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Edited by Look Chan Ho

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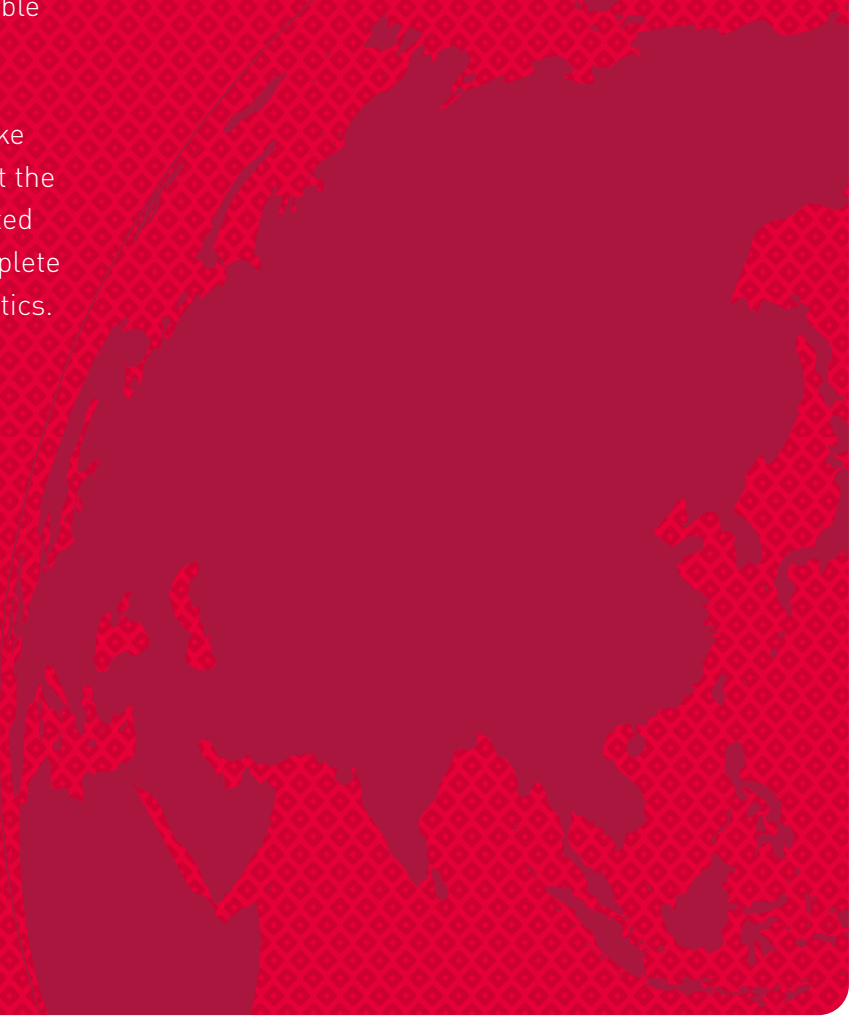

Singapore's Insolvency Law in 2023: Navigating New Frontiers from the SICC to Cryptocurrency

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In summary

Singapore's insolvency law has witnessed significant developments in the past 12 months. In a pivotal move to address cross-border insolvency and restructuring matters, amendments to the Supreme Court of Judicature Act 1969 were made to empower the Singapore International Commercial Court to hear and adjudicate insolvency and restructuring matters that have an international element. Important decisions were also delivered concerning (1) 'no action' clauses, marking the first time the Singapore Courts addressed this issue in the context of insolvency proceedings, (2) considerations in the removal of liquidators and (3) when a director's duty to consider the company's creditor arises. Concurrently, there was a notable increase in insolvency cases involving cryptocurrency, reflecting the growing integration of digital assets in the financial landscape and the challenges they pose.

