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CROSS-BORDER RESTRUCTURING AND INSOLVENCY BETWEEN SINGAPORE AND MALAYSIA

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Given the close economic ties between Singapore and Malaysia, an increasing number of cross-border corporate restructurings and insolvency proceedings have required practitioners to grapple with the interplay between the two legal frameworks. This article delves into cross-border issues between Singapore and Malaysia on schemes of arrangement, winding up, and how the recent Protocols for Court-to-Court Cooperation in Cross-Border Insolvency and Shipping may have a part to play in assisting practitioners in obtaining recognition for Singapore proceedings in Malaysia.

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I. Introduction

1 The UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law") was enacted in Singapore by way of amendment to the Companies Act in 2017. Currently, the Model Law remains in force through s 252 of the Insolvency, Restructuring and Dissolution Act 2018[1] (the "IRDA"). This promotes greater legal certainty and predictability in cross-border insolvency matters

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across the multiple jurisdictions which have similarly enacted the Model Law.

2 On the other hand, Malaysia has not adopted the Model Law into domestic legislation. As such, uncertainty in cross-border issues may arise when seeking recognition for Singapore-sanctioned moratoriums, schemes, as well as Singapore insolvency office-holders.

3 While the legal position regarding this topic is yet to be cemented, cases such as *AirAsia X Bhd v BOC Aviation Ltd* ("*AirAsia X*")[2] indicate a positive outlook. Additionally, the recent implementation of Protocols for Court-to-Court Cooperation in Cross-Border Insolvency and Shipping (each a "Protocol", and together the "Protocols"), as well as potential amendments to the Malaysia's Companies Act 2016[3] (the "CA 2016") could have a positive impact on the likelihood of Singapore proceedings being recognised in Malaysian courts.

4 This article will discuss the 2021 Protocols, as well as how Singapore practitioners may obtain cross-border recognition for their insolvency proceedings in Malaysia amidst the existing uncertainties.

II. The Protocols between Singapore and Malaysia

5 From 23 July 2021, the Supreme Court of Singapore and the Federal Court of Malaysia has implemented the Protocols to facilitate communication and co-operation in proceedings concerning admiralty and shipping law matters as well as cross-border corporate insolvency matters.

6 In particular, the Protocol on cross-border corporate insolvency matters (the "Insolvency Protocol") applies to the following types of cross-border proceedings commenced in Malaysia and Singapore relating to the insolvency or the adjustment of debt of corporations:

2 [2021] 10 MLJ 942.
3 No 777 of 2016 (M'sia).

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(a) winding up or other similar processes as are available in Malaysia and Singapore;

(b) judicial management or other similar processes as are available in Malaysia and Singapore;

(c) schemes of arrangement for debt restructuring or other similar processes as are available in Malaysia and Singapore; or

(d) receivership in the context of corporate insolvency, regardless of whether a receiver and/or manager is appointed over the property of a corporation pursuant to an order of court or under the powers contained in any instrument such as a debenture.

7 The primary thrust of the Insolvency Protocol is to facilitate court-to-court communication whereby each court may initiate a request for court-to-court communication with the foreign court. The Insolvency Protocol leaves it flexible in terms of how the method of court-to-court communication will be carried out and each case will depend on the agreement by the two courts.

8 Further, the parties before each court will be notified of each request for court-to-court communication. However, parties will not be permitted to participate in the said communication unless the courts agree in writing to allow such participation.

9 The Insolvency Protocol does not go so far as to provide guidance on the holding of joint hearings like the provisions seen in the Judicial Insolvency Network's "Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters". Nonetheless, it is envisaged that as part of the court-to-court communication under the Insolvency Protocol, the courts of Singapore and Malaysia could consider fashioning the appropriate bespoke *ad hoc* cross-border insolvency protocol for the cross-border matter before the courts, including the holding of any joint hearings. This would be to achieve the aim of the Insolvency Protocol of providing a framework for co-operation and communication between the

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Courts to facilitate the efficient and timely administration of cross-border corporate insolvency cases.

III. The Malaysian cross-border insolvency framework

10 As mentioned above, Malaysia has not adopted the Model Law. As such, cross-border insolvency matters would rely on common law recognition principles.

