CLIENTALERT

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Hong Kong court stayed winding-up petition in favour of HKIAC arbitration

香港法院中止清盘呈請以支持仲裁

China Europe International Business School (中欧国际工商学院) v. CEIBS Publishing Group and others (the "Petition")

On 22 November 2021, the Hong Kong Court of First Instance stayed a winding-up petition brought by China Europe International Business School (the "**School**") against Hong Kong-registered CEIBS Publishing Group (the "**Publishing Company**"), in which it has a 40% shareholding.

The School helped to set up the Publishing Company in 2007 in partnership with a Chinese venture capitalist for the purpose of publishing products under the School brand. A share purchase agreement concluded in that year included a "quitclaim" provision, under which the School relinquished its rights over intellectual property used by the Publishing Company.

On 20 August 2020, the School commenced litigation against the Publishing Company in the HK court seeking that the "quitclaim" provision was not binding on the School and the Publishing Company did not provide any consideration in exchange for the rights and interest under the quitclaim.

On 23 November 2020, the Publishing Company submitted a notice of arbitration against the School, accusing it of breaching the School's share purchase agreement by disputing the validity of the quitclaim.

On 8 January 2021, the School filed a winding up petition on just and equitable grounds. The Publishing Company contended that the substance of the disputes in the Petition falls within the ambit of the arbitration agreements contained in the share purchase agreement.

China Europe International Business School (中欧国际工商学院) v. CEIBS Publishing Group and others ("清盘呈请")

2021 年 11 月 22 日，香港原讼法庭中止了中欧国际工商学院（"**学院**"）对在香港注册的其持有 40%股权的 CEIBS Publishing Group（"**出版公司**"）提出的清盘呈请。

2007 年，学院与一位中国风险投资家合作，成立了出版公司，以出版学院品牌的产品。当年达成的股份购买协议包括一项"放弃权利"条款，根据该条款，学院放弃了对出版公司使用的知识产权的权利。

2020 年 8 月 20 日，学院在香港法院对出版公司提起诉讼，要求判定"放弃权利"条款对学院没有约束力，出版公司没有提供任何对价以换取放弃权利条款下的权益。

2020 年 11 月 23 日，出版公司针对学院发出仲裁通知，指责其对放弃权利条款的有效性提出异议违反了股份购买协议。

2021 年 1 月 8 日，学院基于公正和公平的理由在香港法院提出了清盘呈请。出版公司认为，呈请书中的争议实质属于股份购买协议中的仲裁协议的范围。

Judge Linda Chan applied the following principles: (1) Hong Kong is a pro-arbitration jurisdiction; (2) in construing the scope of an arbitration clause, the Court will start from the presumption of a "one-stop method of adjudication", covering all disputes between the parties to a given contract; (3) although winding up proceedings do not fall within s.20 of the Arbitration Ordinance (Cap. 609), the Court has inherent jurisdiction to grant a stay of a petition presented on just and equitable grounds in favour of arbitration; (4) in considering whether to grant a stay, the Court will first "identify the substance of the dispute between the parties and ask whether or not the dispute is covered by the arbitration agreement"; and where the substance of the dispute falls within the arbitration clause, the Court may require the parties to have their dispute be determined by arbitration, before the Court considers whether to grant a winding up order (*Re Quiksilver Glorious Sun JV Ltd [2014] 4 HKLRD 759 , §§14-15, 21-23*, per Harris J).

法官 Linda Chan 适用了以下原则 (1) 香港是一个支持仲裁的司法管辖区；(2) 在解释仲裁条款的范围时，法院将从"一站式裁决方法"的假设出发，该方法涵盖特定合同各方之间的所有争议；(3)虽然清盘程序不属于《仲裁条例》(第 609 章) 第 20 条的范围，但法院有固有的管辖权以公正和公平的理由批准中止清盘呈请以支持仲裁；(4) 在考虑是否批准中止时，法院将首先"确定当事人之间争议的实质，并询问该争议是否属于仲裁协议的范围"。如果争议的实质内容属于仲裁条款的范围，法院可以要求各方在法院考虑是否发出清盘令之前通过仲裁来解决他们的争议(*Re Quiksilver Glorious Sun JV Ltd [2014] 4 HKLRD 759, §§14-15, 21-23*, per Harris J)。

Judge Linda Chan rejected submissions made on behalf of the School that since the jurisdiction to grant a stay is a discretionary one, the general principles in relation to case management stays are relevant.

