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USING SYNTHETIC PROCEEDINGS IN CROSS-BORDER INSOLVENCY: OPPORTUNITIES AND CHALLENGES

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INSOL International is pleased to present this new technical paper, "Using Synthetic Proceedings in Cross-Border Insolvency: Opportunities and Challenges", written by Rob Child and Shreya Prakash of Ashurst LLP, Singapore.

The paper provides an overview of synthetic proceedings, which allow the application of foreign law (not just domestic law) in a single insolvency proceeding to minimise the need to open multiple insolvency proceedings in different countries. The authors identify that, despite certain legal challenges to their use, synthetic proceedings can be invoked to resolve a wide range of issues arising in cross-border insolvency cases. This may potentially include any issue that involves a "choice of law" debate in insolvency proceedings and affects distributional outcomes that may result in the opening of ancillary proceedings.

The authors argue that, while synthetic proceedings cannot completely obviate the need to open multiple insolvency proceedings, they can be valuable tools to streamline cross-border insolvency resolution that policymakers, judges and practitioners should consider promoting and utilising in appropriate cases.

INSOL International thanks the authors for their time and expertise in preparing this paper, and hopes our members find it useful and engaging.

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1. Introduction[1, 2]

Cross-border insolvency resolution is typically a complex exercise, requiring coordination and cooperation across different jurisdictions. One of the tools that can facilitate more value-maximising and cost-effective cross-border insolvency resolution is the opening of "synthetic proceedings", which allow the application of foreign law (and not just domestic law) in a single insolvency proceeding, to avoid the opening of multiple insolvency proceedings in different countries where the primary reason for opening additional proceedings is to have recourse to foreign law.

In this paper, we analyse the opportunities and challenges with the use of synthetic proceedings in cross-border insolvency resolutions. In Parts II and III, we set out the origin of synthetic proceedings (as a concept to allow the application of foreign priority of distribution rules in domestic proceedings) and discuss the various benefits synthetic proceedings can offer. We then turn to the initiatives and trends relating to the adoption of synthetic proceedings in Part IV.

In Part V, we highlight other potential applications of synthetic proceedings to resolve issues that involve choice of law considerations and distributional consequences in insolvency proceedings. In Part VI, we then explore why despite their potential, synthetic proceedings have not been used more widely and in Part VII set out some suggestions to promote the use of synthetic proceedings and obviate the need for multiple insolvency proceedings.

Ultimately, we argue that while synthetic proceedings cannot completely obviate the need to open multiple insolvency proceedings across different jurisdictions, they can be valuable tools to streamline cross-border insolvency resolution that policymakers, judges and practitioners should consider promoting and utilising in appropriate cases. While synthetic proceedings have so far involved the application of foreign law to determine distributions to creditors, we have proposed some other uses for synthetic proceedings in cross-border insolvency cases.

2. The origin and "classic" use case of synthetic proceedings

The opening of "synthetic proceedings" is a unique cross-border insolvency tool that allows the application of foreign law in (usually) main or primary insolvency proceedings (hereinafter referred to as "domestic proceedings") to mirror the effect of opening additional, usually secondary insolvency proceedings in a foreign jurisdiction (hereinafter referred to as ancillary proceedings).[3]

This application of foreign law represents a departure from the usual position in which courts apply or direct the application of the law of the jurisdiction in which they are established (i.e. domestic law) to administer the insolvency proceedings opened before them. Synthetic proceedings are intended to obviate the need to open multiple insolvency proceedings by centralising the determination of all issues in the domestic proceeding, while allowing stakeholders to preserve their choice of law.

Synthetic proceedings have most famously been used in England in *Re Collins & Aikman Europe SA*[4] (*Re Collins*), *Re MG Rover Belux SA / NC*[5] (*Re MG Rover*) and *Re Nortel Networks.*[6] In each case, synthetic proceedings were opened to allow the application of foreign law dealing with the priority position of creditors to distributions made in English administrations. These cases are discussed below:

- In *Re Collins,* the English court dealt with administration proceedings of the Collins & Aikman Group, which was a leading supplier of automotive components in the United States and Europe(among other regions).

  The Collins & Aikman group carried on business in Europe through 24 companies across 10 countries. These 24 companies applied for and were placed in administration in England. The joint administrators ran the administration proceedings of all 24 companies in a coordinated manner, with a view to achieving the best possible returns to creditors. During the course of the administration, the joint administrators provided oral assurances to creditors based in different European countries that creditors' positions under relevant local law would be respected while making distributions in the English administrations as far as possible, on the condition that creditors avoided opening secondary proceedings in European jurisdictions. The joint administrators considered that secondary proceedings would make it difficult to achieve the purposes of the administration proceedings.

