Singapore Restructuring & Insolvency Yearbook 2023

2023 has been a monumental year for the development of Singapore case law on restructuring and insolvency.

In the past few years, the focus has been on legislative reform – the introduction of "supercharged" restructuring tools in 2017, the commencement of the omnibus Insolvency, Restructuring and Dissolution Act 2018 (**IRDA**) in 2020, and the expansion of the Singapore International Commercial Court's jurisdiction to hear restructuring and insolvency proceedings in 2022.

In 2023, it is the courts which have maintained the steady drumbeat of Singapore's march towards becoming a premier international restructuring hub, with a formidable string of cases clarifying the boundaries and testing the limits of the law.

In this update, we highlight ten of the most significant decisions in 2023 and discuss their implications for the restructuring and insolvency space in Singapore.

CASE NAME / TOPIC	DISCUSSION
Ascentra Holdings, Inc (in official liquidation) and others v SPGK Pte Ltd [2023] SGCA 32 (***Ascentra Holdings***) (*Cross-border insolvency*)	The Singapore Court of Appeal recognised a foreign *solvent* members' voluntary winding-up as a foreign restructuring and insolvency proceeding, clarifying that there is no requirement for a debtor company to be insolvent to obtain recognition under the UNCITRAL Model Law on Cross-Border Insolvency (**Model Law**). **Practical impact:** The broader implication of this case is that it paves the way for recognition of solvent / pre-distress restructurings, allowing foreign debtor companies to effectively restructure their debts in Singapore before they reach the precipice of insolvency.
Re Thresh, Charles and another (British Steamship Protection and Indemnity Association Ltd and another, non-parties) [2023] SGHC 337 (*Cross-border insolvency*)	A Bermuda-incorporated insurance company was wound up under the Bermuda Insurance Act due to "*serious non-compliances with mandatory regulatory requirements*" in Bermuda. Even though the grounds on which the company was wound up did not relate to insolvency, the winding-up was recognised in Singapore under the Model Law following the broad approach in *Ascentra Holdings*. Further, the General Division of the High Court of Singapore (**High Court**) held that there is a low bar to establish the Singapore courts' jurisdiction to grant recognition and assistance. The High Court found that it had the requisite jurisdiction to grant the recognition order as the principal owner and director of the company (from whom the liquidators sought information and documents relating to the company's affairs) was a Singapore citizen residing in Singapore and there were questionable payments made to a Singapore company owned by the same person. The low jurisdictional threshold for recognition can be contrasted with the "substantial connection" threshold required to place a foreign company in liquidation in Singapore. **Practical impact:** As stated above, *Ascentra Holdings* has opened up possibilities to grant assistance and recognition to foreign liquidation proceedings, even where the debtor in question may not be insolvent or in severe financial distress. This case illustrates the strategic utility of the Model Law in facilitating asset tracing and recovery. Model Law recognition and