Discussion points

- The Singapore International Commercial Court's jurisdiction to deal with insolvency and restructuring matters.
- 'No action' clauses
- Removal of liquidators
- When a director's duty to consider the creditors' interests arises
- Cryptocurrency and Singapore's insolvency regime

Referenced in this article

- Section 18D of the Supreme Court of Judicature Act 1969
- *Lim How Teck v Laguna National Golf and Country Club Ltd* [2023] SGHC 32
- *DB International Trust (Singapore) Limited v Medora Xerxes Jamshid & Anor* [2023] SGHC 83
- *OP3 International Pte Ltd (in liquidation) v Foo Kian Beng* [2022] SGHC 225
- *Re Babel Holding Ltd and other matters* [2023] SGHC 98
- *ByBit Fintech Limited v Ho Kai Xin & 5 Ors* [2023] SGHC 199

The Singapore International Commercial Court (SICC)

Established in 2015, the SICC was conceived to address the growing need for a platform that could adeptly handle international commercial disputes. Its creation aimed to leverage Singapore's reputation as a neutral and reliable legal hub, offering a venue for parties from different jurisdictions to resolve their disputes. Effective from 1 October 2022, the amended section 18D of the Supreme Court of Judicature Act 1969 expands the SICC's jurisdiction to adjudicate on 'any proceedings associated with corporate insolvency, restructuring, or dissolution' under the Insolvency, Restructuring and Dissolution Act 2018 (IRDA), provided that these proceedings possess an international and commercial character.

Concurrently, amendments to the *SICC* (Amendment No. 2) Rules 2022 and the Legal Profession (Representation in Singapore International Commercial Court) (Amendment No. 2) Rules 2022 were made as well to pave the way for the SICC to oversee international corporate insolvency and restructuring cases, ensuring outcomes that cater to both creditors and debtors. Given its panel of international judges, the SICC is well positioned to address cross-border insolvency cases where laws from multiple jurisdictions are involved. Additionally, the amendment to the Legal Profession Rules facilitates foreign lawyers' involvement with Singapore counsel in corporate insolvency proceedings within the SICC. Companies looking to restructure in the SICC can thus benefit from the combined expertise of foreign lawyers familiar with their home jurisdiction's laws and local Singaporean counsel's knowledge on Singapore's legal landscape.

The SICC's capability to address foreign law issues in cross-border scenarios, coupled with its robust international dispute resolution framework, enhances Singapore's position as a leading jurisdiction for international corporate insolvency and restructuring matters. The recent legislative amendments further underscore Singapore's commitment to evolving its insolvency and restructuring landscape and solidifies its reputation as a neutral and reliable legal hub.

Hands tied: the 'no action' clause unravelled

In a legal first for Singapore, the case of *Lim How Teck v Laguna National Golf and Country Club Ltd* [2023] SGHC 32 dealt with the effect a 'no action' clause had on a creditor's standing to obtain a winding up order against an insolvent company.

In 1991, the respondent company, Laguna National Golf and Country Club Ltd (Laguna), issued 1,800 non-interest bearing unsecured notes of US$120,000 each, known as Laguna National Unsecured Notes 2021 Series A (the Unsecured Notes). The funds raised were used to finance the development of a country club. The Unsecured Notes were to be redeemed by Laguna on 11 June 2021 (the Redemption Date). The Unsecured Notes were constituted by a trust deed

dated 18 September 1991 (the Trust Deed) between Laguna and the trustee of the Unsecured Notes.

The crux of the dispute revolved around a 'no-action clause' in the Trust Deed that stipulated that only the trustee could take enforcement action against Laguna. The Trust Deed also stated that the trustee was not bound to take any enforcement steps unless directed by noteholders holding a significant portion of the Unsecured Notes.