  The joint administrators then approached the English court to seek directions to enable them to implement the assurances they had given. The English court found that it had jurisdiction to allow the joint administrators to depart from the application of ordinary provisions of "priority" under English law and make distributions in accordance with foreign law.

1 This paper is not intended to be a comprehensive review of all developments in the law and practice, nor to cover all aspects of the same. Please take legal advice before applying anything contained in these materials to specific issues or transactions. Views expressed are personal.

2 The authors would like to thank Inga West (Counsel, Ashurst) and Shane Jury (Partner, Ashurst) for their inputs on the paper. The authors are also grateful to Flora Porkolab (Trainee, Ashurst) and Ashurst's Research Advisory Teams based in the United Kingdom and Spain for excellent research assistance. Any errors and omissions are the authors' own.

3 Ancillary proceedings in this paper refer to parallel insolvency proceedings opened in an additional jurisdiction, and do not include proceedings for recognition of insolvency proceedings in foreign jurisdictions.

4 [2006] BCC 861.

5 [2007] BCC 446; *Re MG Rover Belux SA/NC* (11 May 2005, Norris Q.C. J, unreported but referred to in *Re MG Rover Belux SA / NC*, [2007] BCC 446 at [4]).

6 *Nortel Networks UK Limited* (14 January 2009, Blackburne J, unreported but referred to in *Nortel Networks UK Limited* [2015] EWHC 2506 (Ch) at [31]-[34]).

The court then proceeded to exercise this jurisdiction by concluding that application of foreign law would be preferable to the alternatives, each of which the court concluded would be more time-consuming and expensive than allowing the administrators to honour their assurances, and by taking note of the high degree of support that creditors of most of the companies accorded to the joint administrators' plan. Notably, the court adjourned the hearing in respect of one of the companies, whose creditors had not provided their views on the application of the joint administrators' assurances.

- Similarly, in *Re MG Rover*, the English court dealt with certain requests made in the course of the administration of a Belgian company in the MG Rover Group. The Belgian company was the national sales company for MG Rover cars, and its administration was conducted with a view to preserve the Belgian company and prevent a fire sale of its stock of new and used cars.

  During the course of the administration, the English court had passed orders declaring that the administrators could make payments to employees of Belgian company "equal to what they would have received in secondary proceedings commenced in Belgium if the administrators thought that such payment would assist in the achievement of the purpose of the administration." [7]

  The order also declared that the administrator could make a payment to someone who was not a secured or preferential creditor without the permission of the court if the administrators considered that such a payment would be likely to assist in the achievement of the purpose of the administration. [8]

  The administrators had also received creditors' consent to develop a creditor payment plan which respected all Belgian local statutory priorities. The administrators made payments to employees and preferential creditors pursuant to these, without seeking further permission of the English court. They did however seek and receive permission to extend the administration period and to make distributions to unsecured creditors in this period, which resulted in an indirect application of Belgian insolvency rules of priority.

  In this regard, the court considered various factors, including:

  (i) whether the proposed distribution was conducive to the achievement of the objectives of the administration;

  (ii) the realistic alternatives to the proposed distribution sought by the administrators and its comparative impact to the distribution proposed; and

  (iii) the creditors' expectations and approval of the proposed distributions.

- Similar assurances were given, and directions were sought and made, in the English administration proceedings of companies in the Nortel Networks Group.

  Nortel Networks was a global telecommunications group, whose Canadian parent company and United States and Canadian subsidiaries were placed in insolvency processes in those jurisdictions. Its European group companies were placed into English administration proceedings and the administrators obtained directions from the English court in respect of various European companies to "(1) make such payments to the employees of the company as they would receive from the assets of the company if secondary proceedings were to be commenced … [and] (2) make such payments from the assets of the company to those creditors whose claims against the company would be preferential under [local law] if secondary proceedings were to be commenced…as they would receive in such secondary proceedings."[9]

These cases set out the "classic" use case of synthetic proceedings: the application of foreign law to determine distributions to creditors in domestic proceedings with a view to avoiding the opening of secondary proceedings.[10]

3. Benefits arising from the use of synthetic proceedings

While the use of synthetic proceedings can be subject to criticism as promoting "ad hoc" territorialism that is inconsistent with principles of universalism,[11] in practice, the benefits of the use of synthetic proceedings are clear.