11 Notwithstanding this, the current CA 2016 contains some limited cross-border insolvency provisions applicable to foreign liquidators of registered foreign companies.

IV. Malaysia's scheme of arrangement framework

12 Malaysia's scheme of arrangement framework is contained in ss 365 to 369 of the CA 2016. The relevant provisions are as follows:

(a) Section 366 of the CA 2016, the Malaysian equivalent of s 210 of the Companies Act 1967[4] ("the CA"), which provides for the manner in which a company may enter into a scheme of arrangement.

(b) Section 368 of the CA 2016, the Malaysian equivalent of s 210(10) of the CA, which empowers the court to restrain further proceedings in lieu of a proposed scheme of arrangement.

(c) Section 369 of the CA 2016, the Malaysian equivalent of s 211 of the CA, sets out, *inter alia*, the information required in the notice of scheme meeting and the explanatory statement.

13 There are, however, notable differences between the two acts. Section 368 of the CA 2016 requires an arrangement or compromise to be proposed for the court to restrain further proceedings whereas s 64 of the IRDA only requires the intention to make a proposal. There is also no Malaysian equivalent of

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the "pre-packed scheme" in s 71 of the IRDA, which allows for scheme to be approved by the court without the holding of a creditor meeting.

14 Be that as it may, Malaysia is currently considering amendments to the law to allow for the introduction of similar scheme of arrangement provisions as contained in Pt 5 of the IRDA. This will lead to greater similarities between the scheme of arrangements laws in Malaysia and Singapore.

15 The analysis below focuses on the current provisions of the CA 2016 and the different possible scenarios that the authors have seen in practice.

A. Singapore company applying for a scheme of arrangement in Malaysia

16 For the purposes of a scheme of arrangement, s 365 of the CA 2016 sets out the meaning of the term "company" as "any corporation or society liable to be wound up under this Act". This is similar to s 63(3) of the IRDA. Therefore, a foreign company, if liable to be wound up under the CA 2016, could apply for a scheme of arrangement in Malaysia.

17 Section 365 of the CA 2016 is to be read together with s 545 of the CA 2016 that stipulates that an "unregistered company" may be liable to be wound up under the CA 2016. In turn, s 544 of the CA 2016 defines such an "unregistered company" as including a "foreign company".

18 Following decisions such as the English High Court decision in *Re Drax Holdings Ltd*[5] ("*Drax Holdings*") and the Singapore High Court decision of *Re Pacific Andes Resources Development Ltd*[6] ("*Pacific Andes*"), the key issue when determining if a foreign company can apply for a scheme of arrangement in Singapore and the UK is whether there exists sufficient nexus between the foreign company and the country it is applying to.

5 [2004] 1 WLR 1049.
6 [2018] 5 SLR 125.

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19 The Malaysian High Court has recently sanctioned a scheme of arrangement by a foreign company, though there are currently no reported Malaysian judgments on the same. Nam Cheong Ltd, a Bermuda-incorporated, Singapore-listed company had initiated scheme of arrangement proceedings in Malaysia, with the Malaysian High Court granting sanction on 21 December 2023. In addressing the court on its jurisdiction to hear a scheme of arrangement by a foreign company, the above-mentioned decisions of *Drax Holdings* and *Pacific Andes*, among others, were successfully applied to set out the factors establishing a sufficient nexus between Nam Cheong Ltd and Malaysia.

20 Additionally, a listed entity, Sapura Energy Bhd ("Sapura Energy"), and 22 of its subsidiaries have initiated scheme of arrangement proceedings in Malaysia.[7] Two of the subsidiaries in the proceedings are Bermuda-incorporated entities. On 10 March 2022, the Malaysian High Court granted an *ex parte* restraining order (*ie*, moratorium order) in favour of all 23 of the Sapura Energy entities and granted leave for the holding of the court-convened meetings of the creditors.

