

2020: THE YEAR OF THE RAT IN OFFSHORE JURISDICTIONS

The numbers, and values, of Asian-related disputes and corporate restructurings involving Bermuda, the British Virgin Islands, and the Cayman Islands are growing

More than 70 per cent of companies whose shares are listed on the Hong Kong Stock Exchange (HKEX) are incorporated in the Cayman Islands, Bermuda and the British Virgin Islands, and there are a substantial number of offshore companies listed on the New York Stock Exchange, NASDAQ, and other international exchanges.

In addition to publicly listed companies, there are significant numbers of privately held Asian entities established in Bermuda, the BVI and the Cayman Islands, including companies, funds, segregated cells, trusts and limited partnerships.

A perfect storm has been brewing in the first half of 2020, between Covid-19 and its global socio-economic impacts, US-China trade wars, the US's Holding Foreign Companies Accountable Act, Hong Kong's new National Security Law, prevailing economic conditions, and an increasing number of regulatory and legislative reforms in offshore jurisdictions.

This has already resulted in a number of corporate privatisation schemes, and distressed debt restructurings, involving Asian corporate groups incorporated in offshore jurisdictions, in which the traditional dividing lines of 'contentious' and 'non-contentious' legal practice areas have become increasingly blurred.

2020 has brought a noticeable increase in transactions in which controlling shareholders of publicly listed Asian companies, incorporated in offshore jurisdictions, have taken those companies private, whether by way of shareholders' schemes of arrangement, voluntary general offers followed by compulsory statutory squeeze-outs of minority shareholders, or statutory mergers (triggering associated minority shareholder appraisal rights).

In the first half of 2020 alone, there have been 10 privatisation schemes of arrangement involving Cayman companies listed on the HKEX and four privatisation schemes involving Bermuda companies. These privatisations have taken place against legal and commercial developments arising in ongoing minority shareholder appraisal litigation, such as the Privy Council's decision in *Shanda Games Ltd v Maso Capital Investments Ltd* [2020] UKPC 2.

There have been an increasing number of 'soft touch' provisional liquidations for restructuring purposes (with associated recognition applications before the Hong Kong and US courts), with a view to restructuring debt liabilities of Asian companies incorporated in Bermuda, the BVI and the Cayman Islands, often in the face of creditor claims, investor activism, and regulatory investigations in the USA, Hong Kong and the offshore jurisdictions themselves.

The courts of Bermuda, the BVI and the Cayman Islands are regularly involved in corporate shareholder, contractual, partnership, and asset recovery disputes involving Asian entities, and 2020 has been no exception in this respect. One obvious trend that has emerged in 2020 is the use of urgent applications for freezing injunctions, the appointment of provisional liquidators or receivers, and disclosure orders, often involving allegations of fraud and dishonesty, in circumstances where all three offshore jurisdictions have previously acknowledged the availability of local interim relief in aid of foreign court proceedings (whether by way of local legislative reform or development of the common law).

In the recent case of *Broad Idea International Limited v Convoy Collateral Limited* (BVICMAP 2019/0026), however, the Eastern Caribbean Court of Appeal has controversially held that the grant of 'Black Swan' interim injunctive relief in aid of foreign proceedings may now have to be facilitated through primary legislation in the BVI, pending further review of the common law position by the Privy Council. Conyers lawyers sit on the BVI Committee charged with pursuing a legislative solution to this issue.

It seems likely that the number of disputes involving BVI and Cayman Islands entities being submitted to arbitration in 2020 and 2021 will continue to grow, with both jurisdictions having established well-resourced international arbitration centres on the ground, in addition to their well-established and efficient commercial courts for the enforcement of awards.

BVI and Cayman Islands companies have consistently made up two of the five biggest groups of companies making use of the Hong Kong International Arbitration Centre, and the offshore judiciary have shown significant support (judicially and extra-judicially) for arbitrations that are seated or held in Hong Kong, Bermuda, the BVI and the Cayman Islands, and for the enforcement of arbitration agreements and arbitration awards, both on a final and interim basis.



Alex Potts QC,
Cayman partner,
Conyers



Richard Evans,
BVI partner,
Conyers

CONYERS

E-mail: alex.potts@conyers.com; richard.evans@conyers.com

Web: www.conyers.com