



**INSOL**  
INTERNATIONAL

GLOBAL INSOLVENCY  
PRACTICE COURSE

# Caribbean offshore jurisdictions and their relationship with the US and Asia

The Hon Mr Justice Nick Segal, Grand  
Court of the Cayman islands

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# The Cayman Islands

- Tax Neutral
- Business friendly laws, c  
120,000 companies and  
35,000 partnerships registered
- Significant inward and outward  
investment involving the USA,  
Hong Kong SAR and mainland  
China
- Common law and statute  
based on the English model



# Cayman Corporate Insolvency Law

The Companies Act (2022 Revision)  
The Companies Winding Up Rules  
The Insolvency Practitioners Regulations  
The Foreign Bankruptcy Proceedings  
(International Cooperation) Rules 2018



# The British Virgin Islands

- Tax Neutral
- Business friendly c  
400,000 active  
companies
- English common law  
framework,



# BVI Corporate Insolvency Law

Insolvency Act 2003

Insolvency Rules 2005

BVI Business Companies Act 2004



# Bermuda

- One of the first offshore international financial centres, 20,000 entities
- Initial focus on insurance and reinsurance
- Significant connectivity with New York, Hong Kong, London and Singapore



# Bermuda Insolvency Law

Companies Act 1981

Companies Winding Up Rules (1982)