The petitioning creditor, Lim How Teck (Lim), was a subscriber of an Unsecured Note and brought the winding up application against Laguna on the basis that his Unsecured Note was not fully redeemed by the Redemption Date. Laguna countered that Lim lacked standing to initiate the winding up process as the 'no action' clause, provided that only the trustee could take enforcement action. Lim informed the Court that he had the necessary support from noteholders to initiate action, but had not given any formal direction to the trustee. Lim nonetheless maintained that he was entitled to bring the winding up application as he contended that the 'no action' clause should not apply. First, Lim argued that the trustee's past conduct allegedly demonstrated an unwillingness to act. Second, he argued that the trustee might be in a position of conflict if it were to initiate winding up proceedings as the trustee faced a potential claim by some noteholders for alleged breach of its duties under the Trust Deed.

After examining several cases from the United States on the issue, the Court held that the 'no action' clause applied but only if the trustee was capable of satisfying its obligations under the Trust Deed. The Court accepted that if Lim was able to show that the trustee displayed an unjustifiable willingness to act in accordance with the terms of the Trust Deed or if it would be placed in a position of conflict, the 'no action' clause would not apply and Lim would be entitled to proceed with his winding up application.

The Court rejected Lim's allegation that the trustee was unwilling to perform its duties under the Trust Deed. The Court found this argument to be a 'non-starter' as Lim had 'simply refused to invoke' the 'no action' clause (ie, for noteholders to direct the trustee to take enforcement action). As for Lim's conflict of interest argument, the Court stated that the 'mere fact that the trustee faces a potential claim by some noteholders does not, in and of itself, necessarily mean that it would be in a position of conflict if it were the applicant in the winding up proceedings'.

However, the Court was of the view that once Laguna was wound up, the trustee would be in a position of conflict. In arriving at this conclusion, the Court stated that if the trustee were to bring the winding up application, the trustee (as applicant) would need to provide relevant information to the liquidators to aid their investigations into Laguna's affairs. The Court opined that it is at this stage that a conflict arises as the trustee would look to protect its interest against noteholders' claims, which would conflict with its duty to protect noteholders'

interests. The Court clarified that it was not making a finding that the trustee did in fact breach its duties under the Trust Deed, and that it was sufficient for present purposes that a conflict of interest may potentially arise. The Court thus determined that the no-action clause did not apply in this case (thus finding that Lim had standing to bring the winding up application). Given that Laguna's inability to pay its debts was not disputed, the Court ordered that Laguna be wound up.

The landmark decision highlights that creditors must be aware of any clauses that might limit their ability to take direct enforcement action in similar situations. While the 'no-action' clause can restrict a creditor's direct action, the Court has clarified that such restrictions are not absolute. Debtor companies should be aware that they cannot solely rely on 'no-action' clauses as an absolute defence against winding up applications by individual creditors. If a trustee is unwilling to act or is in a potential conflict of interest, a creditor might still be able to bypass the clause and initiate action. The decision might also influence how trust deeds and similar financial instruments are drafted in the future. Parties might seek clearer terms to avoid ambiguities around clauses like the 'no action' clause. While in this case the Court made no finding that the trustee was at fault, the judgment could influence the behaviour of trustees, making them more proactive in their roles to avoid situations where individual creditors feel the need to bypass them and take direct action.

Removal of liquidator and the Court's call for accountability

In the case of *DB International Trust (Singapore) Limited v Medora Xerxes Jamshid & Anor* [2023] SGHC 83, the Court examined the principles relating to the removal of a liquidator under section 139(1) of the IRDA. The applicant, DB International Trust (Singapore) Limited, asserted that the liquidator of Kirkham International Pte Ltd (KIPL), Mr Xerxes Jamshid (the Liquidator), ought to be removed from office. The application was made on four grounds.

