SHAREHOLDER DISPUTES IN THE CAYMAN ISLANDS IN 2021

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International businesses incorporated in the Cayman Islands find themselves increasingly subject to shareholder disputes of different sorts in the Grand Court of the Cayman Islands.

One trend that has emerged and grown in 2021 involves disputes involving Cayman holding companies and businesses with operations in the People's Republic of China ("PRC") and Hong Kong.

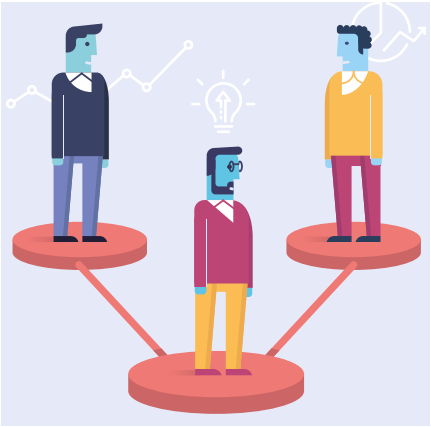
Many of such companies have financially distressed businesses and international creditors, giving rise to insolvency-related issues. Despite this, these companies are often the owners of profitable businesses, where the disputes between the parties principally relate to allegations of mismanagement, or lack of transparency, or abuse of power by controlling shareholders.

As a result, the Grand Court of the Cayman Islands continues to deal with a significant number of 'Just and Equitable' winding-up petitions brought by oppressed minority shareholders, as well as urgent applications for the interim appointment of Provisional Liquidators.

For example, in the recent case of *In the Matter of Principal Investing Fund I Ltd and Long View II Limited and Global Fixed Income Fund I Limited* (29 September 2021), the Court ordered the appointment of Provisional Liquidators on the application of the shareholder petitioner who had presented a Just and Equitable winding-up petition. The application for the appointment of Provisional Liquidators over three Cayman fund companies was made in circumstances where the ultimate beneficial owner ("UBO") of the shares alleged serious acts of misconduct by the funds' principals. This alleged misconduct demonstrated that there was a need for Provisional Liquidators to be appointed to "hold the ring" and investigate the affairs of the funds. The Court held that there was a real risk that if the order was not made, the Cayman funds' assets would be further depleted, the UBO would continue to be oppressed, and there would be further misconduct and mismanagement.

The conduct of general meetings of shareholders, and the finality of the decision making powers of the Chairman of a general meeting, are issues that also continue to come under judicial scrutiny.

In *Re Convoy Global Holdings Limited* [2021] HKCA 1145, the Hong Kong Court of Appeal gave leave to appeal to the Hong Kong Court of Final Appeal on the question of whether, in the context of a Cayman Islands company, the decision of the Chairman of a Company's General Meeting on an objection raised to the qualification of any voter, may be challenged in Court on the ground that it was manifestly wrong or *Wednesbury* unreasonable, notwithstanding a provision in the Articles of Association that the Chairman's decision on such a matter shall be "final and conclusive".



The High Court and the Court of Appeal of Hong Kong held that, on the wording of the Articles of Association, the Chairman's decision can only be overturned by the Court if it can be shown to have been made 'fraudulently or 'in bad faith'. This position is consistent with a line of English authorities which have also been followed in the Cayman Islands (see, for example, *In Re China Agrotech Holdings Limited* [2019] (2) CILR 302). The decisions are, however, at odds Australian and New Zealand authorities.

The Hong Kong Court of Appeal noted in its judgment granting leave to appeal, that in 2019, of a total of 2071 publicly listed companies in Hong Kong, 1084 of them were incorporated in the Cayman Islands, the majority of which had the same, or similar, provisions in their Articles of Association regarding the status of a Chairman's decision at general meeting. The Hong Kong Court of Appeal also noted that the decision of the Hong Kong Court of Final Appeal on an issue of Cayman Islands law will not be binding as a matter of Cayman Islands law and precedent, but it is likely to have persuasive (and commercial) value. Therefore, the final determination of the issue is likely to have a wide impact on the corporate governance of Cayman Islands companies.

Section 238 of the Cayman Islands' Companies Act continues to generate a significant number of share appraisal actions brought by dissenting shareholders, in the context of corporate mergers.

In *Re Changyou.com Limited*, 28 January 2021, the Grand Court of the Cayman Islands considered whether the section 238 appraisal regime applied to 'short-form' mergers between parent companies and their 90% controlled subsidiaries, where no shareholder vote is required.

This was a novel point and despite the literal wording of the Companies Act to the contrary, the Court held that the section 238 appraisal regime should be made available to minority shareholders in a 'short-form' merger. The decision is being appealed: the appeal is being heard by the Court of Appeal of the Cayman Islands in November 2021, with a further appeal to the Privy Council by either of the parties being a distinct possibility.

As well as the increasing number of trial and appeal judgments under section 238 of the Companies Act (dealing mainly with the substantive valuation and accounting questions that arise on the facts of each merger), there is now a large body of case law from the Cayman Courts that concerns ancillary procedural issues relating to discovery, witness evidence, expert opinion evidence, interest and costs.

For example, in the recent decision of *Xiaodu Life Technology Limited*, 27 April 2021, the Grand Court of the Cayman Islands took the novel step of issuing a Letter of Request to the High Court of Hong Kong for the examination and production of documents by various officers of the company, as well as ordering specific ¿discovery of documents.

Looking forwards, we expect to see shareholder disputes continue to dominate the litigation landscape in the Cayman Islands over the next year as the worldwide economy, and the PRC economy in particular, experiences further disruption in light of COVID-19.