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# **Insolvency Jurisdiction in Malaysia and Singapore: Statutory Assistance**

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## *Introduction*

The internationalisation of business is perhaps only the latest in a long line of revolutions in the world of commerce to occupy the thoughts and writings of commentators. The fact that business is international in character has prompted calls for harmonisation of rules in many areas of law. In some instances, these calls have been answered, notably in relation to the international sale of goods, international carriage of goods, bills of exchange, factoring and financial leasing. A great business preoccupation relates to the conduct of litigation with overseas trading partners and a prime concern is that of the recognition and enforcement of judgments overseas. In one area, arbitral awards, there is a measure of agreement following the adoption of a convention. As far as insolvency is concerned, there have been few attempts at an international code to deal with an all too familiar phenomenon, the collapse of companies on an international scale, as the banking industry witnessed in the 1990s. Attempts on a regional scale have not had a great deal of success. Consideration, in the absence of an international framework, remains therefore with how domestic legal systems deal with insolvencies with both local and foreign elements.

## *The Common-Law Position on Foreign Judgments*

It is a general principle that the dissolution of a company by the law of its place of incorporation will be recognised by the courts of Malaysia and Singapore.<sup>1</sup> The extension of this principle would also require recognition of a foreign liquidation order which has been granted in the home jurisdiction, or domicile, of the company. This also includes recognition of the authority of a liquidator appointed by virtue of any order.<sup>2</sup> In addition, orders pronounced by other jurisdictions may also be recognised provided the basis of jurisdiction approximates to grounds normally accepted by the local court. This is subject to certain common-law exceptions to recognition based on whether foreign proceedings are final in nature, whether they comply with perceived notions of natural justice, whether jurisdiction has been exercised validly and whether recognition would offend public order rules.<sup>3</sup>

The traditional common-law doctrine is that a foreign order, although creating an obligation that is actionable within the jurisdiction, can not be enforced

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<sup>1</sup>Lazard Bros. & Co. v Midland Bank Ltd. [1933] AC 283, cited as authority in Woon and Hicks, *The Companies Act of Singapore: An Annotation* at 2:1301. It is submitted this principle is also valid for Malaysia.

<sup>2</sup>This accords with the principle outlined in Rule 178 in Dicey & Morris, *The Conflict of Laws* (Stevens & Sons, 1987) at 1150 and, it is submitted, is also valid in Malaysia and Singapore.

<sup>3</sup>Wood, *Principles of International Insolvency* (Sweet & Maxwell, 1995) at 250 (para. 5-13).

without the institution of fresh legal proceedings.<sup>4</sup> This is said to be on grounds that courts recognise the limitation of their own power, if making an order in similar circumstances, to affect assets of a company abroad without the express consent of the foreign court to initiate and assist proceedings. In this connexion, it has been stated that the proposed winding up in Singapore of a company incorporated in Malaysia would normally only affect assets within the jurisdiction of the court making the order and could not by its nature have full force and effect throughout Malaysia.<sup>5</sup>

Recognition is thus not tantamount to enforcement of the foreign order within the jurisdiction. Nevertheless, it is stated by commentators that, although a foreign liquidation order is not directly enforceable, it is assisted by the recognition of the appointment of the foreign liquidator and allowing him capacity to act in certain instances.<sup>6</sup> Nevertheless, the exercise of this capacity to act may be limited as it has been held that powers available to a liquidator, including those to require examination of a company's directors, are not available to a foreign liquidator, where no proceedings were opened in Singapore in respect of the foreign company.<sup>7</sup>

### ***I - Jurisdiction to Wind Up a Foreign Company***

The law relating to insolvency, contained in the Companies Acts of Malaysia and Singapore,<sup>8</sup> is derived in part from the Australian Uniform Companies Act of 1961. In parallel with the Australian legislation, both the Malaysian and Singapore Acts contain two separate sets of provisions dealing with jurisdiction over a foreign company,<sup>9</sup> the first where that company has registered to conduct business within the jurisdiction and second, if a company falls outside the foregoing provisions, where it falls within the definition of an unregistered company.