In short, synthetic proceedings can help maximise value for creditors and improve the chances of a successful rescue of the debtor, while safeguarding the expectations and interests of local creditors.
In *Re Collins*, for instance, the administrators were able to realise approximately US $45 million more than originally estimated essentially because "synthetic proceedings" allowed the administrators to implement their undertaking without needing to open secondary proceedings.[12] Such value-maximisation is a result of various factors:

7 *Re MG Rover Belux SA/NC* (11 May 2005, Norris Q.C. J, unreported but referred to in *Re MG Rover Belux SA / NC*, [2007] BCC 446 at [3]).
8 *Ibid*.
9 *Nortel Networks UK Limited* (14 January 2009, Blackburne J, unreported but referred to in *Nortel Networks UK Limited* [2015] EWHC 2506 (Ch) at [31]-[34]).
10 Although, as argued in Part V below, we consider that synthetic proceedings can be applied to resolve other issues as well.
11 Justice Kannan Ramesh, "Synthesising Synthetics: Lessons Learnt from Collins & Aikman", Keynote Address at the 2nd Annual GRR Live New York (26 September 2018) citing Jay Westbrook, "A Comment on Universal Proceduralism", (2010) 48 Columbia Journal of Transnational Law 503, 510 at [11], available at: https://www.judiciary.gov.sg/docs/default-source/news-docs/2nd-annual-grr-live-new-york-keynote-addressaa813333f22f6eceb9b0ff0000fcc945.pdf.
12 *Re Collins & Aikman Europe SA*, [2006] B.C.C. 861 at [8].

- Synthetic proceedings allow the insolvency estate to avoid both the costs of a separate, ancillary insolvency proceeding (which includes costs of the officeholders appointed in the ancillary proceedings, court and legal fees, and other process costs) and the costs of coordination between the different proceedings.[13]

- These proceedings help reduce time frames to complete proceedings with "less competition between different proceedings".[14]

- Synthetic proceedings enable more effective rescue, as they result in the centralisation of control over a company's insolvency in a single forum.[15] Since new officeholders and other courts (of a secondary proceeding) are not involved, there is reduced scope for inconsistency in rescue strategies.[16] Further, assets of the debtor in the jurisdiction in which the secondary proceedings could have been opened also remain in control of the insolvency practitioner in the main proceedings, which is often helpful in ensuring the rescue of the entire enterprise.[17] Centralising control also results in the stakeholders being able to choose the application of a single most effective rescue regime whilst being able to preserve priorities under local laws. For example, some jurisdictions in which secondary proceedings may be brought do not have a formal rescue-oriented insolvency process. Synthetic proceedings can help avoid the opening of secondary proceedings in such jurisdiction, which may be inconsistent with the rescue aim of the main proceeding.

4. Trends of adoption of the concept of "synthetic proceedings"

Inspired by English practice and given the abovementioned benefits, the use of "synthetic" proceedings has been promoted as a more efficient and value-maximising alternative to the opening of ancillary proceedings. Two key initiatives to adopt synthetic proceedings have been implemented by the European Union and UNCITRAL, and these are discussed below.

- **European Union**

  Legislative changes were introduced in Europe with the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 (EC Regulations) formally introducing the concept of synthetic proceedings in article 36 of the EC Regulations.

  Briefly, article 36 allows an officeholder appointed in main proceedings to offer a unilateral undertaking to avoid the opening of secondary (and not main) proceedings. The undertaking must be "in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened, that when distributing those assets or the proceeds received as a result of their realisation, it will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State."[18]

  This undertaking must be approved by known local creditors under "rules on qualified majority and voting that apply to the adoption of restructuring plans"[19] in the relevant state where secondary insolvency proceedings could have been opened.

  It is open to interested persons to still request the opening of secondary insolvency proceedings within 30 days from the notice of approval of the undertaking. However, the court is required to refuse the opening of the secondary insolvency proceedings if the insolvency practitioner so requests and the court is satisfied that the undertaking adequately protects the general interests of local creditors.

  If secondary proceedings are opened despite the approval of the undertaking, "the insolvency practitioner in the main insolvency proceedings shall transfer any assets which it removed from the territory of that Member State after the undertaking was given or, where those assets have already been realised, their proceeds, to the insolvency practitioner in the secondary insolvency proceedings."[20] Notably, the insolvency practitioner in the main proceedings is liable for any damage caused to local creditors as a result of her non-compliance with the requirements of article 36.[21]

13 United Nations Commission on International Trade Law, *UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment* (2020), 89 (at [197]) available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-11346_mloegi.pdf.

