公报文章

Covering Ears to Steal Bells: Ignoring Insolvency at Risk of Liquidation

掩耳盗铃：忽视面临清算风险的破产

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The closest Chinese equivalent to the English idiom of 'sticking one's head in the sand' is 'covering one's ears to steal bells'.

Both idioms express the received wisdom that it is unproductive to ignore objective reality.

In other words, it is better to face difficult facts and to engage with them, as soon as possible.

This is certainly true in the case of financially distressed or insolvent companies doing business in the PRC, incorporated in offshore jurisdictions such as Bermuda or the Cayman Islands, and whose shares are listed on the Hong Kong Stock Exchange.

与英语成语“把头埋在沙里”最接近的中文成语是“掩耳盗铃”。

这两个成语都表达了一个公认的观点，即忽视客观现实是徒劳的。

换句话说，最好面对困难，并尽快解决。

对于在中国经营业务、在百慕达或开曼群岛等离岸辖区注册并在香港联交所上市的面临财务困难或资不抵债的公司而言，确实如此。

Take Action Sooner Rather than Later

In light of COVID-19, the Courts of Hong Kong, Bermuda, and the Cayman Islands have been keen to get the message out to indebted Hong Kong and PRC based corporate groups that it is best to engage, as soon as possible, with legal, financial, and restructuring advisors (and with offshore creditors) to reduce the risk of a compulsory liquidation of an offshore holding company, and to increase the prospect of an effective and successful restructuring.

In other words, don't just ignore payment deadlines; offshore creditors' claims; statutory demands; or winding up petitions.

Take advice!

The following Court judgments from the past 12 months are noteworthy in this respect.

In *Re Chase On Development Ltd* [2020] HKCFI 629, Harris J wound up the Company immediately, despite a last-minute application by the Company to adjourn the

早日采取行动

鉴于 2019 冠状病毒病（COVID-19）疫情，香港、百慕大和开曼群岛法院一直希望向负债累累的香港和中国大陆企业集团传达这样一个信息，即最好尽快与法律、财务和重组顾问（以及离岸债权人）接洽，以降低离岸控股公司被强制清算的风险，并增加有效、成功重组的可能性。

换句话说，不要简单地忽视付款期限、离岸债权人的索赔、法定追偿书或清盘申请书。

采纳建议！

在此方面，过去 12 个月法庭的下列判决值得注意。

在 *Re Chase On Development Ltd* [2020] HKCFI 629 一案中，尽管公司在最后一刻申请将庭审延期，以允许其母公司 Sun Cheong Creative Development Holdings Limited（一家开

hearing to allow a potential restructuring of its parent company, Sun Cheong Creative Development Holdings Limited (a Cayman Islands company), to take place.

曼群岛公司）进行可能的重组，但 Harris 法官仍判决公司立即清盘。

Harris J noted that, in cases in which (a) a company is clearly insolvent and (b) a petitioner's debt is not in dispute, an important consideration, when a court is being asked to adjourn a winding-up petition in order to allow the Company time to attempt to restructure its debt, are the views of the Company's unsecured creditors.

Harris 法官指出，在（a）公司明显无力偿债和（b）申请人的债务不存在争议的情况下，当法庭被请求延审一份清盘申请书以使公司有时间试图重组其债务时，一个重要的考虑因素是公司的无担保债权人的意见。

If the creditors take different views, the Court will normally take into account all the circumstances of the case, including the following considerations:

如果债权人持有不同意见，则法庭通常会考虑该案的所有情况，包括以下考虑因素：

(a) A qualitative assessment of the number of creditors for and against a winding-up order. It is not just a matter of counting the number of creditors in favour and those against, or the proportion of the value of the debt they hold;

(a) 对赞成清盘令和反对清盘令的债权人人数的定性评估。这不只是计算赞成和反对的债权人人数，或是计算其持有的债务价值的比例；

(b) The reasons put forward by the supporting and opposing creditors; and

(b) 赞成和反对的债权人提出的理由；以及

(c) The feasibility of the proposed restructuring.