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	assistance can be used to facilitate the gathering of information and documents to investigate whether claims can be made against former directors or controllers for any wrongdoing related to a company.
Re Genesis Asia Pacific Pte Ltd (in its capacity as a foreign representative for Genesis Asia Pte Ltd) and another and other matters [2023] SGHC 240 (*Cross-border insolvency*)	A corporate entity can be its own foreign representative under the Model Law, thus having standing in its own capacity to apply for recognition. To mitigate the risk of conflict between the company's own interests and its duties as a foreign representative, the debtor may be required to periodically update the court on the progress of its restructuring activities and disclose any developments that have affected, or have a real prospect of affecting, the interests of creditors in Singapore. **Practical impact:** This clarification is useful in cases of debtor-in-possession proceedings (e.g., a scheme of arrangement or Chapter 11 reorganisation), where there is no insolvency officeholder appointed over the company who can serve as the foreign representative for the purposes of seeking recognition.
Re Babel Holding Ltd (Parastate Labs, Inc and others, non-parties) [2023] SGHC 329 (***Babel***) (see also *Re Babel Holding Ltd and other matters* [2023] SGHC 98) (*Restructuring and substantive consolidation*)	A Singapore scheme of arrangement can pool the assets and liabilities among different entities within a corporate group to effect a global restructuring of the group. The pooling of assets and liabilities is referred to as "substantive consolidation". Substantive consolidation is not permissible in every situation, but would be appropriate only where the affairs of the group companies are hopelessly intertwined, the legitimate interests of creditors are not unfairly overridden and the restructuring demonstrably benefits the affected creditors. This enhances the ability of the Singapore regime to effectively restructure corporate groups on a holistic basis, building on the developments from *Re DSG Asia Holdings Pte Ltd* [2022] 3 SLR 1250 which approved the use of deed poll structures to restructure a corporate group's debts using a single scheme of arrangement.
Re Zipmex Pte Ltd and other matters [2023] SGHC 88 (***Zipmex***) (*Restructuring*)	The court approved the creation of an "administrative convenience" class of creditors (comprising about 67,000 customers with claims under $5,000) which would not have to vote on the proposed scheme, but could opt in to vote if they wished. The customers would receive full access to their crypto assets under the scheme. Through the creation of the "administrative convenience" class, the scheme company was able to push through a pre-pack scheme of arrangement after securing the approval of the supermajority (>75%) in value of its creditors, without having to obtain the approval of the majority in number of its creditors. The possibility of creating an "administrative convenience" class enables greater execution certainty in restructuring deals where the vast majority of debt is controlled by a small group of creditors. For more details and our practical insights into this case, see our update *Crypto Spring – Will the Recognition of the Administrative Convenience Class in Zipmex Pave the Way for Crypto Restructurings in Singapore?*

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Majestica Enterprises Ltd and another v Kams Singapore Pte Ltd (in compulsory liquidation) [2023] SGHC 250 (***Majestica***) (*Litigation funding*)	The established way of raising litigation funding for companies in winding-up is through the sale of a cause of action or the fruits of that action (*Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597). The additional avenue for litigation funding reaffirmed in *Majestica* is *via* the use of section 204 of the IRDA, which enables a liquidator to seek a court order granting priority to creditors who fund the costs of litigation (among other things). The benefit of seeking priority through section 204 of the IRDA is that the litigation funder can obtain recovery not only from the fruits of the action, but **potentially also from other assets recovered by the liquidator**. In deciding whether to grant priority to litigation funding under section 204 of the IRDA, the court will assess the complexity and necessity of the proceedings which are being funded, the level of risk undertaken by the funding creditor, whether other creditors have been asked to provide funding and failed to do so, the public interest in encouraging creditors to provide funding, and any objections of other creditors or the Official Receiver.
Founder Group (Hong Kong) (in liquidation) v Singapore JHC Co Pte Ltd [2023] SGCA 40 (*Winding up*)	When a claimant applies to wind up a company on the basis of a debt which is governed by an arbitration agreement, the company can defend the winding-up application by demonstrating to the court on a *prima facie* basis that there is a valid arbitration agreement between the parties, and the dispute falls within the scope of that agreement (*AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158). If the company is able to do so, the claimant is deprived of standing to bring the winding-up application. The rationale of these rules is to uphold the parties' bargain to have their disputes arbitrated, rather than determined summarily through a winding-up application before the court. **Practical impact:** The practical consequence is that it is marginally easier for a defendant company to fend off a winding-up application relying on an arbitration agreement than without one. Without an arbitration agreement, the defendant company must be able to raise triable issues to dispute the claimant's debt to defeat the claimant's standing to bring the winding-up application.
Loh Cheng Lee Aaron and another v Hodlnaut Pte Ltd (Zhu Juntao and others, non-parties) [2023] SGHC 323 (*Winding-up*)	A company's cryptocurrency obligations to its creditors can be taken into account when determining whether it is "unable to pay its debts" within the meaning of section 125(1)(e) read with section 125(2)(c) of the IRDA (which is often the primary ground for winding up a company). For more details and our observations on this case, see our update *Obligation to Pay Cryptocurrency May Count as Debts in Determining Insolvency, Singapore High Court Rules*.
Re AAX Asia Pte Ltd (under judicial management) and another [2023] SGHC 324 (*Judicial management; winding-up*)	An interim judicial manager of a company has standing to apply for the winding-up of the company in his own right. **Practical impact:** This ruling should give comfort to insolvency practitioners taking on appointments as interim judicial managers, as it clarifies that they have standing to apply to wind up a company in circumstances where there is no reasonable prospect of achieving any of the statutory purposes of the judicial management.