14 *Idem.*

15 *See* Robert Arts,"Main and Secondary Proceedings in the recast of the European Insolvency Regulation: The Only Good Secondary Proceeding is a Synthetic Secondary Proceeding", 16, available at: https://www.iiiglobal.org/file.cfm/12/docs/2015_gold_arts_main_and_secondary_proceedings.pdf.

16 Bob Wessels, "Contracting Out of Secondary Insolvency Proceedings: The Main Liquidator's Undertaking in the Meaning of Article 18 in the Proposal to Amend the EU Insolvency Regulation", 9 Brooklyn Journal of Corporate, Financial & Commercial Law (2014) 63, 86-87.

17 United Nations Commission on International Trade Law, UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment (2020), 89 (at [197]) available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-11346_mloegi.pdf.

18 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015, Article 36(1).

19 *Idem*, article 36(5).

20 *Idem*, article 36(6).

21 *Idem*, article 36(10).

Following the introduction of "synthetic proceedings" as part of the EC Regulations, various EU Member States have made amendments to their insolvency laws to accommodate such proceedings.[22] While, as far as we are aware, the use of the undertaking mechanism in the EU has not been widespread, at least one instance of the use of an undertaking under article 36 of the EC Regulations has been reported.[23]

This was in relation to the AMTEK Küpper Group, which was a supplier of automotive components. The AMTEK Küpper Group had four subsidiaries in Germany and one in Hungary. The COMI of the AMTEK Küpper Group was in Germany and German insolvency proceedings were commenced in respect of the companies.

The German insolvency practitioner sought to carry out a sale of the profitable undertakings in the AMTEK Küpper Group and used an undertaking to avoid the opening of secondary proceedings in Hungary. The undertaking was approved unanimously by the creditors present and voting and a sale of three of the four German companies and the Hungarian company was successfully delivered. Creditors accorded "first priority" under Hungarian laws made a 100% recovery.

- **UNCITRAL**

UNCITRAL too has incorporated the concept "synthetic proceedings" as part of the Model Law on Enterprise Group Insolvency (MLEGI). Similar to the English cases discussed and the EC Regulations, it envisages the application of synthetic proceedings to apply distributional priorities of a foreign state to avoid the opening of secondary proceedings.[24]

Article 28 of the MLEGI allows the insolvency practitioner appointed in main proceedings to provide an undertaking to accord the same treatment to those creditors who could have brought a secondary proceeding as they would have received in such a secondary proceeding. This undertaking is required to meet the formal requirements set out for such undertakings under the laws of the state in which secondary proceedings could have been opened. The court administering the main proceedings must approve the undertaking.

One of the innovations that the MLEGI offers is that it allows the giving of undertakings where main and non-main proceedings involve different enterprise group members. Although all the cases that have involved the use of synthetic proceedings that we are aware of have involved enterprise groups, the giving of undertakings is usually in respect of a single company in the enterprise group. In other words, the insolvency practitioner appointed in main proceedings of one enterprise group company gives an undertaking to avoid the opening of secondary proceedings in respect of the same enterprise group company. The MLEGI however, envisages the application of synthetic proceedings – that is, the giving of undertakings in situations in which the main proceedings and secondary proceedings relate to different enterprise group companies.[25]

This is, as the MLEGI envisages, the voluntary participation of multiple enterprise group companies in the main insolvency proceedings of one of the enterprise group companies for the purpose of developing and implementing a group insolvency solution. Such proceedings are known as planning proceedings and involve the appointment of an additional insolvency practitioner known as the group representative.[26]

The use of synthetic proceedings or the giving of undertakings in these cases is to avoid the opening of secondary insolvency proceedings in respect of a group member who is not the subject of the main insolvency proceedings but is participating in the planning proceedings. The MLEGI envisages that both: (i) the insolvency practitioner appointed in the main proceedings that serve as the planning proceedings; and (ii) the group representative appointed to the planning proceeding, jointly provide the undertaking.[27]

The MLEGI has not been adopted by any jurisdiction to date, although countries such as the United Kingdom and Singapore are currently considering its adoption.