(c) 拟议重组的可行性。

In this respect, the Hong Kong Court has cited, with approval, the decision of Mr. Justice Segal of the Grand Court of the Cayman Islands in *Re Grand T G Gold Holdings Ltd*, 30 August 2016[1]

在这方面，香港法庭经批准引用了开曼群岛大法院 Segal 法官先生于 2016 年 8 月 30 日对 *Re Grand T G Gold Holdings Ltd* 的裁决。[1]

In the case of *Chase On Development Ltd*, however, the Company was unable to produce a single letter from an unsecured creditor indicating support to the outline restructuring proposal that had been presented to creditors, or support for the proposed adjournment.

但是，就 *Chase On Development Ltd* 一案而言，有关无担保债权人表明支持已经提交给债权人的重组方案大纲或支持提议的延审，公司连一份信件都出示不了。

In *Re SMI Holdings Group Ltd* [2020] HKCFI 824, Harris J also wound up the (Bermuda-incorporated) Company immediately, expressing trenchant views regarding the Company's 'closed-ears' approach to its state of insolvency.

在 *Re SMI Holdings Group Ltd* [2020] HKCFI 824 一案中，Harris 法官也判决这家（百慕大注册的）公司立即清盘，就公司对其破产状态采取的"掩耳"做法表达了尖锐的看法。

The Company was a holding company holding indirect interests in a substantial group of cinemas and theatres and associated businesses in the PRC. The Company's evidence suggested that the Company was attempting to restructure the debt of the businesses in the PRC on a piece-meal basis, but the Company was unable to put before the Court a comprehensive plan for debt restructuring and corporate rehabilitation.

公司为一家控股公司，持有中国一大批影院、剧院及相关业务的间接权益。公司的证据表明，其曾试图逐步重组中国企业的债务，但公司无法向法庭呈上一份有关债务重组和公司复兴的全面计划。

Interestingly, Harris J noted that it was an increasing feature of distressed PRC listed companies that their management have proceeded on the basis that they can attempt to restructure the group's business and

有意思的是，Harris 法官指出，陷入困境的中国上市公司的一个越来越大的特点是，其管理层进行重组的依据是，他们可以尝试重组集团在中国的业务和债务，而无需涉及上市公司（无

[1] Conyers represented the Company, *Grand T G Holdings Ltd*, in successfully securing the adjournment, and eventual withdrawal, of a winding up petition before the Grand Court of the Cayman Islands, to facilitate an effective restructuring. For further background, see https://www.conyers.com/publications/view/grand-tg-gold-holdings-limited/ and https://www.conyers.com/wp-content/uploads/2018/06/2017_11_CAY_Grand_TG_Gold_Holdings_Limited_Pragmatic_Adjournment.pdf
康德明律师事务所代表公司 Grand T G Holdings Ltd，成功确保开曼群岛大法院对清盘申请的延期和最终撤销，以便于有效重组。如需更多背景信息，见 https://www.conyers.com/publications/view/grand-tg-gold-holdings-limited/ 以及 https://www.conyers.com/wp-content/uploads/2018/06/2017_11_CAY_Grand_TG_Gold_Holdings_Limited_Pragmatic_Adjournment.pdf

debt in the PRC without involving the listed company (whether in Hong Kong or in the offshore jurisdiction of incorporation).

The Judge expressed the firm view that it was unrealistic and unhelpful for PRC business groups that have chosen to list in Hong Kong, and to incorporate offshore, to treat the holding company and its listed status purely as a tool of financial convenience (which facilitates access to capital when it is required), but not to recognise that the listed company and the supervisory powers of the Hong Kong and offshore Courts need to be engaged properly, if it becomes necessary to restructure group debt.

The Judge predicted that this will become an increasing problem in the course of 2020 and 2021 as a result of the economic fallout caused by COVID-19.

In the Judge's own words, "**companies and their advisors who find themselves in positions similar to the Company need to think through carefully how to formulate comprehensive restructuring proposals which involve both Hong Kong and the PRC. If they do not, they are likely to suffer the same consequences as this Company, which I order to be wound up**".

In *Re Ming Lam Holdings Ltd* [2020] HKCFI 2321, Harris J adopted an increasingly impatient tone of voice, in winding up a Cayman Islands company that was listed on the Main Board of the Hong Kong Stock Exchange, and who had made a last-minute application for an adjournment.