21 The arguments canvassed before the court were that:

(a) the ultimate holding company of the Bermuda subsidiaries is Sapura Energy, a Malaysian-listed company;

(b) the Bermuda subsidiaries are vessel-owning entities within the Sapura Energy scheme companies;

(c) the management of the Bermuda subsidiaries are based in Malaysia; and

(d) there was also evidence that creditors of the Bermuda subsidiaries are based in Malaysia.

22 At this preliminary stage, and in relation to the two Bermudian subsidiaries, it appears that the existence of sufficient nexus was a key determinant, and the Malaysian High Court was

7 Kuala Lumpur High Court Originating Summons No WA-24NCC-148-03/2022.

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satisfied that there was sufficient nexus between the Bermudian subsidiaries and Malaysia.

B. Recognition of Singapore moratorium in Malaysia

23 Sections 64(5) and 65(4) of the IRDA allow for moratorium orders that "may be expressed to apply to any act of any person in Singapore or within the jurisdiction of the Court, whether the act takes place in Singapore *or elsewhere*" [emphasis added].

24 One issue is whether the Singapore moratorium orders could extend to Malaysia in terms of restraining legal proceedings against companies or assets in Malaysia. If this is possible, the Insolvency Protocol could further assist the Malaysian courts in granting a stay in lieu of a moratorium, by allowing communication and coordination with the Singapore courts on the progress of a Singapore moratorium. However, the question of whether Singapore moratorium orders could extend to Malaysia has not been decided in Malaysia before.

25 The authors submit that it is possible for the Malaysian courts to adopt a similar approach as in *Re Taisoo Suk*[8] ("*Re Taisoo Suk*") in allowing for a moratorium in Malaysia in support of a Singapore moratorium order.

26 In *Re Taisoo Suk*, the Singapore High Court granted interim orders to, among others, restrain all pending, contingent or fresh proceedings against Hanjin Shipping Co Ltd ("Hanjin") and its Singapore subsidiaries. The application had been made under O 92 r 4 of the Rules of Court[9] to invoke the inherent jurisdiction of the court to assist Hanjin's rehabilitation proceedings in Korea.

27 Malaysia has an identical provision in O 92 r 4 of the Malaysia Rules of Court 2012. In Malaysia, it could be argued that the principle in *Re Taisoo Suk* could be invoked in similar circumstances where:[10]

8 [2016] 5 SLR 787.
9 2014 Rev Ed.
10 *Re Taisoo Suk* [2016] 5 SLR 787 at [32].

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> … the imperative for orderly rehabilitation and restructuring of a company running a global business across jurisdictions, and the need to ensure that the company's assets could be marshalled or collected for such effort, both provided sufficiently strong grounds for the exercise of the inherent powers of the court to grant the restraint and stay orders.

28 Depending on the circumstances of the cases, it is possible for a Malaysian court to apply *Arris Solutions, Inc v Asian Broadcasting Network (M) Sdn Bhd*[11] ("*Arris Solutions*") in allowing for a stay of execution in Malaysia while the Singapore moratorium for a scheme of arrangement is still in force. In *Arris Solutions*, the Singapore International Commercial Court granted a stay of execution of the Singapore judgments pursuant to O 92 r 4 of the Rules of Court[12] pending the outcome of the defendant's application for a scheme of arrangement in Malaysia.

29 Nonetheless, we also note the comments in the High Court of the Hong Kong Special Administrative Region Court of First Instance decision in *Re CW Advanced Technologies Ltd*.[13] Harris J made *obiter* comments that it was unclear if the Singapore moratorium was a collective insolvency proceeding for common law recognition purposes. Where the Singapore moratorium is meant to facilitate a scheme of arrangement, there were conflicting authorities on whether a scheme of arrangement could be treated as a collective insolvency proceeding.

C. Recognition of Singapore scheme sanction in Malaysia

30 The next issue is whether Malaysia could recognise a sanctioned Singapore scheme of arrangement.

31 Although there is currently no decided case dealing with this specific point, in the case of *Re Contel Corporation Ltd* ("*Re Contel*").[14] the Supreme Court of Bermuda recognised a Singapore scheme of arrangement obtained by a Bermuda

11 [2017] 4 SLR 1.
12 2014 Rev Ed.
13 [2018] HKCFI 1705.
14 [2011] SC (Bda) 14 Com.