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	The court also confirmed that, where the members of a company authorise an interim judicial manager to apply for winding-up, the interim judicial manager may act in the company's name to apply for winding-up as well.
Re Ocean Tankers (Pte) Ltd (in liquidation) [2023] SGHC 330 (***Ocean Tankers***) (*Insolvency set-off)*	Insolvency set-off is a statutory mechanism that applies when a company enters an insolvent winding-up or judicial management. It automatically sets off any debts owed by a counterparty to the insolvent company against debts owed by the insolvent company to the counterparty. This is helpful for counterparties who have dealt with an insolvent company, as it reduces their liability to the company to the extent of the set-off. *Ocean Tankers* was concerned with a company that entered judicial management (under the Companies Act, prior to the coming into force of the IRDA) and subsequently went into winding-up under the IRDA. A counterparty dealing with the company was sued in arbitration for certain sums. To reduce its liabilities to the company, the counterparty obtained an assignment of certain claims against the company from a related party in the counterparty's group. Certain claims were found to have been validly assigned, while others were not (due to one assignment being prohibited by a non-assignment clause and another found to be a champertous assignment of bare rights to litigate). For the claims that were validly assigned, the court held that the counterparty could rely on them to assert an insolvency set-off to reduce or extinguish its liability to the company, and that the insolvency set-off automatically operated upon the company's entry into winding-up. *Ocean Tankers* illustrates how the acquisition of claims against an insolvent company could provide a useful strategy for debtors to reduce their liabilities to the company. Nevertheless, this strategy should be approached with caution as an assignment might be rendered ineffective if there are non-assignment clauses or if the purported assignment is rendered void or ineffective as a champertous assignment. It should also be noted that, under the current IRDA regime, insolvency set-off operates when a company enters into judicial management (whereas it did not under the old Companies Act). Hence, it is still an open question whether a claim assigned after the commencement of judicial management under the IRDA would be taken into account for the purposes of insolvency set-off.

One trend that has emerged relates to the recognition of foreign restructuring and insolvency proceedings. The Singapore courts have made clear that they will be prepared to recognise proceedings even where the debtor company is not insolvent, and that a debtor company has standing to apply for recognition in its own capacity. The decision in *Ascentra Holdings* is particularly significant as it signals a readiness to recognise pre-insolvency / pre-distress restructurings. The judicial clarifications in this area are welcome, as there is now more certainty on the likelihood of obtaining recognition and assistance in Singapore.

Likewise, a trend emerging from cases involving Singapore schemes favours allowing debtors to be able to restructure more effectively. Two key mechanisms that have been recently tested are the substantive consolidation of assets and liabilities across a corporate group, and the creation of an administrative convenience class where there is a large number of small unimpaired creditors.

It is crucial to note that the courts have been careful in *Babel* and *Zipmex* to qualify the narrow circumstances in which these mechanisms may be utilised. Nevertheless, the message that the courts continue to send remains that, while the courts will be open to creative and novel strategies for effecting schemes of arrangement and/or pre-packs, the overarching consideration is whether there are sufficient safeguards to ensure fair treatment for creditors.

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