

跨境清盘 - 上诉之三项核心要求

Shandong Chenming Paper Holdings Limited v Arjowiggins HKK 2 Limited – CACV 158/2017 (date of judgment 5 August 2020)¹

山东晨鸣纸业集团股份有限公司与 Arjowiggins HKK 2 Limited 案 – CACV 158/2017 (判决日期: 2020 年 8 月 5 日)

Introduction

简介

The three core requirements are factors relevant to the exercise of the Court's discretion to wind up a foreign incorporated company. In this case, the Court of Appeal considered the second core requirement. Despite the fact that Shandong Chenming is a Hong Kong listed PRC incorporated company with no assets in Hong Kong, this does not stop winding up petition from being presented in Hong Kong against it for its failure to honour an arbitration award.

三项核心要求是与法庭行使酌情权向外国公司作出清盘命令的相关因素。在本案中，上诉法院审议了第二项核心要求。尽管山东晨鸣纸业作为在香港上市的中国内地企业，虽然其在香港并没有任何资产，但仍可因其没有支付某项仲裁裁决所判定的款额而在香港被清盘。

The three core requirements

三项核心要求

The Court's jurisdiction to wind up a foreign incorporated company under statute² is discretionary, and the three core requirements are the Court's self-imposed factors relevant to the exercise of such discretion. 法庭依据法规对一家外国公司进行清盘时可行使酌情司法管辖权，而三项核心要求则是法庭在行使该相关酌情权时自行设定的因素。

The three core requirements as approved by the Court of Final Appeal in the case of Kam Leung Siu Kwan v Kam Kwan Lai (2015) 18 HKCFAR 501 (the "Yung Kee case") are as follows:

终审法院援引 *Kam Leung Siu Kwan v Kam Kwan Lai (2015) 18 HKCFAR 501* ("Yung Kee" 案) 一案中总结的适用原则，将法院行使酌情司法管辖权的三项核心要求归结如下：

1. There must be a sufficient connection with Hong Kong, but this does not necessarily have to consist in the presence of assets within the jurisdiction;
有关公司必须与香港有充分的联系，但并非必须在香港拥有资产；
2. There must be a reasonable possibility that the winding up order would benefit those applying for it; and
该清盘令有促使申请人获益的合理可能；及
3. The court must be able to exercise jurisdiction over one or more persons in the distribution of the company's assets.
在分配该公司资产的过程中，法庭必须能够对一名或多名人士行使司法管辖权。

Background

背景

This is an appeal case in respect of the second core requirement.
这是与第二个核心要求相关的上诉案件。

¹ Please refer to - https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=129977&currpage=T

² sections 327(1) and (3) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32)

("Shandong Chenming") is a PRC company listed in both Shenzhen and Hong Kong, but has no assets and/or business in Hong Kong. Based on an arbitral award which the Court had granted leave to be enforced in Hong Kong, Arjowiggins HKK 2 Limited ("Arjowiggins") served a statutory demand on Shandong Chenming. Shandong Chenming then sought an order from the Court declaring that the three core requirements were not satisfied. The declaration, if granted, would effectively restrain Arjowiggins from issuing a winding up petition against Shandong Chenming in Hong Kong.

山东晨鸣纸业控股有限公司（“山东晨鸣”）是一家在深圳和香港双重上市的中国内地企业，但其在香港并没有任何的资产和/或业务。根据香港原讼法庭准予在香港强制执行的仲裁裁决，Arjowiggins HKK 2 Limited（“Arjowiggins”）向山东晨鸣送达法定要求偿债书。山东晨鸣随后向法院申请裁定声明其并不符合三项核心要求之规定。如果此项声明获得法院的批准，将能有效地阻止 Arjowiggins 在香港提交清盘呈请。

Shandong Chenming was able to show it was solvent with substantial assets and business in the PRC. It did not dispute that the arbitral award was payable, and only contended that the second limb of the three core requirements was not satisfied (namely that Arjowiggins would benefit from a winding up order in Hong Kong). It argued that a Hong Kong liquidator would achieve nothing of value in the PRC and that a winding up order in Hong Kong would be a futile exercise. As a result it said, the proper course for Arjowiggins would be to enforce the arbitral award in the PRC.

山东晨鸣能够证明其在中国内地拥有大量资产和业务并具备偿付能力。其没有就仲裁裁决提出异议但拒绝支付赔偿，并争辩其不符合三项核心要求中的第二项（即在香港发出清盘令是否会令 Arjowiggins 受惠）。因此，及时将其在香港清盘，清盘人亦无法做到任何事情，因此，发出清盘令将是“徒劳之举”。亦即，Arjowiggins 的正确做法应该是在中国内地执行仲裁裁决。

Harris J held that (1) the Arjowiggins's leverage against Shandong Chenming arising out of the prospect of a winding up order is capable of satisfying the second core requirement; and (2) the circumstances of the case would justify moderation of that requirement. Please see our previous client alert on Harris J's decision:

[Cross border insolvency – The three core requirements post Yung Kee](#)

夏利士法官认为：（1）Arjowiggins 能够从清盘呈请或委任清盘人所造成的杠杆效果中获益，因此，其符合第二项核心要求的相关规定；（2）根据案件的具体情况，法庭有理由对该三项核心要求作出适度的调整。关于夏利士法官的判决，阁下亦可参阅我们之前发布的资讯：[Cross border insolvency – The three core requirements post Yung Kee](#)。

Can the second core requirement be moderated?

第二项核心要求是否可减弱？

Hon Barma JA delivered the judgment. The Court of Appeal decided that the second core requirement cannot be moderated.

