

## 公报文章

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

### 来自英属维尔京群岛的一份完美而及时的新年礼物：恢复“黑天鹅”管辖权

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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*

在 2020 年的最后一天，也是新年前夜，英属维尔京群岛议会通过了《2020 年东加勒比最高法院（维尔京群岛）（修正）法》“黑天鹅”法案（以下简称“法案”），确定了英属维尔京群岛法院的管辖权可提供广泛的临时救济，以支持在外国司法管辖区（当然包括香港、中国大陆和新加坡）已经启动或即将启动的诉讼。法案于 2021 年 1 月 7 日生效，表明自该日起，英属维尔京群岛立法正式规定了一项独立的冻结令，又名“黑天鹅”冻结令，目的是为涉外诉讼当事人提供实质性帮助。这将对亚洲各地的当事人及其诉讼律师大有裨益。

法案的背景是，上诉法院在 *Broad Idea International Limited v Convoy Collateral Limited* (BVICMAP 2019/0026) 一案中的裁决对英属维尔京群岛法院给予“黑天鹅”冻结令的管辖权提出了质疑。上诉法院于 2020 年 5 月对 *Convoy* 案做出的裁决认为，如果某个英属维尔京群岛实体未在英属维尔京群岛或其他地方参与任何实质性诉讼，则不能在英属维尔京群岛法院寻求针对该实体的临时救济。这推翻了自“黑天鹅”案一审判决确定了给予此类救济的管辖权后近十年来的既定惯例。此后，*Convoy* 对上诉法院的裁决提出了上诉。上诉将于 2021 年 2 月 16 日由枢密院司法委员会一个完整的（7 位法官）小组审理。与此同时，除非且直到枢密院否决了上诉法院对 *Convoy* 的裁决，否则必须通过立法来确立英属维尔京群岛法院有权做出任何其他的“黑天鹅”冻结令。

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*

康德明律师事务所对法案的颁布表示欢迎，法案在《东加勒比最高法院（维尔京群岛）法》（第 80 章）中增加了新的第 24A 条。其实，我们的英属维尔京群岛诉讼团队的两位队员是负责起草法案以纠正这一立场的相关委员会的成员。新的第 24A 条提供了确定性、清晰度和效率来帮助诉讼当事人处理英属维尔京群岛实体的跨境商业纠纷。法案进一步为英属维尔京群岛法院提供了给予其他独立的临时救济措施的管辖权，包括任命接管人以及为支持国外诉讼而发出披露令（这一点非常重要），从而消除了对此等救济措施的司法依据的任何怀疑。毫无疑问，亚洲各地的法律工作者和客户在了解到这一进展后，都会非常赞赏英属维尔京群岛立法机关如此迅速接受和通过该法案以帮助世界各地的涉外诉讼。法案的通过再次证明了英属维尔京群岛作为领先的跨境诉讼离岸管辖区所具备的活力、效率和能力。如果纠纷的合适法庭位于亚洲，那么通常需要在英属维尔京群岛获得具体、及时的临时救济。法案确保了英属维尔京群岛可以给予此类救济。

为方便读者查阅，以下是新的第 24A 条的摘录：在没有实质性诉讼情况下的临时救济：

"24A.

- (1) 如果诉讼已在或即将在外国司法管辖区启动，高等法院或其法官可给予临时救济。
- (2) 关于根据第(1)款申请任何临时救济，如果高等法院或其法官认为存在以下情况，则可拒绝给予此类救济：
  - (a) 除本条外，其对外国司法管辖区的诉讼事项没有管辖权；以及
  - (b) 在特定情况下，高等法院或其法官给予此类救济是不明智的。
- (3) 尽管有以下规定，第(1)款仍然适用：
  - (c) 除本条外，涉外诉讼事项不会引起高等法院或其法官因此拥有管辖权的诉因；或者
  - (d) 任命接管人或寻求给予临时救济不是领土内任何诉讼的附属或附带。
- (4) 本条中的“临时救济”包括高等法院或其法官有权在与其管辖范围内的事项相关的诉讼中给予的任何救济，以及对无诉因被告的命令。
- (5) 如果高等法院或其法官根据普通法有权下达提供文件和信息的命令，则尽管存在以下情况，高等法院或其法官仍可下令：

*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.

*The authors are both members of Conyers’ Asia Disputes & Restructuring Group (ADRG) which is tasked to provide sophisticated Bermuda, British Virgin Islands and Cayman Islands litigation advice to clients connected to our multi-lingual (Cantonese, English and Mandarin speaking) team based in Asia. The ADRG integrates the most experienced and highest rated partner-led litigation teams in Asia, Bermuda, the British Virgin Islands and Cayman Islands providing seamless and comprehensive services across jurisdictions round the clock. Our advocates in these jurisdictions are leaders in their fields, recognised by all leading independent directories and our greater depth and range of expertise in the region distinguishes us from our competition and ensures that our clients receive comprehensive, reliable and thorough advice.*

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- (e) 诉讼可能、将会或已经在领土以外启动；或者
- (f) 根据“证据（外国司法管辖区诉讼）法”的规定，有权下达此类命令

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作者均为康德明律师事务所**亚洲纠纷与重组小组 (ADRG)**的成员，该小组的任务是为那些与我们的多语种（粤语、英语和普通话）亚洲团队联系的客户提供高度专业的百慕大、英属维尔京群岛和开曼群岛诉讼建议。**ADRG**整合了亚洲、百慕大、英属维尔京群岛和开曼群岛最有经验、排名最高的合伙人带领的诉讼团队，全天候提供跨辖区的无缝、全面服务。我们在这些辖区的律师是各自领域的领导者，受到所有领先的独立目录的认可。我们在本地区更深、更广的专业知识使我们有别于竞争对手，确保我们的客户获得全面、可靠和周密的法律意见。

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