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company. However, *Re Contel* applied the Privy Council decision in *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc*[15] ("*Cambridge Gas*") in applying the common law discretionary power to recognise foreign restructuring orders. There may be doubts on the wide principles in *Cambridge Gas* after *Rubin v Eurofinance SA*.[16]

32 As to whether a Singapore scheme would be recognised in Malaysia, a discussion on the applicability of the Gibbs Rule is necessary. The Gibbs Rule is an English common law principle which provides that a debt governed by English law cannot be discharged or compromised by foreign insolvency proceedings.

33 In the Malaysian High Court decision of *RHB Bank Bhd v First Omni Sdn Bhd*[17] ("*RHB Bank Bhd*"), the plaintiff was a Malaysian bank and sued, among others, TT International Ltd ("TT International"), being the second defendant and the corporate guarantor. TT International was a Singapore company and had obtained sanction of its scheme of arrangement in Singapore. Under the terms of the scheme of arrangement, the claims under the corporate guarantee had been waived.

34 TT International applied for certain preliminary issues to be determined by the court. The issues included whether the plaintiff was deemed to have waived its rights to the claim based on the construction of the scheme of arrangement sanctioned by the Court of Appeal of Singapore.

35 The Malaysian High Court referred to the Gibbs Rule and expressed doubt as to whether the scheme of arrangement under Singapore law could operate as a discharge of the debts or liability of the corporate guarantee governed under Malaysian law. Nonetheless, these comments were merely *obiter dicta* and not determinative. The High Court merely concluded that it was not appropriate to rule on the issues framed for preliminary

15 [2007] 1 AC 508.
16 [2013] 1 AC 236.
17 [2021] 8 MLJ 43.

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determination. The discussion on whether the Gibbs Rule applies in Malaysia will also be further touched on below.

36 It is noteworthy that the Gibbs Rule has been subject to much academic criticism. This was recognised in *Pacific Andes Resources Development Ltd*,[18] where the Singapore High Court rejected the application of the Gibbs Rule.

37 Subsequently, in the Malaysian High Court decision of *AirAsia X*, Ong Chee Kwan JC recognised that the Gibbs Rule has been rejected in Singapore,[19] Australia,[20] and the US.[21] The Malaysian High Court shared the view that the Gibbs Rule does not operate to restrict the Malaysian court from entertaining and if thought fit, approving a scheme of arrangement which involves the discharge or modification of any contractual rights between the scheme company and its creditors even where the contracts are governed by English laws or foreign laws. The Court in *AirAsia X* referred to the *RHB Bank Bhd* decision but noted that the points on the application of the Gibbs Rule were merely *obiter dicta*.

38 It remains to be seen whether the common law recognition of modified universalism would allow for a Malaysian Court to give recognition to a Singapore sanctioned scheme of arrangement.

D. Coordination of schemes in Singapore and Malaysia

39 There have been past examples of concurrent schemes of arrangement being initiated by Singapore and Malaysian companies within the same group of companies.

40 Between 2017 and 2018, Nam Cheong Ltd, a listed entity on the Singapore Exchange, applied for a Singapore scheme arrangement as its two Malaysian subsidiaries concurrently

18 [2016] SGHC 210 at [47].
19 *Pacific Andes Resources Development Ltd* [2016] SGHC 210.
20 *Re Bulong Nickel Pty Ltd* [2002] WASC 226; *Re Wollongong Coal Ltd and Jindal Steel & Coal Australia Pty Ltd* [2020] NSWSC 73.
21 *In re Angrokor* 591 BR 163 (Bankr SDNY, 2018).

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applied for a Malaysian scheme of arrangement. The Singapore and the Malaysian schemes were eventually sanctioned.

41 Next and more recently, as noted in *Re DSG Asia Holdings Pte Ltd*,[22] Design Studio Group Ltd, a listed entity on the Singapore Exchange, and the Malaysia subsidiaries had applied for a Singapore scheme of arrangement concurrently with the Malaysian subsidiaries' scheme of arrangement.