Rules of the Supreme Court 1995



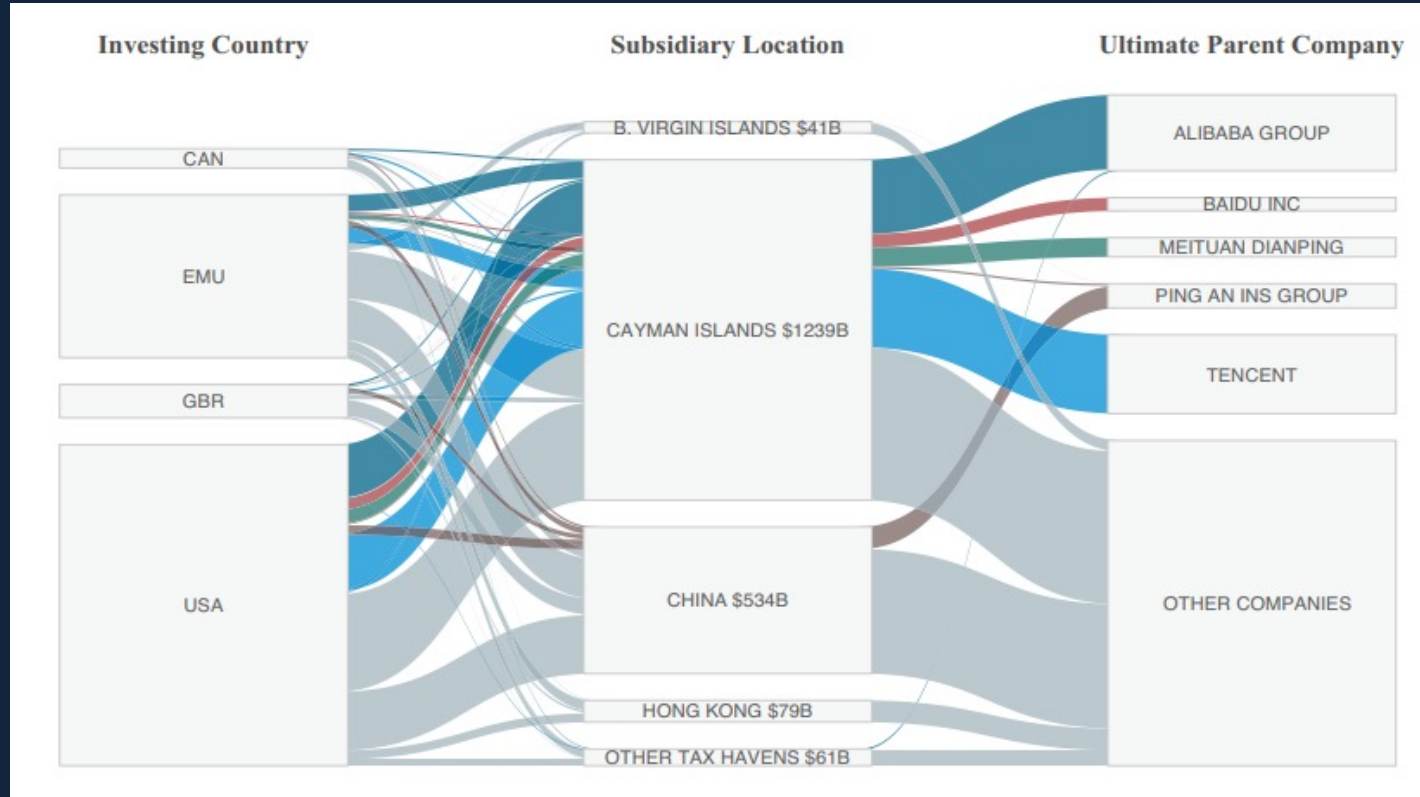
# The Offshore Connection - HKEX

HKEX		
Incorporation	No. of Companies	Percentage
Cayman Islands	1,534	60.78%
Bermuda	465	18.42%
Hong Kong	219	8.68%
China (Mainland)	178	7.05%
British Virgin Islands	12	0.48%
Singapore	10	0.40%
Luxembourg	2	0.08%
Jersey	2	0.08%
Italy	2	0.08%
Canada	2	0.08%
Japan	2	0.08%
Australia	2	0.08%
Israel	1	0.04%
United States	1	0.04%
Not Available	92	3.65%



# NBER Research - China and Offshore Jurisdictions\*

(\*National Bureau of Economic Research Working Paper 30865 "China in Tax Havens" January 2023)



# Cross Border Insolvency

UNCITRAL, 'Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency'

*Inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies...*

Restructuring	Need to safeguard assets and bind creditors
Liquidation	Need to bind creditors and avoid chaos of competing processes



# Recognition of foreign proceedings: statutory powers - I

Statutory powers enacted in both Cayman and BVI

None of Cayman, the BVI or Bermuda have adopted the UNCITRAL Model Law

Part XVIII of the BVI Insolvency Act contains provisions based on the UNCITRAL Model Law but not in force

Part XIX of the BVI Insolvency Act: orders in aid

Applies to Australia, New Zealand, Hong Kong, Japan, Canada, the UK, the USA and Jersey



# Recognition of foreign proceedings – statutory powers - II

Section 467(3): lists 7 types of order the court can make including *“such order as it considers appropriate”*

Section 468: in deciding whether to make such an order the court is to be guided by what will best ensure the economic and expeditious administration of the foreign proceeding to the extent consistent with just treatment of all persons claiming in the foreign proceeding; protection of persons in the Virgin Islands who have claims against the debtor against prejudice and inconvenience in the processing of claims in the foreign proceeding; prevention of preferential or fraudulent dispositions; need for distributions to claimants in the foreign proceedings to be substantially in accordance with the order of distributions in a Virgin Islands insolvency; and (e) comity



# Recognition of foreign proceedings - statutory powers - III

Section 468(2): cannot affect right of any creditor to benefit from insolvency set-off or prejudicing the recoveries of a preferential creditor – section 468(3): cannot make an order that is contrary to public policy

Cayman Companies Act (2023 Revision): Part XVII - orders ancillary to a foreign bankruptcy proceeding

Only applies to foreign representatives appointed in the country of incorporation of the debtor

Covers reorganisation and rehabilitation proceedings



# Recognition of foreign proceedings - statutory powers - IV

Section 241: court may make orders for the purposes of recognising the right of a foreign representative to act in the Islands on behalf of a debtor; enjoining the commencement or staying the continuation of legal proceedings against a debtor; staying the enforcement of any judgment against a debtor; requiring a person in possession of information relating to the debtor to be examined by and produce documents to its foreign representative and ordering the turnover to a representative of any property belonging to a debtor.