#### **A: Specific Jurisdiction to Wind Up a Foreign Registered Company**

The law provides that companies wishing to conduct business in Malaysia or Singapore must not carry out business in these countries unless they have been registered or are about to register with the appropriate authority.<sup>10</sup> The law provides that where a registered foreign company goes into liquidation, or has been dissolved, in its home jurisdiction, any person who is a local agent of the foreign company must lodge notice of that fact and notice of the appointment of a liquidator, where one is appointed, within a time period of

<sup>4</sup>Cheshire and North's Private International Law (Butterworths, 1994) at 348.

<sup>5</sup>Tong Aik (Far East) Ltd. v Eastern Minerals Trading (1959) Ltd. [1965] 2 MLJ 149.

<sup>6</sup>Cooper and Jarvis (eds), Recognition and Enforcement of Cross-Border Insolvency: A Guide to International Practice (Wiley, 1997) at 103 (Singapore).

<sup>7</sup>Re: China Underwriters Life and General Insurance Co. Ltd. [1988] 1 MLJ 409.

<sup>8</sup>Malaysia: Companies Act 1965 (Act 125 of the Federal Statute Series) ('CAM'). Singapore: Companies Act 1967 (Cap. 50, 1994 ed. of the Statutes of Singapore) ('CAS').

<sup>9</sup>s4, CAM and s4, CAS define a foreign company as "a company, corporation, society, association or other body incorporated outside [Malaysia/Singapore] or an unincorporated society, association or other body which under the law of its place of origin may sue or be sued, or hold property in the name of the secretary or other officer of the body or association duly appointed for that purpose and which does not have its head office or principal place of business in [Malaysia/Singapore]".

<sup>10</sup>s332, CAM; s368, CAS.

one month calculated by reference to the dissolution or the beginning of winding up proceedings.<sup>11</sup> The person who has been appointed liquidator in the foreign jurisdiction enjoys the powers of a local liquidator until one is appointed by court.<sup>12</sup> Authority suggests that a foreign liquidator does not become the liquidator for Singapore merely because he is given the powers of this latter post.<sup>13</sup> This would suggest that appointment of a liquidator in Malaysia or Singapore would result in the revocation of any order vesting title to property in the foreign liquidator made by a local court.

A liquidator of a foreign company appointed by the courts must invite all creditors to make their claims against the foreign company within a reasonable time before any distribution of the foreign company's property is made. This is usually performed by advertising in a daily newspaper circulating generally in any country where the foreign company has carried on business at any time prior to liquidation, except in any particular jurisdiction where a liquidator has in fact been appointed.<sup>14</sup> In addition, the liquidator may not pay out a creditor of the foreign company to the exclusion of another creditor of the foreign company without obtaining a court order authorising him to do so.<sup>15</sup> Any payments that are made will be in accordance with domestic rules for the ranking and payment of claims.<sup>16</sup>

The liquidator is required to recover and realise all property belonging to the foreign company in Malaysia or Singapore and pay the net amount to the liquidator of the foreign company for its home jurisdiction unless the courts otherwise order. Nevertheless, this is subject to a local 'grab-rule', by which the net amount is paid after paying any debts and satisfying any liabilities within the jurisdiction.<sup>17</sup> Commentators are divided about the effect of local 'grab-rules', suggesting that this type of territorial approach runs counter to the accepted pari passu principle and equality of treatment. In international insolvency proceedings, it is argued that only very diligent creditors will be able to participate and prove in a number of insolvencies and smaller creditors, unless fortuitously present in the jurisdiction applying the grab-rule, will lose out. This results in an element of unpredictability in international business leading to increased transaction costs in financing and insurance arrangements.

There is authority to suggest that grounds for a court refusing to allow repatriation of assets may arise where, for example, there is a risk that the liquidator in the foreign company's home jurisdiction might not divide assets equitably. Where there is no liquidator for the home jurisdiction, the liquidator may apply to the Court for directions about the disposal of the net amount recovered following winding up of the registered foreign company insofar as its property in Malaysia or Singapore is concerned.<sup>18</sup>

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<sup>11</sup>s340(2)(a), CAM; s377(2)(a), CAS.

