

Article

A Perfect and Timely New Year’s Gift from the BVI: Restoration of the Black Swan Jurisdiction

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On the last day of 2020 and the eve of the new year, the BVI House of Assembly passed the “Black Swan” Bill the Eastern Caribbean Supreme Court (Virgin Islands) (Amendment) Act 2020 (“the Act”) providing certainty on the BVI Court’s jurisdiction to grant a broad range of interim relief in support of proceedings commenced or about to be commenced in a foreign jurisdiction, including of course, Hong Kong, PRC and Singapore. The Act came into force on 7 January 2021, indicating that from that date onwards, a free-standing injunction, also known as a “Black Swan” injunction, is formally enshrined in the BVI legislation for the purposes of providing substantive aid to litigants involved in foreign legal proceedings. This will be of great practical benefit to parties and their litigation attorneys throughout Asia.

The background of the Act is that the BVI Court’s jurisdiction to grant a “Black Swan” injunction was challenged by the Court of Appeal’s decision in *Broad Idea International Limited v Convoy Collateral Limited* (BVICMAP 2019/0026). The Court of Appeal’s decision in *Convoy* delivered in May 2020 ruled that an interim relief against a BVI entity could not be sought before the BVI Court when the BVI entity was not involved in any substantive proceedings either in the BVI or elsewhere. This overturned almost ten years of established practice, following the first instance decision in *Black Swan* which identified the jurisdiction for the grant of such relief. *Convoy* has since appealed the Court of Appeal’s decision. The appeal will be heard by the Judicial Committee of the Privy Council on 16 February 2021 with a full (7 Justice) panel. In the meantime, unless and until the Privy Council overrules the decision of the Court of Appeal in *Convoy* legislation would be required in order to found the BVI Court’s jurisdiction to grant any further Black Swan injunction.

Conyers welcome the enactment of the Act which inserts a new section 24A into the Eastern Caribbean Supreme Court (Virgin Islands) Act (Cap.80). Indeed, two of our BVI litigation team sat on the relevant committee that undertook the exercise of drafting the Bill to remedy the position. The new section 24A provides certainty, clarity and efficiency to aid litigants dealing with BVI entities in cross-border business contentions. The Act further provides jurisdiction for the BVI Court to grant other free-standing interim relief, including appointment of receivers and, very importantly, disclosure orders in support of foreign proceedings, thus removing any doubt as to the jurisdictional basis for such relief. No doubt, legal practitioners and clients throughout Asia would upon learning this development greatly appreciate the effectiveness of the BVI legislature in swiftly adopting and passing the Act to aid foreign litigations worldwide. The passing of the Act, once again, demonstrates the vibrancy, efficiency and proficiency of the BVI as a leading offshore jurisdiction for cross-border litigation. In circumstances where the appropriate forum of a dispute is in Asia, it is often necessary to obtain specific and timely interim relief in the BVI. The Act ensures that the jurisdiction to grant such relief is readily available.

For our readers’ ease of reference, below is an excerpt of the new section 24A: Interim relief in the absence of substantive proceedings:

“24A.

- (1) *The High Court or a judge thereof may grant interim relief where proceedings have been or are about to be commenced in a foreign jurisdiction.*
- (2) *On an application for any interim relief under subsection (1) the High Court or a judge thereof may refuse to grant such relief if, in the opinion of the High Court or a judge thereof,*
 - (a) *it has no jurisdiction, apart from this section, in relation to the subject-matter of the proceedings in a foreign jurisdiction; and*

- (b) *it is inexpedient in the circumstances for the High Court or a judge thereof to grant such relief.*
- (3) *Subsection (1) applies notwithstanding that*
- (c) *the subject matter of the proceedings in a foreign jurisdiction would not, apart from this section, give rise to a cause of action over which the High Court or a judge thereof would have jurisdiction; or*
- (d) *the appointment of a receiver or the grant of interim relief sought is not ancillary or incidental to any proceedings in the Territory.*
- (4) *In this section “interim relief”, includes any relief which the High Court or a judge thereof has power to grant in proceedings relating to matters within its jurisdiction, as well as, an order against a non-cause of action defendant.*
- (5) *Where the High Court or a judge thereof has the power at common law to make an order for the provision of documents and information, the High Court or a judge thereof may notwithstanding that*
- (e) *proceedings may be, will be or have been commenced outside of the Territory; or*
- (f) *a power to make such an order is available under the provisions of the Evidence (Proceedings in Foreign Jurisdictions) Act”*

If you are interested in understanding more about this legal development, or if you are seeking to benefit yourself from the new legislative provisions, please feel free to contact your usual contact at Conyers or the below authors.

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