# Recognition of foreign proceedings - statutory powers - V

Section 242: court must have regard to matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled; protection of claim holders in the Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding; the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate; distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed under Cayman law; recognition and enforcement of security interests created by the debtor; the non-enforcement of foreign taxes, fines and penalties and comity.



# Recognition of foreign proceedings - statutory powers - VI

See *Picard v Primeo Fund* 2014 (1) CILR 379 – Primeo was an open-ended investment fund incorporated and in liquidation in the Cayman Islands. It invested in Bernard L Madoff Investment Securities LLC (*BLMIS*). The US court appointed trustee of BLMIS commenced actions in Cayman against Primeo seeking to recover sums received by Primeo from BLMIS based on the transaction avoidance provisions of the US Bankruptcy Code and separately a voidable preference claim under section 145 of the Cayman Companies Act (and alternatively at common law).





## Recognition of foreign proceedings - statutory powers - VII

The Court of Appeal held that the court did not have jurisdiction under sections 241 and 242 to apply transaction avoidance provisions of foreign insolvency law. The claims based on the US Bankruptcy Code were struck out. But there was jurisdiction under those sections to apply transaction avoidance provisions of the Companies Act so that the Cayman preference claims could proceed (the Court did not decide whether there was also a right at common law). Chadwick P held that the making of a transaction avoidance order in aid of foreign bankruptcy proceedings was the making of an order ancillary to foreign bankruptcy proceedings for the purposes of section 241.



# Recognition of foreign proceedings - statutory powers - VIII

Cayman, BVI and Bermuda have, by practice directions issued by the court, adopted the Judicial Insolvency Network's Guidelines on Court-to-Court Communications.

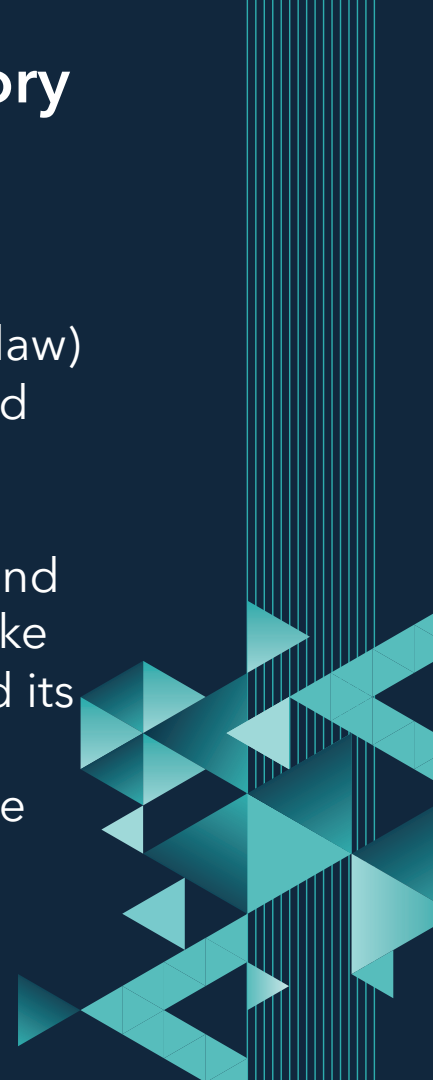
In Cayman official liquidators are under a duty to consider whether it is appropriate to enter into an international protocol with any foreign officeholder. The purpose of an international protocol is to promote the orderly administration of the estate of a company in liquidation and avoid duplication of work and conflict between the official liquidator and the foreign officeholder. Companies Winding Up Rules Order 21, rule 2.



# Recognition of foreign proceedings - non-statutory powers - I

In Cayman, BVI and Bermuda there is a non-statutory (common law) power to grant assistance to foreign insolvency officeholders and foreign proceedings.