Lack of vigour: first, it was argued that despite being appointed two years ago, the liquidator had shown insufficient proactiveness. He permitted Mr Taylor, a former KIPL director, to represent KIPL in the Indonesian courts. The liquidator then signed a broadly worded ratification on 31 January 2022, ratifying Mr Taylor's actions. However, in doing so, the liquidator essentially ratified Mr Taylor's execution of a resolution that led to the issuance of new PT Borneo Prima Coal Indonesia (BPCI) shares. This effectively diluted KIPL's shareholding in BPCI from 95 per cent to 28.5 per cent. The applicant also alleged that the liquidator had not personally investigated KIPL's affairs. Instead, the liquidator engaged KPMG and simply relied on their efforts in the ongoing investigations. The Court found that the liquidator had not displayed sufficient vigour in carrying out his duties as the dilution of KIPL's shareholding in BPCI was contrary to a liquidator's primary purpose of preserving and distributing KIPL's assets. Further, while

the Court accepted that it was reasonable for a liquidator to engage external expertise to supplement areas of investigation, the liquidator in the present case had effectively delegated all responsibility of such investigation to KPMG.

Neglect of statutory obligations: second, it was submitted by the applicant that the liquidator failed to obtain court approval for appointment of solicitors until reminded, did not get court sanction for a funding agreement, and mistakenly believed that those filing a proof of debt were not considered 'creditors' for convening a creditors' meeting. The liquidator also refused to exercise his powers to admit the applicant's proof of debt for the purposes of voting at a creditors' meeting. Out of these instances, the Court found that the applicant showed cause for removal of the liquidator in respect of his refusal to exercise his powers to admit the applicant's proof of debt for the purposes of voting. While the liquidator refused to admit the proof of debt as he had suspicions that KIPL's records were not true, the Court held that such suspicions could not extend indefinitely simply because of the lack of progress in investigating KIPL's records.

Conflict of interest: third, the applicant pointed out that the liquidator might attempt to defend his past actions, potentially conflicting with future investigations. The Court rejected this ground, stating that the applicant's contention was that the liquidator acted carelessly or not sufficiently vigorously. As such, the Court opined that a conflict would not arise as the liquidators 'would have no interest in defending his past acts if those acts do not expose him to any serious liability'.

Loss of confidence: creditors had lost faith in the liquidator's capability to liquidate KIPL's assets effectively. The Court accepted that the loss of confidence was justified in the present case given the liquidator's lack of diligence and breach of his statutory obligations. Further, creditors holding about 95 per cent of the value of debt supported the application for his removal.

As the applicant had successfully demonstrated grounds for the liquidator's removal, the Court next considered whether it should exercise its discretion to do so. In this regard, the Court determined that the liquidator ought to be removed as it saw no compelling reason against the removal. While the Court accepted that the liquidator had done substantial work in the liquidation, the outcome of that work was not evident to the Court given the lack of progress in the liquidation. In the circumstances, the Court ordered that the liquidator be removed.

The decision is a win for creditors as it reinforces their rights and the importance of their confidence in the liquidation process. Liquidators should be aware that their actions (or inactions) may come under scrutiny and they should act diligently, uphold their statutory obligations, avoid conflicts of interests and maintain the confidence of creditors.

Teetering on the edge: when do directors owe a duty to creditors?

This issue arose in the case of *OP3 International Pte Ltd (in liquidation) v Foo Kian Beng* [2022] SGHC 225. The facts which led to this case were these. OP3 International Pte Ltd (OP3) was a company incorporated on 20 December 2006, primarily involved in interior design, decorating consultancy, and construction activities. Foo Kian Beng (Foo) was the sole director of OP3 from 1 August 2010 to 3 April 2020.

On 25 May 2015, OP3 was served with a writ of summons in Suit 498, which was commenced by Smile Inc Dental Surgeons Pte Ltd (Smile Inc). On 5 October 2017, following the trial on liability, the High Court found OP3 liable to Smile Inc for damages but granted judgment for OP3 on its counterclaim for US$87,432.50. After the assessment of damages, on 11 November 2019, Smile Inc's damages were quantified at US$621,621.69. Accounting for the set-off sum of US$87,432.50, OP3 owed Smile Inc damages of US$534,189.19 (excluding interest and costs). On 3 April 2020, OP3 was wound up following a court order obtained by Smile Inc as the judgment debt remained outstanding.