<sup>12</sup>s340(2)(b), CAM; s377(2)(b), CAS.

<sup>13</sup>Re: China Underwriters Life and General Insurance Co. Ltd. [1988] 1 MLJ 409 at 413D (per Chan Sek Keong JC). It is submitted this analysis also holds true for the Malaysian provision.

<sup>14</sup>s340(3)(a), CAM; s377(3)(a).

<sup>15</sup>s340(3)(b), CAM; s377(3)(b), CAS.

<sup>16</sup>s292, CAM; s328, CAS.

<sup>17</sup>s340(3)(c), CAM; s377(3)(c), CAS.

<sup>18</sup>s340(4), CAM; s377(4), CAS.

Proceedings under the specific jurisdiction rule are generally treated as being ancillary to proceedings being conducted in the foreign company's home jurisdiction.<sup>19</sup> As the definition in the law uses the term 'place of incorporation or origin', it is submitted that where there is evidence that the company has closer attachments to another jurisdiction in which incorporation was not actually carried out, proceedings in that jurisdiction will be treated as primary proceedings, to which a liquidation in Singapore or Malaysia will be ancillary. Nevertheless, these rules may not be of application where there are no proceedings in the home jurisdiction or these proceedings fall short of what are considered liquidation proceedings. In addition, there is doubt that this provision applied in situations where the foreign company has not in fact registered to conduct business.<sup>20</sup>

### B: The General Jurisdiction Rule

Additional jurisdiction in Malaysia and Singapore to wind up a company not incorporated in these jurisdictions is available in Division 5 of Part X of the respective Acts. These rules apply to what are termed 'unregistered companies', defined to include a foreign company and any partnership association or company consisting of more than 5 members, but not include a company incorporated under the Act.<sup>21</sup> The rules in this part are stated to be in addition to and do not supersede any provisions contained in the Act or any other law dealing with the winding up of companies. The same powers are, in fact, given to the courts or appointed liquidator to perform any act in the case of a company falling under these rules as is normally performed in respect of the winding up of companies.<sup>22</sup> As a general principle, an unregistered company may be wound up notwithstanding that it is being wound up or has been dissolved or has otherwise ceased to exist as a company by virtue of the laws of the place where it was incorporated.<sup>23</sup>

An unregistered company may be wound up under Part X, which deals with winding up in general, subject to certain necessary adaptations. These include, in relation to foreign companies, the fact that the principal place of business in Malaysia or Singapore for the purpose of winding up is taken to be the registered office of the foreign company and that a foreign company may not be subject to voluntary winding up.<sup>24</sup>

Proof that a foreign company is in fact carrying on business in Malaysia or Singapore is to be inferred from the establishment of a share transfer or registration office or frequent dealings with property in the jurisdiction as an

<sup>19</sup>Re: Commercial Bank of South Australia (1886) 33 Ch D. 174 and Re: English, Scottish and Australian Chartered Bank [1893] 3 Ch 385.

<sup>20</sup>United Kingdom Tobacco (1929) Ltd. v Malayan Tobacco Distributors Ltd. [1933] MLJ 1 is authority to suggest that registration is an obligation, although failure to register does not make the company an illegal association or prevent it from enforcing any rights it may have.

<sup>21</sup>s314(1), CAM; s350(1), CAS. In Woon and Hicks, op. cit., it is pointed out at 2:5734 that the Singapore text inserts a comma between the words 'partnership' and 'association', thus possibly changing the import of the provision.

<sup>22</sup>s314(2), CAM; s350(2), CAS.

<sup>23</sup>s315(3), CAM; s351(3), CAS.