5. Further potential use cases for synthetic proceedings

While synthetic proceedings have been used primarily to settle the "priority" of creditors by opening of synthetic "secondary" proceedings – that is, the application of the law of the place where secondary proceedings could have been opened to change outcomes in main insolvency proceedings – we consider that there are other potential uses for this concept.

One as yet untested use would be to apply the law of the COMI of the debtor (i.e. where main proceedings would have been opened) to determine the "priority" of creditors in insolvency proceedings opened in a non-COMI jurisdiction (and that would be considered secondary proceedings if main proceedings were to be opened).[28]

22 "The Commercial Code Now Operational to Deal with European Insolvency Proceedings", Lamy Business Law Review, N° 139, July 1, 2018.
23 M.R. (Sits) Schreurs, "The Approval of European Synthetic Secondaries ("undertakings") by Local Creditors: A Dutch Perspective", 33(3) Insolv. Int. 2020, 78.
24 Note however that there are differences between the approach adopted in the MLEGI and the EC Regulations. For example, the undertaking envisaged in the MLEGI is not restricted to those assets that are located in the jurisdiction in which the secondary proceedings could have been brought.
25 United Nations Commission on International Trade Law, *UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment* (2020) at 90 (paragraphs [202] – [203]) available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-11346_mloegi.pdf.
26 UNCITRAL Model Law on Enterprise Group Insolvency, article 2(g).
27 United Nations Commission on International Trade Law, *UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment* (2020) at 90 (paragraphs [202] – [203]) available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-11346_mloegi.pdf.
28 Justice Kannan Ramesh, "Synthesising Synthetics: Lessons Learnt from Collins & Aikman", Keynote Address at the 2nd Annual GRR Live New York (26 September 2018) at [16] available at: https://www.judiciary.gov.sg/docs/default-source/news-docs/2nd-annual-grr-live-new-york-keynote-addressaa813333f22f6eceb9b0ff0000fcc945.pdf.

This could be envisaged in those instances where secondary proceedings need to be opened to compromise certain debts – such as where English proceedings need to be opened to compromise English law governed debts due to the rule in *Gibbs* – but creditors expect the application of the law of the jurisdiction of the debtor's COMI to govern distributional priorities. Opening synthetic main proceedings in these cases would then serve to obviate the need for multiple proceedings, including parallel proceedings which may be costly for the insolvency estate.[29]

More fundamentally, synthetic proceedings can be opened to determine issues that do not relate only to inter se "priority" of various creditors in respect of distributions. At their heart synthetic proceedings allow parties to apply foreign law to the resolution of certain issues, whilst carrying out domestic proceedings under the domestic law. In other words, synthetic proceedings are deployed to apply foreign law with a view to improve distributional outcomes for certain creditors, and by obviating the need for multiple proceedings, improving distributional outcomes for *all* creditors.

As such, in our view, any issue that involves a "choice of law" debate in insolvency proceedings[30] and affects distributional outcomes that may result in the opening of ancillary proceedings, could be the subject of a synthetic proceeding. Taking three examples, for illustration:

- While authorising the adoption or termination of contracts, insolvency practitioners could opt to apply (and domestic courts could be asked to authorise the application of) foreign law. This could be where, for example, domestic law does not have a clear framework for either the adoption or rejection of executory contracts by the debtor or insolvency professional administering the debtor's insolvency proceeding or the application of associated safeguards for contractual counter-parties in such circumstances (for instance by ensuring continued payments, as an exception to the principle of *pari passu* distribution, if contracts are adopted). Where contractual counter-parties are located in jurisdictions with such frameworks, and are considering opening ancillary proceedings to take advantage of that framework, it may be appropriate for the domestic court to open synthetic proceedings and apply foreign law if stakeholders agree that it would be value-maximising to do so.

- Avoidance actions could also be the subject of synthetic proceedings. It may be possible to apply foreign law to avoidance actions taken out before the court administering the insolvency proceeding. There have been cases in which foreign law has been applied to avoidance actions, for example under Chapter 15 of the United States Bankruptcy Code. In *Fogerty v Petroquest Res., Inc* (*In re Condor*),[31] for instance, liquidators of Condor Insurance Limited, which declared bankruptcy in St Kitts & Nevis, commenced recognition proceedings under Chapter 15 of the United States Bankruptcy Code. The liquidators also requested to commence avoidance actions in the United States under the law of St. Kitts & Nevis. While this was not with the view to avoid multiple insolvency proceedings,[32] this case provides a useful precedent to consider the application of foreign law to avoidance actions to avoid the opening of multiple proceedings in other matters.