议员 Barma JA 表明了他的看法。第二项核心要求不可被减弱。

In Re China Medical Technologies Inc [2018] HKCA 111, the Court of Appeal³ concluded that the third core requirement could be dispensed with in a suitable case⁴. That conclusion was based on the obiter expressed by the Court of Final Appeal in the Yung Kee case that the second core requirement is always essential and often sufficient.

在 Re China Medical Technologies Inc [2018] HKCA 11 一案中，上诉法院归结认为，在适当的情况下，第三项核心要求可以被免除。这一结论是基于终审法院在镛记清盘案的判决而得出，即第二项核心要求是始终必不可缺的且通常是充分的。

The Court of Appeal considered that it was common for the Court to adopt self-imposed constraints on the exercise of its discretion which provide predictability as to how the discretion is likely to be exercised. The Court of Appeal further considered that there would seldom be circumstances where it would be justified to wind up a company which could provide no reasonable prospect of any benefit to the petitioner.

Benefits from a winding up order?

从清盘中获益？

The benefit to Argowiggins was described by Harris J as being: 夏利士法官认为 Argowiggins 将从清盘中获得的受惠有：

"... the leverage created by the prospect of a winding up petition, or the appointment of a liquidator and the steps a liquidator may take to recover assets even if such steps are problematic..."

³ Differently constituted but the judgment was also delivered by Hon Barma JA

⁴ Based on the view expressed by the Court of Final Appeal in Kam Leung Siu Kwan v Kam Kwan Lai (2015) 18 HKCFAR 501

“。。。清盘申请或是任命一个清盘人以及清盘人为追回资产而可能采取的步骤可能引发的杠杆效力，即使这些步骤存在问题。。。 ”

Shandong Chenming raised the following arguments which were all rejected by the Court of Appeal:
山东晨鸣提出了以下论点，均被上诉法院驳回：

1. Arjowiggins' leverage was no more than the pressure imposed on Shandong Chenming to pay the debt in order to avoid the seriously adverse consequences of a winding up order. If Arjowiggins did obtain a benefit (i.e. payment of the debt owed), the winding up process would have to be terminated.
Arjowiggins的杠杆效力无非是对山东晨鸣施加压力，要求其偿还债务，以避免因清盘令带来的严重不利影响。如果Arjowiggins确实从中获得了受惠（例如：收回所有欠款），则清盘程序应即时终止。
2. The benefit which the Companies Judge found should not be taken into account when considering the second core requirement:
在考虑第二项核心要求是否适用时，不应以公司的利益作为判断的依据：
 - i. As winding up has the nature of a collective remedy for creditors as a class, it is necessary for the benefit available to a petitioner to be one that benefits not just himself, but all the other creditors.
由于清盘对债权人而言具备集体救济的属性，因此上诉人将可获得的利益不应仅仅使他本人受益，而应使所有其他债权人亦可从中受益；
 - ii. The making of a winding up order would not only benefit the other creditors, but would be a detriment to them and other stakeholders.
清盘令的颁布不仅有利于其他债权人，且会对其与其他持份者的关系造成损害；
 - iii. The Court should be very reluctant to wind up an evidently solvent company.
法院应该非常不情愿关闭一家显然有偿付能力的公司。

The Court of Appeal found that:
上诉法院裁定：

1. There was a real benefit to Arjowiggins in the making of a winding up order against Shandong Chenming. The benefit was not affected by the possibility that Arjowiggins might obtain the benefit of payment of its award at an earlier stage. While it is improper to seek to use a winding up petition to pressure a company into payment of a disputed debt, a petitioner is entitled to present a winding up petition where the debt is undisputed or indisputable and cannot be said to be acting improperly.
对山东晨鸣下达清盘令，确实可以让Arjowiggins受惠。Arjowiggins可能可以在较早的时候获得赔偿。使用清盘申请来压逼公司偿付有争议的债务并非恰当，但如果该债务是确实存在或无可争辩的，且该债务的形成是基于正当的行为，上诉人则有权有权提出清盘的申请。
2. It was clear from the Yung Kee case that only a benefit of a winding up order to the petitioner is required but not a benefit to all the creditors.
从铺记清盘案中可以看到，清盘令只需要对上诉人有利，而不需要对所有债权人有利。
3. The present appeal concerns whether the Court should exercise its jurisdiction over Shandong Chenming under s327 of Cap 32. Whether a solvent company should be wound up for refusing to pay its indisputable debt concerns a different discretion which arises only after the Court has decided it has jurisdiction over the solvent foreign company.
本上诉涉及法院是否应根据第32章第327条对山东晨明行使管辖权。一家有偿付能力的公司是否应因拒绝偿付其无可争议的债务而被清盘，这涉及到只有在法院裁定其对有偿付能力的外国公司拥有管辖权之后才会出现的不同的裁量权。

The Court of Appeal therefore dismissed the appeal, which means that Arjowiggins can present a winding up petition against Shandong Chengming in Hong Kong based on the unsatisfied arbitration award.
因此，上诉法院驳回了上诉，这意味着 Arjowiggins 可以依据未解决的仲裁裁决，在香港呈请对山东晨鸣的清盘申请书。

Takeaway points

总结

1. The Court of Appeal confirmed that the second core requirement (i.e. reasonable benefit of a winding up order to the petitioner) cannot be moderated and is always necessary.
上诉法院确认，第二项核心要求（即清盘令对请愿人的合理利益）不能被减弱，而且总是必要的。
2. In appropriate circumstances, foreign companies (with sufficient connection to Hong Kong) seeking to evade payment of a judgment debt and/or arbitral award may risk being wound up by the Hong Kong Court.
在适当的情况下，外国公司（与香港有足够的联系）试图逃避支付已判决债务和/或仲裁裁决可能会受到香港法院的清盘。

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