<sup>24</sup>s315(1)(a)-(b), CAM; s351(1)(a)-(b), CAS.

agent, legal personal representative or trustee.<sup>25</sup> Activities which of themselves do not signify that the foreign company is carrying out business include acting as a party to legal proceedings, holding company meetings in Malaysia or Singapore, maintaining a bank account, effecting a sale through an independent contractor, creating security over property or debt, collecting or enforcing rights over debt, investing funds or holding property, procures the conclusion of contracts binding outside these countries and conducting a single or isolated transaction within a 31-day period, unless this transaction is one of a similar series conducted over a period of time.<sup>26</sup> In addition, in Malaysia, the temporary importation of goods for a display or exhibition with view to re-export is not considered to amount to carrying on business.<sup>27</sup>

Circumstances in which an unregistered company may be wound up include where it is unable to pay its debts, where it has been dissolved, where it has ceased to carry on business in Malaysia or Singapore, where it has a place of business in these countries only for the purpose of winding up its business and where the court is of the opinion that it is just and equitable that it should be wound up.<sup>28</sup> Instances in which an unregistered company is deemed to be unable to pay its debts include where it fails to pay or otherwise secure or compound within three weeks following the presentation of a demand made by a creditor for payment of a sum in excess of the statutory set amount,<sup>29</sup> where it fails to take steps upon the service of notice of an action or other proceedings by another party on either a shareholder or the company concerned by paying any debt due or taking steps to meet any demands which have been made, where execution or enforcement of a judgment obtained in any court has not been satisfied by the company and, lastly, where it is proved to the satisfaction of the Court that the company is unable to pay its debts.<sup>30</sup>

Following dissolution of an unregistered company, where any property belonging to that body remains in Malaysia or Singapore, the legal or equitable estate or other interest in that property, together with any claim, right or remedy affecting that property will vest in the person entitled under the law of the company's place of incorporation or origin.<sup>31</sup> Where the place of origin is Malaysia or Singapore, which may be the case of partnership associations or other types of company, local rules on the distribution of the assets of defunct companies will apply.<sup>32</sup> An element of reciprocity is required for the operation of this section as the place of origin must be a country, designated by the Government Minister responsible as having laws containing provisions similar to those set out in these rules.<sup>33</sup>

### C: Additional Considerations for Exercising Jurisdiction

<sup>25</sup> s330(1), CAM; s366(1), CAS.

<sup>26</sup> s330(2), CAM; s366(2), CAS.

<sup>27</sup> s330(2)(j), CAM.

<sup>28</sup> s315(1)(c), CAM; s351(1)(c), CAS.

<sup>29</sup> MYR 500; SGD 1000.

<sup>30</sup> s315(2), CAM; s351(2), CAS.

<sup>31</sup> s318(1), CAM; s354(1), CAS.

<sup>32</sup> s318(2), CAM; s354(2), CAS.

<sup>33</sup> s318(3), CAM; s354(3), CAS.

### (i) Further Jurisdictional Requirements

It is stated that the existence of a place of business in Singapore is not necessary for the exercise of jurisdiction to wind up an unregistered, or foreign, company. A winding up order may be made as long as assets are present within the jurisdiction. As an alternative, there may be persons present within the jurisdiction who have a legitimate interest in the proper distribution of a company's assets.<sup>34</sup> A broad view is taken of the definition of assets, so as to include rights pertaining to a cause of action.<sup>35</sup>

### (ii) Discretion to Refuse a Petition

The granting of an order following a winding up petition is said to involve the exercise of a court's discretionary powers. This is firmly established in local law, following the decision in Tong Aik.<sup>36</sup> In this instance, an appeal was brought to the Federal Court in Singapore against the decision of the High Court refusing to make an order for the winding up of the Eastern Minerals & Trading (1959) Ltd. company. The appellant was unable to obtain payment of a judgment debt and evidence to support the contention that the company was unable to pay its debts appeared in an affidavit sworn by one of the respondent's directors. The company was incorporated under the Companies Ordinance of the States of Malaya and had its registered office in the state of Kelantan. Although it had maintained a place of business in Singapore, by the time of the petition it had notified the Registrar of Companies that it had ceased to maintain its place of business. It was thus considered an unregistered company and fell to be wound up under the appropriate rules in Singapore.<sup>37</sup>