- The scope of releases granted as part of restructuring proceedings could also be the subject of synthetic proceedings. Unless prohibited by domestic laws, courts could consider allowing certain types of releases, such as third party releases to avoid the opening of secondary or parallel proceedings. In *In re Metcalfe & Mansfield Alternative Investment*,[33] for example, the United States Bankruptcy Court gave effect to third party releases approved as part of Canadian insolvency proceedings (as part of Chapter 15 post-recognition relief) although they were wider than the third party releases available under United States bankruptcy law. While this relief was not granted to obviate multiple proceedings, it provides a blueprint for the application of foreign law to deal with the issue of releases.

Although theoretically sound, these potential uses of synthetic proceedings are not without challenges. Indeed, various challenges impede the adoption of even the "classic" use of synthetic proceedings, and these are discussed below.

6. Challenges to the adoption of synthetic proceedings

Although synthetic proceedings have been available for almost two decades, we are aware of only a handful of cases in which they have actually been used. There are various reasons for this.

First, most countries do not grant their courts express jurisdiction to apply the laws of another country in insolvency proceedings opened before them. This could pose a challenge for courts being able to find requisite powers to apply foreign law, particularly in civil law jurisdictions, where powers of courts are limited to those expressly provided for in statute.[34] Even in common law systems where typically courts have more discretion, they may find they do not have adequate jurisdiction (or a basis to apply their discretion) to apply foreign law. In *Re Alitalia Linee Aeree Italiane SpA Connock v Fantozzi*,[35] for example, the English court was reluctant to apply foreign law to secondary proceedings

29 *Idem* at [17].

30 See United Nations Commission on International Trade Law, *The UNCITRAL Legislative Guide on Insolvency* 2005), 67-74 available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf for a discussion of common issues requiring choice of law determinations in insolvency proceedings.

31 601 F.3d 319 (5th Cir. 2010).

32 This is because United States domestic law does not permit insurance companies from filing for insolvency and commencing avoidance actions under Chapter 7 or Chapter 11 of the United States Bankruptcy Code.

33 421 B.R. 685 (Bankr. S.D.N.Y. 2010).

34 John A.E. Pottow, "A New Role for Secondary Proceedings in International Bankruptcies" (2011) 46(3) Texas International Law Journal 579, 590.

35 [2011] 1 W.L.R. 2049.

opened in England on the basis that the EC Regulations envisaged that secondary proceedings which had been opened in England should be governed by English law and not the law of the main proceedings (i.e. Italian law).

Commentators have also suggested that synthetic proceedings may be unavailable in the United States, suggesting that "if a foreign-domiciled entity's bankruptcy case is being administered by a United States bankruptcy court under Chapter 11, there is no statutory or common law authority that would permit a United States court to apply the law of a foreign jurisdiction to that case so as to replicate the results that would be achieved in a proceeding in that jurisdiction."[36]

Second, even where courts have jurisdiction, resort to synthetic proceedings is not always without challenge. Notably, the application of foreign law could be in conflict with mandatory provisions of domestic law. For instance, in *Re Nortel Networks,* the administrators wished to conduct a claims adjudication process and then make distributions in accordance with laws of foreign countries (i.e. the local laws of the creditors). The court noted that "if the Administrators were simply to…trigger the statutory scheme for the proof of debts… this would also activate a number of mandatory provisions of the legislation which would or might be inconsistent with the making of payments to creditors under local laws".[37]

Third, the application of foreign law could be subject to conditions that are cumbersome to adhere to in practice. For instance, one of the conditions for use of synthetic proceedings under the EC Regulations is that the insolvency practitioner appointed in the main proceedings has liability for any damage caused to local creditors as a result of non-compliance with article 36 of the EC Regulations (which allow for the use of synthetic proceedings). Anecdotal evidence suggests that these personal liability provisions (and difficulties with obtaining insurance to cover such liability) make it unattractive for insolvency practitioners to approach courts to open synthetic proceedings.