Between 2015 and 2017, OP3 paid dividends to Foo totalling US$2.8 million. OP3 alleged that these dividend payments were improper as the company was in a 'parlous financial situation' or insolvent at the material time. In particular, OP3 argued that it was insolvent from 25 May 2015, as a contingent liability arose from Suit 498. As such, as OP3 argued, Foo (as director of OP3) had breached his duty to consider the interests of creditors when he paid dividends to himself. In response, Foo argued that no value should be ascribed to the contingent liability and that he was not obliged to consider the interests of creditors unless OP3 was insolvent or 'on the verge of insolvency' (and not merely when the company is in a parlous financial situation). He asserted that OP3 was in neither of these states when the dividends were declared.

Often, when a company is solvent, directors owe no duty to its creditors. However, when the company becomes insolvent, directors have a duty to consider the interests of the company's creditors. Parties, however, differed in when the duty to consider the interests of creditors arises prior to the insolvency of a company. OP3 argued that such a duty arose when the company was in financially parlous situation while Foo submitted that the true test was whether the company was on the verge of insolvency. If the court accepted this argument, it could exonerate Foo from the alleged breaches of duty.

The Court, however, was not swayed by Foo's argument, and held that the duty is invoked when a company finds itself in a financially parlous state, a scenario less dire than being on the verge of insolvency. The Court noted that the rationale underlying the duty to creditors is rooted in safeguarding a company's assets from wrongful dissipation, ensuring that the company can settle its debts to its creditors. The Court emphasised that the duty to heed the interests of

creditors was not solely reserved for times when a company was on the 'verge of insolvency' (as Foo contended). The duty also arose when the company was in a financially parlous state. The Court made reference to Court of Appeal decision in *Dynasty Line Ltd (in liquidation) v Sukamto Sia* [2014] 3 SLR 277 and held that ultimately, 'a practical and broad assessment of the financial health of the company should be undertaken to decide when . . . the pendulum should swing towards the interests of the creditors.'

Applying the above principles, the Court held that OP3 was not in a financially parlous state from 25 May 2015 or at the end of 2015. Among other things, the Court held that OP3 was unable to prove that the value that ought to be ascribed to the contingent liability arising out of Suit 489 would have resulted OP3 in being in a financially parlous state at those times.

Instead, based on the balance sheet of OP3, the Court concluded that OP3 was insolvent at the end of 2016. As at 31 December 2016, OP3 had net assets of US$157,683. Factoring in the contingent liability arising from Suit 498 (which was ongoing at the end of 2016), and attributing a discounted value of between US$441,000 and US$514,500, OP3 would have been balance sheet insolvent. Hence, the Court held that by close to the end of December 2016, Foo was under a duty to consider the interests of creditors.

Given that a dividend sum of US$500,000 was paid on 27 December 2016, the Court found that Mr Foo was in breach of his fiduciary duty to act bona fide in the best interests of OP3 (including the creditors).

The decision has serious implications for directors. Directors must be vigilant about the company's financial health well before it reaches the point of insolvency. The duty to consider creditors' interests can arise even when the company is in a financially parlous state, which is a less severe condition than being on the brink of insolvency. The judgment is currently on appeal to Singapore's Court of Appeal and its outcome will be keenly watched as it could determine whether directors take a more risk-averse approach in similar situations.

Digital dilemmas

In recent times, Singapore has witnessed a notable uptick in insolvency cases linked to the burgeoning world of cryptocurrency. As the city-state cements its position as a global financial hub, it is also becoming a focal point for digital currency ventures. However, with the rapid growth and volatility inherent to the cryptocurrency sector, some enterprises have faced financial challenges, leading to insolvency proceedings.

The intricacy of these cryptocurrency-related insolvency cases could easily fill an article on their own. For want of space, we highlight three particularly noteworthy cases that may pique the interest of our readers.