42 The Insolvency Protocol could assist in such a situation of concurrent schemes of arrangement and where there is likely a need to coordinate the cross-border proceedings and elements of inter-conditionality of the schemes. Furthermore, given the considered amendments to Malaysia's scheme of arrangement framework, increased similarity to Singapore law could further facilitate coordination between the two proceedings.

V. Winding up

43 From a cross-border winding-up perspective, one key issue would be the avenues in which a foreign liquidator may be recognised in Malaysia.

44 This issue has to be considered for two categories of companies: (a) registered foreign companies, *ie*, foreign companies registered to carry on business in Malaysia; and (b) unregistered foreign companies.

A. Recognition of foreign liquidator of registered foreign companies

45 Under s 561 of the CA 2016, a foreign company shall not carry on a business in Malaysia unless the foreign company is registered as a foreign company under the CA 2016. As

22 [2022] 3 SLR 1250.

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at 31 December 2021, there are 4,930 registered foreign companies in Malaysia.[23]

46 The CA 2016's provisions on foreign companies (under Div 1 of Pt V of the CA 2016) omitted the previous reference in Companies Act 1965[24] ("CA 1965") to how the current Div 1 of Pt V of the CA 2016, including the section on liquidation of a foreign company, applied to a foreign company "only if it has a place of business or is carrying on business within Malaysia". The CA 2016 also does not have similar wording such as in s 250(1) of the IRDA which states the section applies to a foreign company which "establishes a place of business or carries on business in Singapore".

47 Nonetheless, it is assumed that the CA 2016 provisions on foreign companies are confined only to foreign companies carrying on a business in Malaysia.[25]

48 Under s 578(3)(*b*) of the CA 2016, if a foreign company goes into liquidation or is dissolved in its place of incorporation or origin, the foreign liquidator shall have the powers and functions of a liquidator until a liquidator for Malaysia is duly appointed by the Malaysian court.

49 The use of the term "or origin" in s 578(3)(*b*) of the CA 2016 suggests that there is a deliberate distinction between the place of incorporation and place of origin. Therefore, there is the opinion[26] that where the foreign company has closer attachments to another jurisdiction in which incorporation was not actually carried out, proceedings in that jurisdiction of "origin" will be treated as primary proceedings, to which a liquidation in Malaysia will be ancillary.

23 Companies Commission of Malaysia website at <https://www.ssm.com.my/Pages/Publication/Statistics/Companies%20and%20Business%20Registered/Company%20and%20Business%20Registered%20Statistic%20for%202021/Company-and-Business-Registered-Statistic-2021.aspx>.
24 No 79 of 1965 (M'sia).
25 *Law and Practice of Corporate Insolvency in Malaysia* (Rabindra S Nathan ed) (Sweet & Maxwell, 2019) at para 18.055.
26 PJ Omar, "Cross-border Jurisdiction and Assistance in Insolvency: The Position in Malaysia and Singapore" (2008) 11(1) PELJ 158.

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50 It is anticipated that the foreign liquidator would still make a formal application under s 578 of the CA 2016 to the Malaysian court for an order for such recognition and for a declaration of such powers of a Malaysian liquidator.[27]

51 Additionally, it is important to note that s 578(4)(*c*)(ii) of the CA 2016 contains a ring-fencing provision similar to s 250(3)(*c*) of the IRDA. Therefore, the liquidator of the foreign company shall have to first satisfy any liabilities incurred in Malaysia by the foreign company before paying the net amount overseas.

B. Recognition of foreign liquidator of unregistered foreign companies

(1) Unregistered foreign companies wound up in place of incorporation

52 In addition to the above statutory provision on foreign liquidators of a registered foreign company, common law principles would also generally apply to a foreign liquidator of a foreign company wound up in its place of incorporation.

53 This principle was recognised by the Singapore Court of Appeal in *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd*[28] where the case cited, among others, r 179 of *Dicey, Morris and Collins on The Conflict of Laws*.[29] Rule 179 states that "the authority of the liquidator appointed under the law of the place of incorporation is recognised in England".

