CAREY OLSEN

The interaction between winding up petitions and arbitration agreements in the British Virgin Islands / BVI的清盘申请和仲裁的相互影响

Service area 服务范围 / Dispute Resolution and Litigation, Restructuring and Insolvency 争议解决与诉讼, 重组与破产
Legal jurisdictions 司法管辖 / British Virgin Islands, Hong Kong 英属维尔京群岛, 香港
Date 日期 / July 2020 2020年7月

The relationship between arbitration clauses and winding up proceedings is a contentious issue in many jurisdictions and the debate shows no sign of abating. In a recent case, *Rangecroft Ltd v Lenox International Holdings Ltd*[1], the BVI Commercial Court has further clarified the effect of an arbitration agreement on creditor's winding up proceedings pursued on the basis of a company's insolvency.

有关仲裁条款和清盘程序之间的关系在不同管辖一直都存在争议。在最近的案件Rangecroft Ltd v Lenox International Holdings Ltd中[1]，BVI法院进一步澄清仲裁协议对于债权人基于公司破产而欲提起清盘的影响。

The basic facts of this case were that the creditor, Rangecroft Ltd, made an application for the appointment of a liquidator to the debtor, Lenox International Holdings Ltd, on the basis that the debtor was unable to pay its debt as they fell due. The debtor disputed that the debt was repayable and brought cross claims against the creditor.

案件背景为Rangecroft Ltd以债权人身份提出申请向债务人Lenox International Holdings Ltd任命清算人，理由为其无法在债权到期后还款。债务人提出异议，表明其有能力清偿款项，并对债权人提出交叉诉讼。

The loan agreement between the debtor and the creditor contained a wide arbitration clause which covered "*any disputes arising out of or connected with this Agreement, including a dispute as to the validity, existence or termination of this Agreement or this Clause 20 or any non-contractual obligation arising out of or in connection with this Agreement*". It was not controversial that all of the debtor's defences and cross claims fell within the scope of the arbitration clause.

债务人与债权人签订的贷款协议中包括仲裁条款，包含 "任何有关本协议的争议，包括本协议的有效性，存在或终止，或是条款20或任何由本协议引起的非合同义务" 。无疑债务人提出的抗辩和交叉诉讼落入仲裁条款的范围。

It is established in the BVI that the mandatory stay provision under section 18(1) of the Arbitration Act 2013, which is equivalent to section 9(4) of the Arbitration Act 1996 (UK), does not apply to winding up proceedings on the basis that arbitration agreements are designed to resolve disputes between the contracting parties and do not cover collective remedies such as winding up[2]. Though the mandatory stay does not apply, the court retained a wide discretion under section 162 of the Insolvency Act 2003 to stay the proceedings and to require the parties to resolve the dispute by arbitration[3]. The key issue in this case was whether the Court should exercise its discretion to grant a stay.

根据判例BVI 2013年仲裁法第18(1)条（与英国1996年仲裁法第9(4)条类同）的中止程序规定不适用于清盘程序，理由是仲裁协议目的在于解决缔约方之间的争议，并不包括类似清盘这类的集

1 BVIHC (COM) No 37 of 2020, unreported 未报告, *6 July 2020* 2020年七月六日
2 C-Mobile Services Limited v Huawei Technologies Co Limited BVIHCMAP 2014/0017, unreported 未报告, *15 September 2015* 2015年九月十五日; *Jinpeng Group Ltd v Peak Hotels and Resorts Ltd, BVIHCMAP 2014/0025 and 2015/0003, unreported* 未报告, *8 December 2015* 2015年十二月八日 .
3 Ibid. 同上

体救济权利[2]。虽然强制中止不适用于此，法院根据2003年破产法第162条拥有酌情权暂停清盘程序，并要求双方通过仲裁解决争议[3]。此案的重点在于法院是否应该行使酌情权暂停清盘程序。

In exercising its discretion, the Commercial Court considered that (i) the creditor had, without good reason, failed to serve a statutory demand, (ii) the debtor only had one creditor which went to the collective nature of the proceedings and (iii) it is more appropriate to have the question whether there exists a genuine and substantial dispute between the parties resolved by arbitration. Having considered these factors, the Commercial Court granted a stay to require the parties to resolve the dispute as to the debt by arbitration.