As the Judge noted, "**This would appear to be yet another example of a Mainland business listed in Hong Kong facing serious financial problems, not engaging properly with its creditors or the court in an attempt to stave-off a winding-up by advancing a proposal for rehabilitating its business and restructuring its debt. … I have in recent authorities … drawn attention to the unsatisfactory way in which listed companies of this sort are responding to winding-up petitions. A peculiar characteristic of the companies winding-up list in the last few months has been that a significant proportion of the companies coming before the court have been listed rather than domestic small and medium size enterprises. It is troubling that the court is repeatedly encountering Hong Kong listed Mainland business groups, who seem to lack any sophistication when it comes to dealing with insolvency and their more general company law obligations**".

In *Re Master Glory Group Ltd* [2020] HKCFI 1141, Harris J wound up another Bermuda-incorporated listed Company immediately, despite a last-minute adjournment application. The Judge's growing sense of impatience was clear from his judgment: "**It is ridiculous that the court when dealing with a**

论在香港还是在注册的离岸辖区）。

法官坚定认为，对于选择在香港上市并在离岸辖区注册的中国企业集团而言，一个不现实也无益的情况是，其将控股公司及其上市地位纯粹视为提供财务便利的工具（这有助于在必要时获得资金），却没有认识到如果上市公司有必要重组集团债务，则需要与香港的监督机关和离岸辖区的法院妥善接洽。

法官预测，由于 COVID-19 造成的经济影响，这种情况将在 2020 年和 2021 年成为一个日益严重的问题。

用法官自己的话说："**处于与该公司相似状况的公司及其顾问们需要仔细考虑如何制定涉及香港和中国大陆两者的全面重组方案。如果不这样做的话，其很可能遭受与该公司相同的后果，那就是我下令将其清盘**"。

在 *Re Ming Lam Holdings Ltd* [2020] HKCFI 2321 一案中，Harris 法官在对一家在香港联合交易所主板上市并在最后一刻提出了延审申请的开曼群岛公司裁定清盘时，在语气上显得越来越不耐烦。

正如法官所指出的："**这似乎是另一个例子，即一家在香港上市、面临严重财务问题的大陆公司，没有与其债权人或法院妥善接洽以试图通过呈上一份复兴其业务和重组其债务的方案来避免清盘。……我最近在行使职权时……提请注意这类上市公司对清盘申请的回应令人不满意。过去几个月公司清盘名单的一个独特特点是，法庭审理的公司有很大一部分是上市公司，而不是国内中小型企业。令人不安的是，法庭屡屡遇到在香港上市的大陆企业集团，其在处理破产及其更一般的公司法义务方面显得很不成熟**"。

在 *Re Master Glory Group Ltd* [2020] HKCFI 1141 一案中，尽管有最后的延审申请，Harris 法官还是对另一家在百慕大注册的上市公司裁定立即清盘。从法官的判决中可以明显看出他越来越不耐烦了："**荒谬的是，法庭在处理主板上市公司的清盘申请书时，只在申请书提交法官审理的当天早晨才收到公司**

Petition to wind up a company listed on the Main Board should only receive a response from the Company the morning on which the Petition comes on for hearing before a judge, and which contains evidence which is as vague and unsophisticated as that which has been produced today. If listed companies are going to respond to petitions in this way, the very likely consequence as in the present case, is the court will feel that there is no sensible alternative, but to make the normal winding-up order".

的回应，其中包含的证据与今天已提供的证据一样含糊不清。如果上市公司以这种方式回应申请，那么就像本案一样，很可能的结果是，法庭会认为除了下达正常的清盘令之外，没有其他明智的选择”。

In *Re Rexlot Holdings Ltd* [2020] HKCFI 2212, Deputy High Court Judge Maurellet SC also wound up a Bermuda-incorporated listed Company immediately, despite a last-minute adjournment application. The last-minute adjournment application relied on two lines of argument:

在 *Re Rexlot Holdings Ltd* [2020] HKCFI 2212 一案中，尽管最后一刻申请了延审，但高等法院暂委法官 Maurellet 也还是判决立即清盘一家在百慕大注册的上市公司。最后一刻申请延审指望两个论点：

(1) Since a substantial part of the Company's underlying assets were in the PRC and the operations themselves consisted of a lottery business operation through mainland Chinese subsidiaries, it would take liquidators, assuming the company were liquidated, some time to realise the value of the business, which would be further complicated by certain foreign exchange control restrictions. Further, if the Company were to be liquidated, the mainland Chinese lottery authorities may or may not award new lottery contracts to the mainland Chinese subsidiaries. There was a serious risk that the Chinese authorities, **having maintained stringent requirements on the** financial position of lottery operators would either revoke or otherwise end the licences to operate the said lottery businesses if the holding Company were to be wound up.