54 Therefore, a liquidator of a foreign company will be recognised as the representative of the company for the purposes of getting in and realising the company's worldwide assets and there would generally be no basis for a national court to decline

27 *Law and Practice of Corporate Insolvency in Malaysia* (Rabindra S Nathan ed) (Sweet & Maxwell, 2019) at para 18.074.
28 [2014] 2 SLR 815.
29 *Dicey, Morris and Collins on The Conflict of Laws* vol 2 (Sweet & Maxwell, 15th Ed, 2012) at para 30-102.

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to recognise the liquidator's claim to assets belonging to the company under general principles of property law.

55 Common law developments may also extend to allowing a foreign liquidator to obtain orders from a national court for the production of information and documents without the need for parallel winding-up proceedings before that national court.

56 For example, the Hong Kong Court of First Instance decision of *The Joint Official Liquidators of A Company v B*[30] involved foreign liquidators of a company incorporated in the Cayman Islands and which was wound up in the Cayman Islands. The foreign liquidators applied in Hong Kong for orders recognising the foreign liquidators and for orders against Hong Kong respondents to produce documents to the liquidators concerning details of banks accounts into which substantial sums of money were paid by the company.

57 These principles would all be persuasive in Malaysia.

(2) Unregistered foreign companies wound up in centre of main interest

58 Common law recognition of a foreign liquidator may also extend to recognising a foreign liquidator where the foreign company was wound up in a jurisdiction other than its place of incorporation. The company may be incorporated under one jurisdiction, but its bulk of business may have been carried out in another jurisdiction. This jurisdiction would be the centre of main interest ("COMI") of the company concerned.

59 The Singapore High Court in *Re Opto-Medix Ltd*[31] involved two British Virgin Islands-incorporated companies that conducted the bulk of its business in Japan. Japanese winding-up orders were made and a Japanese bankruptcy trustee was appointed. There were moneys still held in Singapore bank accounts. The Japanese bankruptcy trustee applied in Singapore

30 [2014] 5 HKC 152.
31 [2016] 4 SLR 312.

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for recognition of the Japanese winding-up proceedings and of his appointment as bankruptcy trustee, in order to ascertain, administer and dispose of assets in Singapore. He undertook to pay all debts in Singapore before remitting any funds out of Singapore. The application was allowed.

60 The Singapore High Court held that the winding up of a company in a jurisdiction other than that of its place of incorporation might be recognised in Singapore provided there was a basis for doing so. Such a basis could be that the jurisdiction was where the bulk of the business and transactions of the company occurred. The place of incorporation may be an accident of many factors, and may be far removed from the actual place of business. The COMI will likely be the place where most dealings occur, most money is paid in and out, and most decisions are made. It is therefore the place where the bulk of the business is carried out and provides a strong connecting factor to the courts there. Hence, the carrying out of the bulk of the business provided a basis to recognise the applicant's appointment as bankruptcy trustee.

61 This approach will likely be adopted by the Malaysian courts.

VI. Implications/Conclusion

62 Even with the implementation of the Insolvency Protocol, the current legal position of gaining recognition for Singapore proceedings in Malaysia remains relatively unclear. Therefore, it would be prudent for insolvency practitioners dealing with cross-border insolvency proceedings in Malaysia to consider parallel schemes, or in the context of liquidation, concurrent proceedings as a solution.

63 Alternatively, Singapore practitioners may consider synthetic proceedings,[32] *ie*, a domestic court in insolvency proceedings applying foreign law to create an effect which would

32 See Sim Kwan Kiat, "Jurisdictional Basis of Synthetic Proceedings in Cross-border Insolvency" [2019] SAL Prac 10.

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have been achieved had secondary insolvency proceedings been commenced in a foreign jurisdiction. While synthetic proceedings in cross-border insolvency remains a novel point within Singapore courts, several arguments can be made for its use. Notably, the UNCITRAL Working Group V (Insolvency Law) has recognised the merits of synthetic proceedings, and Singapore courts may be persuaded to conduct synthetic proceedings for the purposes of mitigating conflict whilst ensuring the protection of foreign creditors. This has the added effect of enhanced efficiency and reduced costs by doing away with secondary proceedings. However, whether Singapore courts will exercise their power to conduct synthetic proceedings remains an open question.

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