BVI法院会考虑以下三点决定是否行使酌情权，(i) 债权人没有适当理由未能送达法定还款要求，(ii) 债务人只有一位债权人而未能引起诉讼的集体性质，(iii) 双方是否存在实质和重大的争议需要透过仲裁解决。经过这些考虑后，法院暂停了清盘程序而要求双方通过仲裁解决有关债务的争议。

In reaching its conclusion, the Commercial Court has given considerable weight to the policy considerations behind section 18 of the Arbitration Act. This is in line with the Court of Appeal judgment in C-Mobile, that "*the court must always be astute to ensure that it is giving effect to the terms of the parties' bargain as it relates to their agreed forum for settling their disputes*" [4]. The Commercial Court was of the opinion that if it were to consider whether there exists a genuine and substantial dispute between the parties, it would result in precisely the prejudice section 18 of the Arbitration Act intended to avoid, and thus considered it to be inappropriate for the court to determine whether or not the debt is bona fide disputed on substantial grounds. This case suggests the mere existence of an arbitration agreement between the parties could weigh in favour of granting a stay.

BVI法院在作出此结论前充分考虑了仲裁法第18条的政策考量。这也与上诉法庭在C-Mobile案件中的裁决一致——"法院需保持敏锐的触觉，确保争议双方通过双方拟定的条款解决其争议[4]"。法院认为如果要认定双方是否存在实质和重大的争议反而会引起仲裁法第18条旨在避免的问题，因此法院认为在这情况下不应以实质性理由决定债务是否为真实争议。此案表示只要双方仅存在仲裁协议已有充分理由暂停清算程序。

This marks a further clarification of the approach in the BVI. On the basis of previous decisions, it would perhaps have been expected that the Court would have determined for itself whether there was a genuine and substantial dispute before referring the matter to arbitration. The *Lenox International* decision is therefore necessary reading and illustrates that this area continues to develop.

此案的决定进一步澄清了BVI法院的倾向。因为根据之前的判决，人们可能会认为法院会考虑是否存在实质和重大的争议，而Lenox International 案件的决定说明了法院在这方面观点的发展而值得一读。

As an additional takeaway, for debtors it is crucial that any issues regarding an arbitration clause should be raised when it seeks to set aside the statutory demand. By the time the court was considering the appointment of a liquidator, it would potentially be too late to rely on the arbitration clause if the issue had not been raised in the application to set aside the statutory demand.

作为补充，债务人必须在寻求撤销法定还款要求时提出有关仲裁条款的问题。因为法院考虑是否任命清算人时，由于在撤销法定还款要求的申请中没有提出该问题，这时候再依靠仲裁条款可能已经太迟。

For more information or for a copy of the Court's decisions, please feel free to contact your usual Carey Olsen contact.

如需了解更多资料或取得法院判决的副本，请与您通常的Carey Olsen联络人联系。

4 C-Mobile Services Limited v Huawei Technologies Co Limited, BVIHCMAP 2014/0017, unreported未报告, 15 September 2015 2015年九月十五日

FIND US / 联系我们

Carey Olsen Hong Kong LLP
Suites 3610-13
Jardine House
1 Connaught Place
Central
Hong Kong

T +852 3628 9000
E hongkong@careyolsen.com

Carey Olsen Singapore LLP
10 Collyer Quay #29-10
Ocean Financial Centre
Singapore 049315

T +65 6911 8310
E singapore@careyolsen.com

FOLLOW US / 关注我们

Visit our dispute resolution and litigation team at careyolsen.com

请访问 careyolsen.com 了解我们的争议解决服务

PLEASE NOTE / 请注意