Fourth, even if domestic courts are willing and able to apply foreign law, courts of foreign countries may not be willing, or in a position, to cede control. This may not only be as a result of courts exercising a territorial impulse, but may also be justified on the basis that the insolvency systems of the country in which insolvency proceedings have been opened and those of the country of the foreign court may have different policy underpinnings or goals. In some jurisdictions, for instance, judicial assents are required for employee redundancies, as the preservation of employment is considered "equal or superior to the maximisation of creditor value as an aim of bankruptcy law"[38], and as such, synthetic proceedings may be of limited utility in such cases. In *Re Nortel* for example, in respect of one company, administrators were "unable to effect the necessary redundancies in France, or carry out a major part of its required restructuring programme, without entering into a French insolvency process."[39]

Finally, all cases of synthetic proceedings considered so far have required creditors' consent for such proceedings to be opened.[40] However, even if the opening of multiple proceedings would ultimately be value-destructive, there may be cases where it is not possible to obtain general alignment on the use of synthetic proceedings. For instance, foreign creditors may not have faith that the domestic court would be able to protect their interests even if they apply foreign law. Equally, domestic creditors in the insolvency proceeding may not be convinced that domestic law should be disapplied, particularly if foreign law is disadvantageous to them. They may be willing to risk the application of foreign law by a foreign court on the basis that they could subsequently convince the domestic court that the outcome of the foreign insolvency proceedings should not be recognised in their country, and therefore limit the effect of foreign law on themselves.

Given these limitations, practitioners may consider it less risky to open secondary proceedings, even if they do not result in the most value-maximising outcomes for relevant stakeholders.

7. Suggested reforms and strategies to promote use of synthetic proceedings

It may not be possible or desirable to entirely replace ancillary proceedings, particularly where "the laws of the ancillary jurisdiction require direct oversight over the insolvency process"[41]; where there is fundamental incompatibility between the insolvency regimes of the domestic and foreign country; or when creditors are not aligned that all issues should be resolved in the domestic proceeding.[42] However, policy makers, judges and practitioners should consider ways to promote the use of synthetic proceedings where there is broad consensus that such use would be value-maximising, and there is no fundamental incompatibility between insolvency regimes applicable to domestic proceedings and possible ancillary proceedings.

36 Jeremy Hollembeak, "United States of America" in *The Restructuring of Corporate Groups: A Global Analysis of Substantive, Procedural and Synthetic Group Procedures* (INSOL International, 2022) at 293.

37 *Nortel Networks UK Limited* [2015] EWHC 2506 (Ch) at [38].

38 John A.E. Pottow, "A New Role for Secondary Proceedings in International Bankruptcies" (2011) 46(3) Texas International Law Journal 579, 586-587.

39 *Nortel Networks UK Limited* [2015] EWHC 2506 (Ch) at [36].

40 Note that the MLEGI does not mandatorily require such creditor consent although individual jurisdictions have an option to make creditor consent a pre-requisite when adopting the MLEGI in domestic legislation.

41 Justice Kannan Ramesh, "Synthesising Synthetics: Lessons Learnt from Collins & Aikman", Keynote address at the 2nd Annual GRR Live New York (26 September 2018) at [18] available at: https://www.judiciary.gov.sg/docs/default-source/news-ådocs/2nd-annual-grr-live-new-york-keynote-addressaa813333f22f6eceb9b0ff0000fcc945.pdf.

42 Although there may be ways to address some of these concerns as well, we have not explored them in this paper.

- **Suggestions for policy makers**

  Policy makers should consider providing courts with a clear jurisdictional basis to open synthetic proceedings, and take steps to ensure that the conditions to enable the use of synthetic proceedings are not too onerous on practitioners. Such steps may be considered along with other measures to streamline cross-border insolvency cases, such as the adoption of the MLEGI. In this regard, the United Kingdom Government has indicated that it intends to implement the MLEGI, including its provisions relating to synthetic proceedings.[43] In Singapore, the Committee to Enhance Singapore's Corporate Restructuring and Insolvency Regime has similarly recommended the adoption of the MLEGI, "including the supplemental provisions that would allow Singapore to support synthetic proceedings."[44]

- **Suggestions for judges**

  In the absence of an explicit legislative basis, and where stakeholders are keen to open synthetic proceedings, judges should remain open to examining applicable doctrines of comity and cooperation to consider how best they can resolve cross-border issues to obviate the need for value-destructive multiple insolvency proceedings.

  Courts before which domestic proceedings are opened should also consider establishing greater "court-to-court communication and cooperation"[45] to improve their decision making in synthetic proceedings. Foreign courts before whom ancillary proceedings could have been opened should also engage in greater communication and cooperation to ensure that synthetic proceedings meet their objectives – i.e. the preservation of local creditors' interests while obviating the need for multiple proceedings. This will greatly enhance the credibility of synthetic proceedings and assist in overcoming challenges or hesitation to their adoption.