The first is *Re Babel Holding Ltd and other matters* [2023] SGHC 98. In this case, applications were filed by several companies affiliated with the Babel Finance brand (the Babel Finance Group) for (1) the extension of a moratorium for the purposes of formulating a restructuring plan (the Moratoria Extension Applications) and (2) the sealing of documents that 'contain the unredacted versions of lists of the applicants' creditors as well as letters of support in respect of the Moratoria Extension Applications' (the Sealing Application).

In deciding whether the Moratoria Extension Applications ought to be allowed, the Court had to consider (among other things) whether there was a 'reasonable prospect of the [proposed] Scheme working and being acceptable to the general run of creditors'. In this regard, the proposed Scheme contemplated a substantive consolidation, or pooling, of the assets and liabilities of the entire Babel Finance Group. The proposed Scheme also involved a deed poll structure (the Deed Poll Structure) under which one of the Singapore subsidiaries would become a primary co-obligor in respect of the Scheme claims of the entire Babel Finance Group, in order that a single scheme of arrangement may be proposed in respect of the Group.

After considering the terms of section 210 of the Companies Act 1967, the Court did not find that the proposed substantive consolidation or Deed Poll Structure to be inappropriate in principle. The Court also relied on Australian cases cited by the Babel Finance Group that showed that substantive consolidation, or pooling, may be conducted pursuant to a scheme of arrangement in some situations, such as where it would be impractical to individually identify each company's assets and liabilities. The Court thus allowed the Moratoria Extension Applications (albeit for a period of three months rather than the six months asked for).

As for the Sealing Application, the Babel Finance Group argued that this was required 'to safeguard the commercially sensitive information relating to the identity of the applicant's creditors, in order to prevent these creditors from suffering a potentially negative market reaction to news of their exposure to the Babel Finance Group'. A group of creditors objected to the Sealing Application as it would prevent scheme creditors from consulting with each other on appropriate steps and discussing how their interests might best be protected. The Court allowed the Sealing Application, pointing out that at that stage of the proceedings, it was concerned only with the extension of the moratoria, rather than the approval of a scheme meeting or the sanctioning of a scheme. Hence, the need for transparency and the ability of the Scheme creditors to consult with one another was less pressing. The Court thus held that the importance of safeguarding the commercially sensitive information in the documents outweighed the interests that would be served by releasing this information to the public.

The Court's acceptance of both substantive consolidation and the Deed Poll Structure indicates a flexible approach towards complex restructuring efforts. Given the complex corporate structures adopted by some cryptocurrency outfits, this decision could encourage such distressed groups to consider Singapore as a venue for their restructuring efforts. The Court's decision to seal the documents underscores the potential negative market reactions that can arise from revelations about a company's financial distress and its creditors. In the present case, the sealing of the list of creditors prevented the further spread of contagion and panic in the cryptocurrency market. The decision might lead other companies in similar situations to seek similar protections in the future. However, such protections may be lifted at a later stage if the interests of making the information public outweigh the important of safeguarding such sensitive information.

The next case, is the unreported decision of *Algorand Foundation Ltd v Three Arrows Capital Pte Ltd*. Algorand Foundation Ltd (Algorand) sought a winding up order against Three Arrows Capital Pte Ltd (3AC), hinging its claim on a cryptocurrency, USDC. For context, USDC is a digital stablecoin pegged to the United States dollar. Algorand's winding up application was grounded on the fact that 3AC owed 53.5 million USDC to it. However, the principle contention was whether this cryptocurrency, not recognised as legal tender in Singapore, could amount to a sum of money due and owing. Algorand submitted that foreign currencies, even if not legal tender or widely accepted in Singapore, are acknowledged as money. Hence, it argued that the same ought to apply in respect of cryptocurrency.

The Court was however not convinced by Algorand's arguments and dismissed the winding up application. The Court held that cryptocurrency could not be equated to a money debt for the purposes of section 125(2)(a) of the IRDA. In this regard, section 125(2)(a) of the IRDA provides that a company is 'deemed unable to pay the debts' if the company is 'indebted in a sum exceeding S$15,000' and is make payment three weeks after receipt of a demand for the same. The Court expressed that the word 'indebted' traditionally corresponds to a fiat currency debt, thereby excluding cryptocurrency from this definition.