法官 Linda Chan 拒绝了呈请人提出的意见，即鉴于批准中止是酌情的，这与案件管理中止有关的一般原则是相关的。

One of the arguments raised against the stay was that some respondents to the Petition were non-parties to the arbitration agreements. In this regard, the court referred to the approach of the English Court of Appeal *Fulham Football Club (1987) Ltd v Richards* [2012] Ch 333, i.e. the question of whether an issue was arbitrable was not necessarily determined by the limitations on the tribunal's powers to make orders affecting non-parties (which is derived from the contractual basis of arbitration). The fact that an arbitrator cannot make a winding-up order affecting third parties does not mean that it is impossible for the members and a company to agree to submit their disputes, inter se as shareholders, to arbitration.

而反对中止的论点之一是，清盘呈请的其中一些答辩人不是仲裁协议的缔约方。 对于这个问题，香港法院参考了英国上诉法院 *Fulham Football Club (1987) Ltd v Richards [2012] Ch 333* 的处理方法，即是否可仲裁的问题并非取决于仲裁庭是否有权对非仲裁当事人作出有影响的指令（后者源于仲裁是以仲裁协议为基础）。虽然仲裁员不能作出影响第三方的清盘令，但这并不意味着股东和公司不可能同意将他们之间的争议提交仲裁。

In conclusion, the Judge agreed to the approach described in *Fulham Football Club* and held that the substance of the disputes raised in the Petition fell within the scope of the arbitration agreements and this was an appropriate case to exercise the discretion to stay the Petition pending determination of the disputes in the arbitration.

最后，法官同意采纳英国上诉法院在 *Fulham Football* 案中的做法，并认为清盘呈请中提出的争议实质属于仲裁协议的范围，该案属于适合行使酌情权的案件，即在仲裁裁决做出之前适宜中止清盘呈请。

Takeaways

- In an application for a case management stay, where the plaintiff is not bound by any arbitration agreement and is therefore entitled to bring the action as of right, the court will require very good reasons and compelling circumstances to grant a stay.

- By contrast, in an application for stay of a petition in favour of arbitration, where the petitioner is bound by an arbitration agreement, the Court is being asked to give effect to that agreement by requiring the petitioner to refer the dispute to arbitration.

- Once it is shown by the party seeking a stay that the substance of the dispute falls within the scope of the arbitration agreement, the burden then shifts to the petitioner to satisfy the Court as to why it should be allowed to act in breach of the arbitration agreement by pursuing the dispute in Court.

- The question whether it is just and equitable to wind up the company does not arise unless and until the petitioner has discharged the burden of proving its case as pleaded in the petition (Note: company may be wound up by court if the court is of the opinion that it is just and equitable that the company should be wound up under s.177(1)(f) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) ("CWUMPO").

- There is nothing objectionable for the tribunal first to resolve the disputes raised in the arbitration, and at a later stage for the Court to consider the findings and determinations made by the tribunal in deciding whether or not the company should be wound up.

重点小结:

- 向香港法院基于案件管理而申请中止时，如果原告不受任何仲裁协议的约束，而因此有权提起诉讼，法院需要非常充分的理由和令人信服的情况才能批准中止。

- 相反，在申请中止清盘以支持仲裁时，呈请人受仲裁协议的约束，法院须依据有效的仲裁协议要求呈请人将争议提交仲裁。

- 一旦寻求中止法院清盘的一方证明争议的实质内容属于仲裁协议的范围，那么责任就转移到清盘呈请人身上，让法院相信为什么应允许其违反仲裁协议，将争议提交法院处理。

- 除非并且直到呈请人已经履行了证明其在呈请书中所申辩的案由的责任，否则无法依据公正和公平理由申请清盘（注：按照香港《公司(清盘及杂项条文)条例第 177 条第(1)(f)款的规定，公司可由法院清盘当法院认为将公司清盘是公正公平的）。

- 没有异议的是，首先应由仲裁庭解决仲裁中提出的争议，然后，法院再考虑仲裁庭作出的结论和裁定以决定一间公司是否应该清盘。

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