisory role aimed at preventing oppression and injustice.

In *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316,[25] the Court of Appeal recognised the court's inherent jurisdiction to restrain the presentation of winding-up petition to relieve a party to the proceedings from an oppressive and damaging situation in which the company has been placed through abuse of court process. intervene where the presentation of a winding-up petition would result in injustice. The Court also pointed out that these proceedings could cause the loss of commercial reputation.

The Federal Court clarified the limitation of this injunction in *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] 1 MLJ 867,[26] and reaffirmed by the Court of Appeal in *RHB Bank Bhd v Malaysia Pacific Corporation Bhd* [2018] 3 MLJ 721.[27] These decisions highlighted that the *Fortuna* injunction is an exceptional remedy and should be used cautiously to avoid unfairly depriving creditors of their rights. Thus, judicial control has evolved from merely deciding on disputed debts to a broader role in maintaining the integrity of the insolvency process and preventing the abuse of winding-up proceedings.

These developments show the Courts are willing to adapt judicial control to address current commercial realities, especially given the rise of the incorporation of arbitration clauses in commercial agreements. The relationship between insolvency and arbitration poses unique challenges. While insolvency law aims to preserve the value through a collective approach for stakeholders, arbitration is built on the party's autonomy. Chan and Rajagopal observed that the arbitration and insolvency regimes embody contrasting legal policies and may at times present a conflict between collective interests and party autonomy.[28]

In *V Medical Services (M) Sdn Bhd v Swissray Asia Healthcare Co Ltd* [2025] 4 MLJ 1,[29] the Federal Court clarified the relationship between arbitration agreements and winding-up proceedings. The Court recognised that insolvency proceedings should not be used to circumvent valid arbitration agreements while maintaining that the existence of an arbitration agreement does not automatically preclude the presentation of a winding-up petition where no genuine dispute exists. The decision reflects a more nuanced approach towards balancing insolvency policy with party autonomy and signifies the continuing evolution of judicial control in response to modern forms of abuse. Accordingly, judicial control has expanded beyond the traditional concerns of disputed

[23] Stonegate Securities Ltd v Gregory [1980] Ch 576.
[24] Re Mechanised Construction Pte Ltd [1989] 1 MLJ 183.
[25] Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 MLJ 316.
[26] Pacific & Orient Insurance Co Bhd v Muniammah Muniandy [2010] 1 MLJ 867.
[27] RHB Bank Bhd v Malaysia Pacific Corporation Bhd [2018] 3 MLJ 721.
[28] Chan, D., & Rajagopal, S. (2020). *To stay or not to stay? A clash of arbitration and insolvency regimes*. Singapore Academy of Law Journal, 32, 494–523.
[29] V Medical Services (M) Sdn Bhd v Swissray Asia Healthcare Co Ltd [2025] 4 MLJ 1.

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debts and oppressive petitions to accommodate the increasingly complex interaction between insolvency and alternative dispute resolution mechanisms (Chan & Rajagopal, 2020).[30]

The foregoing authorities demonstrate that judicial control has evolved into the principal mechanism for safeguarding the integrity of winding-up proceedings in Malaysia. Through the development of the bona fide dispute principle, the recognition and expansion of the *Fortuna* jurisdiction and the recent accommodation of arbitration agreements within the insolvency framework, the courts have consistently emphasised that winding-up proceedings are intended to function as a collective insolvency remedy rather than as an instrument of debt collection or commercial oppression. The evolution of judicial control is consistent with the broader shift in Malaysian insolvency law from a culture centred upon liquidation and creditor wealth maximisation towards one that increasingly emphasises corporate rescue and value preservation.[31] In this regard, judicial control has been effective in ensuring that the insolvency jurisdiction is exercised for its proper purpose and in maintaining a balance between the interests of creditors and debtor companies.

Despite these developments, there are still limitations to the effectiveness of judicial control. The use of *Fortuna* injunction, as affirmed in *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] 1 MLJ 867 and subsequently reaffirmed in *RHB Bank Bhd v Malaysia Pacific Corporation Bhd* [2018] 3 MLJ 721, still remain exceptional and depends on the discretion of the Courts. Hence, the protection against the abuse of winding-up petition is not guaranteed and must be assessed based on the circumstances of the case. Additionally, the judicial control usually occurs only after winding-up proceedings have commenced. By then, the company may already face commercial disruption. The advertisement of the winding-up petition can alert banks and suppliers to the company. Indeed, it has been observed that the advertisement of a winding-up petition may alert banks and suppliers to the company's financial difficulties, thereby resulting in the termination of banking facilities or the freezing of bank accounts, with potentially severe consequences for the company’s business operations.[32] Therefore, the judicial control does not totally prevent commercial and reputational damage.

