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RECIPROCAL BANKRUPTCY ARRANGEMENTS AND
COOPERATION BETWEEN MALAYSIA & SINGAPORE

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The purpose of this short paper is to outline the existing provisions under Malaysian bankruptcy law for recognition of foreign bankruptcies, and in particular, Singapore bankruptcy orders.

Malaysia & Singapore

A short introduction to the history of modern Malaysia will assist in facilitating an understanding of the modern day reciprocal arrangements with Singapore and why there is cooperation between the two countries. Today, independent Malaysia is a Federation of 13 states and a Federal Territory. However prior to World War II, the position was rather different. There were only nine Malay states and two British colonies, namely Penang and Malacca that made up Malaya (or Peninsular Malaya). Sabah and Sarawak on the island of Borneo were still governed by Britain. Singapore, very close to Malaya in terms of geographical proximity and historical ties, was at the time a British colony. In 1957, the nine Malay states, Penang and Malacca came together to form independent Malaya. In 1963, Singapore, Sabah and Sarawak joined Malaya in a new union called the Federation of Malaysia. Singapore left Malaysia in 1965 to become an independent country in its own right. That remains the position until today.

The Bankruptcy (Transitional Provisions) Ordinance 1946

A useful starting point for tracing the reciprocal arrangements between Malaysia and Singapore is an ordinance passed by the Malayan Union Government in 1946² entitled *The Bankruptcy (Transitional Provisions) Ordinance* ("Ordinance").

The Ordinance provided that the Chief Secretary (Malayan Union)³ could by notification in the Gazette declare that the Government of the Malayan Union⁴ has entered into an agreement

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² Ordinance No. 17 of 1946, Malayan Union.

³ Singapore was not part of the Malayan Union.

⁴ A short-lived union that lasted only until 1948.

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with the Government of the 'Colony' for the recognition, by each Government of the Official Assignees in Bankruptcy appointed by the other.⁵ Section 7(1) of the Ordinance provided that for the purposes of section 8, 'Colony' meant Singapore. Section 7(2) provided that the Courts of the Malayan Union and its officers shall in all matters of bankruptcy act in aid of and be auxiliary to the courts of the 'Colony' having jurisdiction in bankruptcy. All that was required was an order of the Supreme Court of the Colony and a request for aid. Section 7(2) further provided that if those prerequisites were satisfied, the Malayan Union courts would effectively exercise the same jurisdiction as the Singapore court in bankruptcy.

The Ordinance further provided⁶ that from the date of notification in the Gazette, property of a Singapore bankrupt in the Malayan Union would vest in the Singapore Official Assignee, and the Malayan Union courts would recognise the title of the Singapore Official Assignee to such property. The Ordinance also provided that the Official Assignee of the Colony could sue and be sued in any court in the Malayan Union by the following official name "*The Official Assignee of the property of [], a bankrupt under the law of the Colony of Singapore*".⁷

The notification came in 1950. It was L.N. 37A and provided that the Malayan government had entered into an agreement with the Singapore government for the recognition, by each of the Governments, of the Official Assignees in Bankruptcy appointed by the other.⁸

The Bankruptcy Act 1967

By and large, the position remained that way until 1967 when Malaysia passed the (current) Bankruptcy Act 1967 ("Bankruptcy Act"). The provisions of the Ordinance on arrangements with Singapore were carried through to the Bankruptcy Act, except that this time, the arrangements could also be extended to any 'designated country'.

Section 104(1) provides that the High Court and its officers shall in all matters of bankruptcy act in aid of and be auxiliary to the courts of Singapore (or any designated country⁹) having jurisdiction in bankruptcy. All that was required was an order of any court of the Republic of Singapore or designated country and a request for aid.¹⁰ Section 104(2A) provides that the Malaysian courts shall, in relation to such assistance and auxiliary jurisdiction, have regard to the rules of private international law. The Yang Di Pertuan Agong¹¹ may by notification in the Gazette declare that the Government of Malaysia has entered into an agreement with the Government of the Republic of Singapore for the recognition, by each of the Governments, of the Official Assignees in Bankruptcy appointed by the other¹².