The court has a power which if the circumstances justify its use and subject to the limitations on its use allows the forum court to make suitable orders for the purpose of allowing the foreign court and its officeholders to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits on the foreign court's powers.



# Recognition of foreign proceedings - non-statutory powers - II

Assistance can be granted to foreign proceedings in the place of incorporation and if the circumstances so permit in other jurisdictions: see my judgment in *Re China Agrotech* [2017 (2) CILR 526]

But there are limits on the court's power: court can only make orders based on and by applying the applicable domestic substantive or procedural law (including orders in the exercise of its case management powers with respect to proceedings before it) - and can only *assist* by allowing foreign officeholder to exercise the powers they have in their home state



# Recognition of foreign proceedings – non-statutory powers - III

- *Singularis Holdings Limited v PricewaterhouseCoopers* [2015] AC 1675 (JCPC on appeal from Bermuda)
- *Hunt v Transworld Payment Solutions Limited* [2020] SC (Bermuda) 14 Com



# Recognition of foreign proceedings - schemes of arrangement - I

Schemes involve the variation or discharge of debt or other liabilities (or of rights attached to shares) - the rules governing the effectiveness of a discharge under foreign schemes or proceedings is, at common law, different from the rules on the recognition of the powers of foreign insolvency officeholders and foreign statutory stays

*Dicey, Morris & Collins' Rule 211: A discharge from any debt or liability under the bankruptcy law of a foreign country outside the UK is a discharge therefrom in England if and only if it is a discharge under the law applicable to the contract*



# Recognition of foreign proceedings – schemes of arrangement - II

Dicey adds that on principle the same rule applies to foreign compositions and that English courts have not looked on the foreign insolvency or restructuring proceeding and any discharge under it as a judgment or order of the foreign court.

Parallel schemes in order to achieve a global discharge – in the place of the debtor's assets (COMI) and of incorporation



# Recognition of foreign proceedings - schemes of arrangement - III

Parallel schemes involving Cayman and Hong Kong: see *Re China Agrotech* (HK liquidation, no Cayman proceeding) and *Re Freeman Fintech 2021* (1) CILR 426 (parallel schemes in Cayman and HK)

Schemes for Cayman companies with HK listing and COMI discharging New York governed debt: *Re E-House (China) Enterprise Holdings Limited* (unreported, 17 November 2022)





# Recognition of foreign proceedings – schemes of arrangement - IV

Use of appointment of light touch provisional liquidators: *Re Midway Resources International* (unreported, 30 March, 2021)  
– impact on Hong Kong winding up proceedings

Use of appointment of restructuring officer under section 91B of the Companies Act (with a scheme of arrangement under section 91I of the Companies Act)



# Effectiveness of schemes of arrangement

## Rule in ***Re Gibbs***

Parallel schemes in Hong Kong and England

- ***Hong Kong Airlines Limited*** [2023] BCC 477
- ***Hong Kong Airlines Limited*** [2022] HKCFI 3792

English Court satisfied that scheme should be treated as effective in courts where related company guarantors were located (Cayman and BVI) given *Re Gibbs* would apply



# Hong Kong Questions Scheme Effectiveness

***In the Matter of Rare Earth Magnesium Technology Group Holdings Limited [2022] HKCFI 1686***

***Re Modern Land (China) Co Ltd 22-10707 (MG)***

***Re E-House (China) Enterprise Holdings Limited (unreported, 17 November 2022)***



# The View from Hong Kong – PLs I

## Restructuring and Provisional Liquidation

- it is not possible to appoint ‘soft touch’ liquidators for the purpose of restructuring. They can be appointed for the purpose of winding up, not to avoid winding up

***Re Legend International Resorts*** [2006] 2 HKLRD 192  
(cf **Sun Cheong Holdings** [2020] (2) CILR 942)

- but foreign ‘soft touch’ liquidators can be granted recognition to explore and facilitate company restructuring, albeit without the authority afforded to officeholders appointed in Hong Kong