（1）由于公司很大一部分基础资产都在中国大陆，且业务本身包括通过大陆子公司经营的彩票业务，因此，假设公司被清算，清算人将需要一段时间才能认识到业务的价值，这会因为某些外汇管制限制而使情况进一步复杂化。此外，如果要对公司进行清算，中国大陆彩票机构可能会、也可能不会与那些大陆子公司签订新的彩票合同。有一个重大风险，即中国彩票机构对彩票经营商的财务状况一直具有严格的要求，如果该控股公司要清盘，则彩票机构有可能撤销或以其他方式终止这些彩票公司的经营许可证。

(2) The Company also argued that there would be considerable upside for all creditors and shareholders if an adjournment were granted given the significant financial commitment which a substantial shareholder was willing to make in support of a restructuring.

（2）公司认为，鉴于大股东愿意为支持重组而做出重大财务承诺，如果延审获得批准，那么对所有债权人和股东来说，都会受益颇大。

Despite these arguments, the Judge was not persuaded to grant an adjournment, however, given the fact that the majority of independent unsecured creditors were not in favour of a last-minute adjournment.

尽管有这些论点，但是考虑到大多数独立无担保债权人不赞成最后一刻延审，法官并没有被说服准予延审。

COVID-19 adjournment applications

COVID-19延审申请

The Bermuda Courts and the Cayman Courts will consider, of course, whether a short adjournment is appropriate in the circumstances of any given case, especially in light of COVID-19 (taking into account its impact on the Company's creditors, directors, management, employees, legal advisors, and external auditors, and ongoing difficulties associated with completing on-site audit work).

百慕大法院和开曼法院当然会考虑在某个特定情况下，短暂延审是否适当，尤其在 COVID-19 的情况下（考虑到其对公司债权人、董事、管理层、员工、法律顾问和外部审计员的影响，以及在完成现场审计工作方面持续存在的困难）。

But in cases where a Company is admittedly insolvent (especially on both a cash-flow and a balance sheet

但是，如果公司无可否认是无力偿债的（特别是在现金流和资产负债表的基础上），并且债务无可争议，那么仅仅基于

basis), and a debt is undisputed, there can be no expectation of an adjournment of a winding up petition hearing, simply on the basis of COVID-19 alone, in the absence of any evidence of a credible restructuring proposal.

COVID-19 这一事实，在没有任何可信的重组方案证据的情况下，就不能期望清盘申请庭审会延期。

Conclusion

From a Bermuda law, Cayman Islands law, and Hong Kong law perspective, there are good reasons why offshore, publicly-listed companies, and their Boards of Directors, should engage early with the restructuring process, and in good faith.

结论

从百慕大法律、开曼群岛法律和香港法律的角度来看，离岸上市公司及其董事会应有充分理由尽早开始重组进程，而且要真诚地进行。

As Mr. Justice Harris has noted, it is surprising that any publicly-listed company might not do so. Indeed, there are obvious inferences to be drawn when a publicly-listed company does not take appropriate professional advice at the appropriate time.

正如 Harris 法官先生所指出的那样，任何一家上市公司若不这样做，都是令人惊讶的。的确，如果上市公司未在适当的时候接受适当的专业建议，则可以得出明显的推断。

There are well-established restructuring solutions available for Bermuda and Cayman Islands companies in financial distress, including out-of-court consensual solutions (by negotiation and agreement with all relevant creditors), the Court appointment of 'soft-touch' Provisional Liquidators for restructuring purposes (equivalent to restructuring officers), the use of the automatic stay (or moratorium) associated with provisional liquidation, and the promotion of Court-supervised Schemes of Arrangement, whether under the primary supervision of the Hong Kong Court, or the Cayman or Bermuda courts, and whether by way of parallel Schemes or foreign Scheme recognition applications.