Evidence was nevertheless available to the court suggesting that the company's sole activity was carrying out mining in Kelantan and that the company had minimal assets in Singapore, although there were substantial outstanding liabilities. The court's view was that the effect of an order made by a Singapore court was necessarily limited to assets present within the jurisdiction and no useful purpose would be served if there were indeed no assets present. That fact was sufficient in itself to deny the appeal, although the court also noted that there was nothing to prevent a petition being brought in the States of Malaya and that the relevant companies enactment provided for the due administration of assets.<sup>38</sup> Furthermore, the companies enactment contained a reciprocal provision allowing a winding up order made by one jurisdiction to be acted on in the other without the necessity for formal winding up proceedings to be opened.<sup>39</sup>

### (iii) Forum Non-Conveniens/Lis Alibi Pendens

<sup>34</sup>Woon and Hicks, op. cit. at 2:5828, citing as authority Banque des Marchands de Moscou (Koupetschesky) v Kindersley [1951] Ch 112.

<sup>35</sup>Re: Compania Merabello San Nicholas SA [1973] Ch 75 and Re: Allobrogia Steamship Corp. [1978] 3 All ER 423.

<sup>36</sup>Tong Aik (Far East) Ltd. v Eastern Minerals Trading (1959) Ltd. [1965] 2 MLJ 149.

<sup>37</sup>s295, Companies Ordinance (Cap. 174), Singapore.

<sup>38</sup>Companies Ordinance (No. 13 of 1946), States of Malaya.

<sup>39</sup>In Part XIII of the Ordinance of both countries.

Although rarely invoked in the context of insolvency proceedings, a plea of forum non conveniens or lis alibi pendens may be raised where litigation is already in contemplation or has been initiated on an issue which will be affected by the onset of insolvency proceedings, especially where the rules of insolvency proceedings prevent the determination of issues, including the fate of priorities, set-offs, and dispositions of assets, except by application of insolvency principles. This may result in great detriment to an individual creditor in comparison to the benefit available for all creditors as a class. This is of particular relevance where the court is petitioned to open winding up proceedings in respect of a foreign company on just and equitable grounds.

The Malaysian and Singapore views on the doctrine of forum non conveniens is broadly similar to that in English law, where it is a relatively recent development.<sup>40</sup> Under previous common-law rules, a stay of action would only be granted in cases of vexation or oppression.<sup>41</sup> The basic principle now is that a stay will only be granted where the court is satisfied that there is another available forum which is the appropriate forum for trial and that the case may be tried more suitably in that forum in the interest of all the parties and of justice. The burden of proof is on the defendant to show that there is another forum which is more appropriate. Factors to be taken into account include with which country the action has the most real and substantial connection, the law governing the relevant transaction, the place where the parties reside or carry on business and questions of convenience and expense, although it is not enough to show that the plaintiff will obtain a personal or legal advantage by the action remaining within the jurisdiction.<sup>42</sup>

## ***II - Mutual Assistance Measures: Co-operation with Foreign Courts***

It is authoritatively stated that Part XIII of the former Companies Ordinance, predecessor to the Companies Acts of both Malaysia and Singapore, contained a provision by which a winding up order made by one of the jurisdictions over a company incorporated in that jurisdiction had effect in the other jurisdiction without the necessity for formal winding up proceedings.<sup>43</sup> This provision has not survived in the modern law of either jurisdiction, although an analogous provision still exists with respect to bankruptcy.<sup>44</sup>

Significantly, although the statutory assistance provisions are derived from their Australian counterparts, they do not include those derived from law reform proposals highlighting the increased significance of cross-border elements in insolvency proceedings and which are the genesis of the

<sup>40</sup>The Atlantic Star [1974] AC 436.

<sup>41</sup>Logan v Bank of Scotland (No. 2) [1906] 1 KB 141.

<sup>42</sup>Spiliada Maritime Corp. v Cansulex Ltd. [1987] AC 480.

<sup>43</sup>Tong Aik (Far East) Ltd. v Eastern Minerals Trading (1959) Ltd. [1965] 2 MLJ 149 at 150D (per Wylie CJ Borneo).