The Bankruptcy Act also carried over the provision that from the date of notification in the Gazette, property of a bankrupt in Singapore in Malaysia would vest in the Singapore Official Assignee, and the Malaysian courts would recognise the title of the Singapore Official Assignee

⁵ Section 8(1).

⁶ In section 8(2).

⁷ Section 8(4).

⁸ With effect 1 February 1950.

⁹ Designated country meant any country designated for the purposes of this section by notification in the Gazette: section 104(7).

¹⁰ Section 104(2).

¹¹ The Malaysian monarch.

¹² Section 104(3).

to such property.¹³ Further, the Official Assignee of the Republic of Singapore could sue and be sued in any court in Malaysia by the following official name “*The Official Assignee of the property of [] J, a bankrupt under the law of the Republic of Singapore*”.¹⁴

One point that has cast some uncertainty over the situation is the fact that there has been no Gazette notification under section 104(3) regarding an agreement between the Malaysian and Singapore Governments. There was a gazette notification in 1988¹⁵ adding the United Kingdom and Australia as ‘Designated Countries’.

Some Case Law

There has not been much judicial analysis in Malaysia of these provisions, and what little there is seems to be inconsistent.

In *Amos William Dawe v Decelopment & Commercial Bank (Ltd) Bhd*¹⁶, the Federal Court of Malaysia was faced with a situation where the Appellant had been made a bankrupt in Singapore before the Respondent had successfully entered judgment against him in the court below. Given the bankruptcy, the Appellant no longer had the ability to maintain the appeal as only the Singapore Official Assignee could. Furthermore, the judgment entered by the Respondent would have been irregularly obtained, as the Appellant had already been adjudged a bankrupt before judgment, and no leave of court had been obtained to proceed. The Federal Court noted section 104 of the Bankruptcy Act and the fact that there was no separate Gazette notification under section 104. The Federal Court did refer to L.N 37A of 1950 and was content to regard that as being sufficient to extend to the (present) Bankruptcy Act. The Court therefore recognised the Singapore bankruptcy order and its effect.¹⁷ The judgment entered for the Respondent was accordingly set aside. However the solicitors for the Appellant/bankrupt were made to pay the costs of the appeal personally since they ought to have been aware of the effects of the Appellant’s bankruptcy, which compromised the Appellant’s ability to maintain the appeal.

In the *Amos Willaim Dawe* case, the Malaysian Federal Court accepted that the 1950 notification was sufficient and continued to apply even under the Bankruptcy Act. The High Court of Malaya cast some doubt on this in the case of *The Official Assignee of the Property of Tan Cheek Soon @ Soon Tan, a Bankrupt under the Law of the Republic of Singapore v Yip Siew Han (f)*.¹⁸ The Plaintiff, the Official Assignee of Singapore, sought a declaration that the proceeds of sale of two properties were held by the Defendant on trust for the bankrupt’s estate, and sought judgment for the sum so held on trust. The Plaintiff styled himself in the manner stipulated in section 104(6) of the Bankruptcy Act. However, the Plaintiff’s application for summary judgment against the Defendant surprisingly was dismissed. The Court held that the 1950 notification that the Federal Court had accepted in *Amos William Dawe* no longer applied given that section 137(2) of the Bankruptcy Act had repealed all earlier Malayan legislation. Accordingly, the Court held that there was a triable issue as to whether the Plaintiff had complied with the requirements of sub-sections (1), (2), (3), (4) and (5) of section 104 of the Bankruptcy Act. It is not clear whether the High Court took into consideration the point that under the Interpretation Act 1967, all rules, regulations, notices, rulings, directions, etc issued under any

¹³ Section 104(4).

¹⁴ Section 104(6).

¹⁵ Under section 104(7).

¹⁶ [1980] 1 MLJ 230.

¹⁷ [1980] 1 MLJ 230 at 231, right hand column, lines F to G.

¹⁸ [2001] MLJU 136.

repealed legislation continued to have force until replaced by new rules, regulations, rulings, directions, etc.

Thus, the ultimate legal position is somewhat unclear. Unofficially, members of the Malaysian Official Assignee's office have indicated that they accept that for all practical purposes, LN 37 of 1950 continues to apply, and that there is close cooperation between the Malaysian and Singaporean Official Assignee's Offices.