***Moody Technology Holdings Ltd*** [2020] HKCFI 416



# The View From Hong Kong – PLs II

- Assistance per modified universalism is intended to ensure that all a company's assets are distributed to creditors in a winding up under a single system of distribution, a collective process (***Singularis***)
- Foreign 'soft touch' PLs seeking recognition and assistance may not be entitled to a stay of proceedings in Hong Kong. Soft touch PL appointment is not necessarily in support of a single system of distribution

***In the Matter of FDG Electric Vehicles*** [2020] HKCFI 293

- Increasing HK Court frustration with number of soft touch PL requests for recognition and assistance from PLs appointed offshore. Focus on COMI

***Global Brands Group Holding Limited*** [2022] HKCFI 1789

- Recognition, but assistance may be limited

***China Bozza Development Holdings*** [2021] HKCFI 123



# COMI vs Place of Incorporation I

**Dicey, Morris & Collins on the Conflict of Laws 30-145:**

*“...the law of incorporation determines who is entitled to act on behalf of a corporation. If under that law a liquidator is appointed to act then their authority should also be recognized here”*

- **Silver Base Group Holdings Limited** FSD 329 of 2021 (DDJ) Cayman

22 Nov 2021 – Application to Cayman Court for PLs adjourned: inadequate notice to creditors & comity concerns in light of pending Hong Kong winding up petition. Cayman judge seeks all material before Hong Kong court

8 Dec 2021 – Cayman judge reviews Hong Kong case law and determines that the appointment of JPLs in Cayman will not stop proceedings in Hong Kong if Hong Kong decides not to recognize Cayman’s statutory moratorium but through Cayman Court’s eyes *‘it would be sensible and appropriate for the Hong Kong court to recognize and give assistance to the JPLS which this court has appointed over a company incorporated under the laws of the Cayman Islands’*

5 May 2022 – Winding up order in the Cayman Islands.



# COMI and Place of Incorporation II

**Silver Base Group Holdings Limited** [2022] HKCFI 2386 Hong Kong

27 July 2022

Cayman liquidators withdraw recognition application after *Global Brands* decision

Hong Kong makes winding up order since

- Company's listing in Hong Kong a sufficient connection
- Assets in Hong Kong mean there will be benefit to creditors if Hong Kong order
- There are creditors in Hong Kong over whom Hong Kong court can exercise jurisdiction.

Hon. Harris J - liquidation outside the place of incorporation is not necessarily ancillary to the Hong Kong jurisdiction



# COMI vs Place of Incorporation III

Increasing number of companies being wound up in Hong Kong despite offshore place of incorporation offshore provided

- a sufficient connection with Hong Kong;
- a reasonable possibility that winding up will benefit creditors
- jurisdiction over one or more persons interested in the distribution of assets

- **Li Yiging v Lamtex Holdings** [2021] HKCFI 622
- **Ping An Securities Group Holdings Ltd** [2021] HKCFI 1394
- **Up Energy Development Group Ltd** [2022] HKCFI 132





# View from Hong Kong – Mainland Cooperation?

## Supreme People's Court and the Government of Hong Kong – Mutual Recognition & Consensus

May 2021 – records consensus relating to mutual recognition to improve the mechanism for judicial assistance between China and Hong Kong in insolvency proceedings

- ***Re Samson Paper*** [2020] HKCFI 2931 – 1<sup>st</sup> HK Letter of Request to China
- ***Oznar Water International Holding Limited*** (in liquidation)[2022] HKCFI 363 (letter of request)
- ***Hong Kong Fresh Water International Group Limited*** (in liquidation) [2022] HKCFI 924 (letter of request to Shanghai court)



# Reciprocity – Offshore & China

***Industrial bank Financial Leasing Co Ltd v Xing Libing***  
BVIHC (COM) 0032 of 2018

BVI Court recognition and assistance in enforcement of a  
China judgment