- **Suggestions for practitioners**

  In the meantime, practitioners should also remain open to testing synthetic proceedings in environments of uncertainty. In this regard, practitioners could consider the use of jurisdictions and fora that have indicated openness and special capability to open such proceedings as nodal jurisdictions for cross-border matters.

  Singapore is one such jurisdiction. Not only have judges and policymakers indicated openness to the use of synthetic proceedings, but the legal framework is arguably sufficiently flexible to allow for the use of synthetic proceedings.[46] Singapore has also established a dedicated court to deal with issues relating to international commerce (including cross-border restructuring) – the Singapore International Commercial Court (SICC). The SICC is comprised of a mix of international and local judges,[47] and is able to hear submissions from foreign lawyers on issues of foreign law[48] (as opposed to having issues of foreign law proved as matters of fact before it, as is the case with ordinary courts in common law countries). This international experience of judges (including their familiarity with the laws of their home jurisdictions) is likely to make the SICC particularly credible and well-suited to serve as a forum to open synthetic proceedings for the streamlining of cross-border insolvency resolution.

  If synthetic proceedings cannot be opened in their jurisdiction, practitioners should also consider other creative solutions to overcoming challenges to the application of foreign law and obviate the need to open multiple insolvency proceedings. For instance, in *Re Nortel,* the administrators "envisaged the promulgation of a company voluntary arrangement under the Act (CVA) or a scheme of arrangement under the Companies Act 2006"[49] to ensure that they could both adjudicate claims and distribute proceedings in accordance with foreign law, as the mandatory statutory scheme in administration would not have allowed it.

  It was noted that "both those procedures require approval by creditors in accordance with the relevant statute, and if so approved (and in the case of a scheme of arrangement, sanctioned by the court) will have the effect of modifying the statutory scheme that would otherwise be applicable and creditors' rights under it."[50]

43 The Insolvency Service, "Implementation of Two UNCITRAL Model Laws on Insolvency: Summary of Consultation Responses and Government Response" available at: https://www.gov.uk/government/consultations/implementation-of-two-uncitral-model-laws-on-insolvency/outcome/implementation-of-two-uncitral-model-laws-on-insolvency-summary-of-consultation-responses-and-government-response>.

44 *Report of the Committee to Enhance Singapore's Corporate Restructuring and Insolvency Regime* (2025) at [4.3]

45 Justice Kannan Ramesh, "Synthesising Synthetics: Lessons Learnt from Collins & Aikman", Keynote address at the 2nd Annual GRR Live New York (26 September 2018) at [17] - [18] available at: https://www.judiciary.gov.sg/docs/default-source/news-docs/2nd-annual-grr-live-new-york-keynote-addressaa813333f22f6eceb9b0ff0000fcc945.pdf .

46 Sim Kwan Kiat, "Jurisdictional Basis of Synthetic Proceedings in Cross-Border Insolvency", 2019 SAL Practitioner 10 available at: https://journalsonline.academypublishing.org.sg/Journals/SAL-Practitioner/Insolvency-and-Restructuring/ctl/eFirstSALPDFJournalView/mid/596/ArticleId/1387/Citation/JournalsOnlinePDF.

47 Singapore International Court, "Who We Are: Judges" available at: https://www.judiciary.gov.sg/singapore-international-commercial-court/about-the-sicc/judges.

48 Singapore International Commercial Court Rules 2023, Order 3, Rule 1.

49 *Nortel Networks UK Limited* [2015] EWHC 2506 (Ch) at [39].

50 *Idem*.

8. Conclusion

Opening synthetic proceedings can be a valuable tool to enhance the efficiency and effectiveness of cross-border insolvency resolution. While synthetic proceedings are not widely resorted to due to various legal and practical obstacles, they have potential to be used to resolve a wide range of issues arising in cross-border insolvency cases. Any issue that involves a "choice of law" debate in insolvency proceedings[51] and affects distributional outcomes that may result in the opening of ancillary proceedings could potentially be the subject of synthetic proceedings. Where their opening could be value-maximising, practitioners and judges should consider the use of synthetic proceedings. Policymakers should also take steps to ensure that insolvency frameworks clearly allow the use of synthetic proceedings when stakeholders consider appropriate.

51 See United Nations Commission on International Trade Law, *The UNCITRAL Legislative Guide on Insolvency* 2005), 67-74 available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf for a discussion of common issues requiring choice of law determinations in insolvency proceedings.

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