All hope is, however, not lost for holders of cryptocurrency. In *ByBit Fintech Limited v Ho Kai Xin & 5 Ors* [2023] SGHC 199, the Court had to determine whether USDT (another stablecoin pegged to the US dollar) was a form of property capable of being held on trust. The Court made reference to Order 22 (which deals with enforcement of Judgments and Orders) of Singapore's Rules of Court 2021 (which came into effect on 1 April 2022) that provides under Rule 1(1) that 'movable property' includes 'cash, debt, deposits of money, bonds, shares or other securities, membership in clubs or societies, and cryptocurrency or other digital currency'. On this basis (among others), the Court held that USDT was indeed property capable of being held on trust and granted the declaration of a constructive trust over cryptocurrencies sought by the plaintiff. In reaching

this decision, the Court opined that 'the holder of a crypto asset has in principle an incorporeal right of property recognisable by the common law as a thing in action and so enforceable in court'.

While the *Algorand* case suggests that cryptocurrency cannot be used as a basis for winding up applications under section 125(2)(a) of the IRDA, it appears from the *ByBit* case that other avenues, such as trust-based claims, might be available to claimants. The drafters deserve commendation for their foresight in including cryptocurrency and digital assets (which is broad enough to include non-fungible tokens) within the ambit of the Rules of Court 2021, reflecting a progressive approach to modern legal challenges.

Conclusion

The latest developments in insolvency and restructuring in Singapore highlight an exciting phase in the nation's legal evolution. Singapore is charting the right course, proactively adapting to modern challenges and solidifying its reputation as a forward-thinking legal hub.

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Suresh graduated from National University of Singapore with an LLB (Hons) degree in 1993, and started his career at a leading firm in Singapore. He was a Partner there for the better part of 2000 – 2010. In 2002, Suresh left Singapore to spend a year as a Legal Officer at the United Nations Compensation Commission in Geneva, where he reviewed war reparations claims arising out of the first Gulf war. He returned to Singapore in 2003. In 2010, Suresh joined a prominent firm, where he served as head of its Litigation Department.

Suresh's main areas of practice are corporate and commercial litigation, international arbitration, insolvency and restructuring, banking, and employment related disputes.

Suresh has also been admitted to the rolls of solicitors of the Supreme Court of England and Wales. He serves as an advocacy trainer for advocates and solicitors doing the Singapore Bar Examination. He also serves as a Racing Steward at the Singapore Turf Club, as well as a Judicial Officer with the Singapore Rugby Union.

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Clients come to Bryan Tan for his extensive experience in: corporate and commercial litigation (both in the General Division of the High Court and the Singapore International Commercial Court); international arbitration; restructuring & insolvency; employment-related disputes; tech-related disputes; cryptocurrency and blockchain; and computer technology.

Clients served by Bryan include Dell, BitMEX, and Crédit Agricole Corporate & Investment Bank.

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Prior to joining PK Wong & Nair, Noel practiced at one of Singapore's Big Four law firms and was Assistant Chief Counsel at the Infocomm Media Development Authority (IMDA). He was also Counsel at the Singapore International Mediation Centre (SIMC).

Noel's main practice is civil and commercial litigation, where he has amassed experience in restructuring and insolvency, tort, admiralty, tax, and telecommunications/infocomm regulatory matters. He has also assisted clients in achieving mutually beneficial settlements of their disputes, through mediation or negotiations.

Noel graduated from the National University of Singapore in 2015, where he was placed on the Dean's List for Academic Year 2011/2012. In Part B of the Bar Examinations, he scored a distinction in Ethics and Professional Responsibility. He has contributed to the Shipping volume of the Halsbury's Laws of Singapore.

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