<sup>44</sup>s104, Bankruptcy Act 1967 (Act 360 of the Federal Statute Series) (Malaysia) ('BAM'), s155, Bankruptcy Act 1995 (Act No. 15 of 1995) (Singapore). The use of the words 'bankruptcy and insolvency' in s104(1), BAM suggest, if the ordinary meaning of the words are followed, that corporate insolvency is included in the definition, although s121, BAM excludes the possibility of receiving orders being made against companies and the language of s104(3)-(6), BAM only speaks of the Official Assignee in Bankruptcy, leading one to assume *a contrario* that it was not intended that companies should be covered by this provision.



provisions now to be found in Division 9 of Part 5.7 of the Corporations Law,<sup>45</sup> titled “Co-operation between Australian and foreign courts in external administration matters” and which have been applied in a number of instances, including proceedings involving the BCCI.<sup>46</sup> Proceedings in which co-operation is available are termed “external administration matters”, defined as including the winding up in any Australian state or territory of an Australian or foreign company, the winding up outside Australia of a foreign company or other body corporate and the insolvency of similar bodies. Co-operation is available in the case of certain “prescribed countries”, defined to mean any country which has been prescribed or a colony, overseas territory or protectorate of that country.<sup>47</sup>

Co-operation is effected through the requirement that judges of courts in Australia and any of their officers act in aid of all courts, as well as judges and officers of those courts, that have jurisdiction under corresponding laws in all external administration matters.<sup>48</sup> Mandatory assistance and auxiliary help to the courts of Australian territories and prescribed countries is provided for and assistance at the discretion of the court may be given to the courts of other countries that have jurisdiction in external administration matters.<sup>49</sup> On receipt of a request from a court in an Australian territory or other country, an Australian court may exercise such powers with respect to the matter as it could exercise if the matter had arisen within its own jurisdiction.<sup>50</sup> An Australian court may also issue a Letter of Request to other courts, including courts in an Australian territory or other country, with jurisdiction in comparable matters to act in aid of, and be auxiliary to the Australian court.<sup>51</sup>

### *Summary*

The rise of international commerce and the ease of setting up in more than one jurisdiction now means that many companies have little difficulty in gearing their economic expansion to a global scale. Just as expansion has brought considerations of conflicts of law and choice of law in international contracts and litigation, so too the periodic downturns in the world economy have brought considerations of conflicts rules in relation to insolvencies, especially as insolvencies with an international dimension raise a number of important issues, including the diversity of laws which are potentially applicable to both substantive law and procedure and the potential for conflict arising from the assertion of jurisdiction by a number of courts.

<sup>45</sup>Corporations Law (No. 109 of 1989) ('CL').

<sup>46</sup>Harmer, An Overview of Recent Developments and Future Prospects in Australia, chapter 4 in Ziegel (ed.), Current Developments in International and Comparative Corporate Insolvency Law (OUP, 1994) at para. 6.5.3, citing Australian Law Reform Commission Report No. 45 para. 383.

<sup>47</sup>s580, CL. Nine countries have in fact been prescribed under this section and s29, Bankruptcy Act (Australia): Canada, Jersey, Malaysia, New Zealand, Papua New Guinea, Singapore, Switzerland, the United Kingdom and the United States. See Omar, Cross-Border Co-operation in Australian Corporate Insolvency Law [1999] 2 Insolvency Lawyer 69.

<sup>48</sup>s581(1), CL.

<sup>49</sup>s582(2), CL.

<sup>50</sup>s583(3), CL.

<sup>51</sup>s583(4), CL.

This phenomenon has induced courts to begin to co-operate with each other, realising that insolvency can have far-reaching consequences on society as well as domestic and foreign economies. As the number of international insolvencies likely to increase due to periodic decline in the world economy, this spirit of co-operation can only be positive. In Singapore, commentators state that the law does not as yet appear sufficiently comprehensive to deal with the complicated nature of cross-border questions arising in the course of the insolvency of foreign companies. Nevertheless, there is a growing awareness of the need to amend the law before these problems are aggravated.<sup>52</sup> It is submitted that the same case could be made for Malaysia, where a great number of foreign companies operate and where the insolvency of some of these companies is a statistical possibility.

**3rd March 1999**

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<sup>52</sup>Cooper & Jarvis, *op. cit* at 103.