现有完善的重组解决方案可供陷入财务困境的百慕大公司和开曼群岛公司采用，包括庭外共识解决方案（通过与所有相关债权人谈判并达成协议）、法庭以重组目的而任命“随和的”临时清算人（等同于重组官）、使用与临时清算相关的自动中止（或暂停）机制以及开展法院监督的重组安排计划（无论是在香港法院、开曼群岛法院还是百慕达法院的主要监督下，也无论是通过平行计划还是外国计划认可申请的方式）。

There have also been a number of cases over the past 20 years in which the commercial value of a Hong Kong listed Company's listing status has been preserved and monetized in payment of creditors[2], subject to compliance with the Hong Kong Stock Exchange's listing rules in this respect.

在过去的 20 年中，有一些案例，其中的香港上市公司的上市地位之商业价值被保留，并以货币形式支付给债权人[2]，但需遵守香港联合交易所在这方面的上市规则 。

Experience suggests that it is crucial for the Board of Directors of a publicly-listed company in financial distress to develop genuine potential restructuring proposals as early as possible; to identify "White Knight" investors amongst the company's body of creditors or shareholders; and to encourage the active support of any restructuring proposals by a majority of unsecured creditors. The Courts are unlikely to appoint, or to continue the appointment of, 'soft-touch' Provisional Liquidators for restructuring purposes unless the Court is satisfied, evidentially, that there is a realistic prospect of a successful restructuring in the

经验表明，对于陷入财务困境的上市公司董事会而言，至关重要的事情是尽早制定切实可行的重组方案；在公司债权人或股东中确认“白骑士”投资者；鼓励大多数无担保债权人积极支持任何重组方案。法庭不太可能为重组目的而任命或继续任命“随和的”临时清算人，除非法庭有证可考，相信从公司债权人的最大利益出发，成功重组切实可行。

[2] See, for example, cases such as *Re China Solar Energy Holdings Limited* [2018] HKCFI 555, *Re Rhine Holdings* (2000, unreported), *Re Yaohan Hong Kong Corp Ltd* [2001] 1 HKLRD 363; *Re Albatronics (Far East) Co Ltd* [2002] 4 HKC 99; *Re I-China Holdings Ltd* [2004] HKEC 1844; *Re Plus Holdings Ltd* [2007] 2 HKLRD 725; *Re Plus Holdings Ltd* [2008] HKEC 2397; *Re China Medical and Bio Science Ltd* [2009] HKEC 2679, and *Sunlink International Holdings Limited v Wong Shu Wing* [2010] HKCFI 982.
例如查阅以下案件：Re China Solar Energy Holdings Limited [2018] HKCFI 555, Re Rhine Holdings（2000 年，未报道）；Re Yaohan Hong Kong Corp Ltd [2001] 1 HKLRD 363; Re Albatronics (Far East) Co Ltd [2002] 4 HKC 99; Re I-China Holdings Ltd [2004] HKEC 1844; Re Plus Holdings Ltd [2007] 2 HKLRD 725; Re Plus Holdings Ltd [2008] HKEC 2397; Re China Medical and Bio Science Ltd [2009] HKEC 2679 以及 Sunlink International Holdings Limited 诉 Wong Shu Wing [2010] HKCFI 982。

best interests of a company's creditors.

In conclusion, successful restructuring solutions require the early involvement of legal, financial, and restructuring advisors. They should not be left until the very last minute before the Court hearing of a winding up petition, simply in the hope of playing for time.

Even if a comprehensive restructuring is not expected to be a realistic possibility, there are nonetheless good legal and commercial reasons why the Board of Directors and shareholders of an offshore company should take appropriate advice when the company enters the zone of insolvency, taking into account personal liabilities under Bermuda law and Cayman Islands law, and the duties owed in the interests of creditors.

总之，成功的重组解决方案需要法律、财务和重组顾问的早期参与。不要只是希望能拖延时间而直到法庭审理清盘申请的最后一刻才与他们联系。

即使预计实际上无法进行全面重组，但是，出于法律和商业上的充分理由，离岸公司的董事会和股东在公司进入破产境地时仍应采纳适当的建议，重视百慕大法律和开曼群岛法律规定的个人责任以及为债权人的利益应尽的义务。

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