Hong Kong—winding-up petition stayed pending arbitration on just and equitable grounds (China Europe International Business School v Chengwei Evergreen Capital LP)

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06/12/2021

Arbitration analysis: The Hong Kong Court of First Instance ordered that a winding-up petition presented against CEIBS Publishing Group Ltd (the 'Company') on just and equitable ground be stayed pending the determination of the arbitration between the petitioner, China Europe International Business School (the 'Petitioner') and the Company. Upon the determination of the arbitration, the parties have liberty to restore the petition for further directions. The approach of the court is consistent with leading case authorities in Hong Kong and England and Wales. One of the arguments raised in opposition to the stay was that some respondents to the petition were non-parties to various arbitration agreements. Despite that, the court considered that the substance of the disputes in the petition fell within the scope of the arbitration agreements. Written by Alexander Tang,

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China Europe International Business School v Chengwei Evergreen Capital LP (formerly known as Chengwei Ventures Evergreen Fund LP) and others [2021] HKCU 5635 (subscription to Lexis+ US required)

What are the practical implications of this case?

This case is another good example demonstrating that Hong Kong is a pro-arbitration jurisdiction. Pursuant to section 20 of the Arbitration Ordinance (Cap 609), if an action is brought before the court in a matter which falls within the scope of an arbitration agreement, the court is required to refer the relevant parties to arbitration. Winding-up proceedings in Hong Kong are not 'actions' so they do not fall within section 20 of the Arbitration Ordinance. However, the court has inherent jurisdiction to grant a stay of a petition presented on the just and equitable ground in favour of arbitration. Where the substance of the dispute in the petition 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. In the case of winding-up petitions on just and equitable grounds, the arbitration agreement operates as an agreement not to present a winding-up petition unless and until the underlying dispute had been determined in the arbitration.

What was the background?

The Company was a joint venture vehicle which carries on publishing business. The Petitioner and the first three respondents were the original shareholders of the Company when it was incorporated in 2007.

In 2007, a series of agreements (including a share purchase agreement (SPA))

In 2007, a series of agreements (including a share purchase agreement (SPA)) (collectively '2007 Agreements') were entered into between an affiliated

entity of the Petitioner, the Company and the first three respondents. Each of the 2007 Agreements contains essentially the same arbitration clause. In the same year, the rights and obligations of these agreements were assigned to the Petitioner from its affiliated entity. There was also an agreement entered into between the Petitioner and the Company under which the Petitioner essentially relinquishes its rights to the publishing business and intellectual property rights ('Quitclaim').

In 2016, the Petitioner expressed concerns about the Quitclaim and considered it necessary to re-negotiate the co-operation model. Several rounds of negotiations took place but no consensus was reached. This resulted in the transfer of the Company's shareholding from the first three respondents to other respondents in the petition in 2019 and 2020 as well as the appointment of new directors.

In 2020, the Petitioner commenced a High Court action against the Company seeking a declaration that the Quitclaim was non-binding but discontinued the action in the same year. The Company commenced arbitration alleging breach of the Quitclaim and the SPA on the part of the Petitioner.

The Petitioner presented the winding-up petition in early 2021 and the Company took out a stay application. The Petitioner placed heavy reliance in the petition about the common understandings of the parties' co-operation prior to the 2007 Agreements, and among others, alleged that the transfer of shareholdings was invalid.

The issues before the court were:

- whether there was a dispute between the Company and the Petitioner, and if so, whether the Company should be allowed to

pursue the stay application

- whether the substance of the disputes fell within the scope of the arbitration agreements, and
- whether the court should exercise its discretion to order a stay of the petition

What did the court decide?

The court's answers were affirmative on all three issues. The approach of the English Court of Appeal in *Fulham Football Club (1987) Ltd v Richards* [2012] Ch 333 and the Hong Kong case of *Re Quiksilver Glorious Sun JV Ltd* [2014] 4 HKLRD 759 (not reported by LexisNexis®UK) were adopted.

The court decided that:

- while a company usually does not have any active role in an ordinary shareholders' dispute, it does not mean that the court would disallow any stay application made by the company in a petition on just and equitable ground. On the facts, the Company was not merely a nominal party. It had a dispute with the Petitioner regarding the core contentions raised in the petition
- the substance of the disputes raised in the petition fell within the scope of the arbitration agreements. The petitioner had not explained how the common understandings prior to the 2007 Agreements could survive the entire agreement clause in the SPA. Also, the court considered that the arbitration clause was wide enough to cover (i) the existence and effect of the parties' common understandings; and (ii) the transfer of the Company's shareholding in 2019 and 2020

which were disputes 'relating to' the 2007 Agreements

- the grounds relied on by the Petitioner did not justify it to pursue the disputes by way of the petition. In particular, the facts of the case were very different from the case of *Champ Prestige International Ltd v China City Construction (International) Co Ltd* [2020] HKCFI 355 (not reported by LexisNexis®UK), where only one out of the many issues between the parties fell within the scope of the arbitration agreements. Also, the court considered that the joinder of the non-parties to the arbitration agreement was not necessary for the petition because the only relief sought by the petitioner was a winding-up order against the Company. Even with a joinder, those parties may choose to remain neutral. The undertaking by the non-parties that they would agree to be bound by the findings of the tribunal in the arbitration also seemed to have provided additional comfort to the court for granting the stay

The court considered that the arbitration tribunal could resolve and determine the disputes raised by the plaintiff in the arbitration, and the court would then consider the findings and determinations made by the tribunal in deciding whether or not the Company should be wound up.

Case details

- Court: Hong Kong Court of First Instance
- Judge: The Honourable Madam Justice Linda Chan
- Date of judgment: 22 November 2021

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