Recent trends regarding the relationship between arbitration and winding-up proceedings further illustrate the complexities involved in judicial control. As observed by Chan and Rajagopal, the arbitration and insolvency regimes embody contrasting legal policies, since arbitration is founded upon party autonomy whereas insolvency law operates as a collective process for the benefit of stakeholders.[33] The Federal Court’s decision in *V Medical Services (M) Sdn Bhd v Swissray Asia Healthcare Co Ltd* [2025] 4 MLJ 1 reflects an effort to address and balance these competing factors. Although this decision shows that judicial control can adapt to modern commercial realities, it also on the other hand shows that judicial control alone may not fully prevent the strategic use of winding-up proceedings for commercial pressure. Therefore, despite judicial control being a safeguard to abuse of winding-up proceedings, its success may ultimately rely on additional measures beyond the Courts’ decisions.

CONCLUSION AND RECOMMENDATIONS

Malaysian law is no stranger to the issue of the abusive use of winding up petitions as a tool obtain debts. Winding up under the Companies Act 2016 is meant to be a remedy of last resort against genuine insolvent companies and not a weapon to harass creditors into paying debts due. At the same time, the quick nature of the remedy, the implicit acknowledgement of inability to pay debts upon filing of a statutory demand, and the reputational damage caused by advertising of the petition make it particularly susceptible to being used as a means to pressure debtors into paying debts owed. This issue has been addressed in Malaysia through the development of the judicial control over winding up petitions. The bona fide dispute doctrine served to limit petitions to those where debt is genuinely disputed. The Fortuna doctrine allows the court to restrict the presentation or advertisement of petitions known to be abusive. More recently, the Federal Court in V Medical

[30] Chan, D., & Rajagopal, S. (2020). *To stay or not to stay? A clash of arbitration and insolvency regimes*. Singapore Academy of Law Journal, 32, 494–523.

[31] Thim Wai Chen, Ruzita Azmi and Rohana Abdul Rahman, ‘Paradigm Shift from a Liquidation Culture to a Corporate Rescue Culture in Malaysia: A Legal Review’ (2018) *Malayan Law Journal* 1.

[32] Ibid.

[33] Ibid no.28.

Services (M) Sdn Bhd v Swissray Asia Healthcare Co Ltd took a nuanced view of the judiciary' role in controlling winding up petitions which served as a useful guide as to how the courts could control future petitions. Together, these doctrines illustrate the court's growing ability and willingness to control the misuse of winding up petitions.

However, the ability of the courts to control abusive petitions is only one part of the solution. There are three key reasons why control through the courts is not an optimal solution. First, it is a reactive measure. Courts can only act when abuse has occurred and not prevent it. Second, it is an exceptional remedy available only in certain circumstances. Fortuna is an exception and not the rule and thus while useful in theory, it is of limited use to cash-strapped small businesses which are the frequent petitioners in winding up petitions. Finally, there is no specific anti-abuse legislation in Malaysia. Unlike other jurisdictions which have specific statutes criminalizing the abuse of winding up petitions, the Companies Act 2016 does jot have any such provisions resulting in the anti-abuse mechanisms being limited to the court's direction.

This note sets out four proposals for reform. First, the Malaysian Parliament should consider amending the Companies Act 2016 to include a specific anti-abuse provision which would allow the court to dismiss petitions brought with the intent to harass debtors and impose costs against the petitioner. Second, there should be a review of the minimum amount of debts for which a statutory demand or winding up petition may be presented to reduce the likelihood that either instrument will be used to coerce debtors into paying smaller amounts of money owed. Third, there is a need for the Malaysian courts to imposed wasted costs or exemplary costs on creditors more often for petitions brought in bad faith as deterrent. Finally, the interaction between abusive petitions and the corporate rescue regime should receive more judicial and legislative attention. When a viable company is petitioned, a conversion to a corporate rescue process such as judicial management or corporate voluntary arrangement should be considered to give all creditors an equal opportunity to recover some of their debts[34].

In conclusion, it is necessary for courts, legislators and lawyers to work together to ensure that winding up petition are not abused. Without additional statutory intervention, wider discussion about petitioning practices and stronger judicial measures to punish abusive petitions, the winding up process will continue to have the potential to be used as a tool to coerce debtors to pay debts owed.

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