FEBRUARY 2016

UPDATE

BVI Court pitches in on long-running Ku De Ta dispute: the co-mingling of arbitration provisions, disputes and liquidation proceedings

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The recent decision of the BVI Court in the case of Retribution Limited v L Capital KDT Limited BVIHCMAP 2015/78 considers the availability of arbitration stays to winding-up proceedings. This update discusses the case and its importance to the BVI as an international arbitration centre.

Introduction

In *Retribution Limited v L Capital KDT Limited* (BVIHCMAP 2015/78 and 2015/89), the BVI High Court has confirmed that the BVI Arbitration Act 2013 signals the BVI's commitment to providing a modern and comprehensive legal framework for attracting and dealing with arbitral disputes and, save only in limited circumstances, the Court will not allow parties who have agreed to arbitrate their disputes to by-pass an arbitration agreement through the draconian threat of liquidation. The decision is a welcome move for the jurisdiction and serves to highlight the BVI as an emerging centre for international arbitration.

Facts

In 2013, L Capital KDT Limited (LCap) and Retribution Limited (the Company) entered into a shareholder agreement (SHA) which governed the terms of the parties' ownership and control of Kudeta Limited (KDT), a BVI incorporated company. Through their ownership of KDT, the parties owned a number of underlying subsidiary companies, and among the assets owned by the group of companies is Ce La Vi (formerly Ku De Ta Singapore), a restaurant situated in Singapore's iconic Marina Bay Sands resort.

Prior to LCap acquiring an interest in KDT, some of KDT's subsidiaries had been involved in a trade mark dispute over the use of the Ku De Ta trademark in Singapore. Approximately 15 months after LCap's acquisition of shares in KDT, the Singapore Court of Appeal handed down two judgments in the trademark dispute. The Court of Appeal in Singapore overturned the first instance decision, and in so doing found against the subsidiaries, which resulted in consequential awards of damages and costs being made against them. Relying on an indemnity clause in the SHA, LCap sought to claim the damages and costs, which the subsidiary companies had been ordered to pay, from the Company. When payment was not forthcoming, LCap served a statutory demand on the Company.

The Company immediately applied to set aside the statutory demand on the basis that on a proper construction of the indemnity clause there was no debt due and owing as contended for by LCap. Furthermore, the Company argued that in any event the dispute fell within the terms of the arbitration clause contained in the SHA, and accordingly the matter should be stayed pending the resolution of the dispute at arbitration. Prior to the hearing of the Company's application to set aside the statutory demand, LCap applied to appoint liquidators over the Company. The sums claimed and grounds relied on in LCap's application were identical to those set out in its statutory demand and the two applications were heard in tandem.

The Decision

The Company argued that, following the English Court of Appeal's decision in *Saltford Estates (No.2) Limited v Altomart Limited* [2014] EWCA 1575, if the Court was satisfied that there was a dispute which fell

within the terms of the arbitration agreement, the Court, exercising its jurisdiction consistently with the legislative policy embodied in section 18 of the BVI Arbitration Act 2013 Act (which is drafted in similar terms to section 9 of the English Arbitration Act 1996), should exercise its discretion and dismiss the application to appoint liquidators, or order a stay of the proceedings pending arbitration.

In its judgment, the Court noted that the introduction of section 18(1) of the BVI Arbitration Act was designed to provide:

> 'a comprehensive legal and modern framework for attracting and dealing with arbitral disputes from around the world, and to provide the platform from which to launch the BVI as an international arbitration centre. Furthermore, section 18(1) was intended specifically to limit the jurisdiction and power of the Court to intervene in and determine matters which clearly fall within the four corners of an arbitration agreement, by which the parties have decided, as a matter of contract, to have all disputes determined only by arbitration, however minor or indefensible their dispute or difference may be.'

The difficulty for the Company came in the form of the BVI Court of Appeal's decision in *Jinpeng Group Limited v Peak Hotels and Resorts Limited* (BVI Civil Appeals Nos:25 of 2014 and 3 of 2015) in which the BVI Court of Appeal declined to follow the principles in *Saltford Estates* and grant an automatic stay or dismissal of winding up proceedings solely because the respondent disputed the debt and that dispute fell under an applicable arbitration agreement. In Peak Hotels, the Court of Appeal held that the principle of a debt being disputed on genuine and substantial grounds was too firmly a part of BVI jurisprudence to apply the reasoning in *Saltford Estates*.

Accordingly, whilst the High Court had sympathy with the Company's submission that an automatic arbitration stay should be granted, it held that it was bound by the Court of Appeal's decision in Peak. It was thus necessary for the Court to go on to consider whether the debt was disputed on genuine and substantial grounds.

Applying the test formulated in the case of Sp*arkasse Bregenz Bank AG v Associated Capital Corporation* (BVI Civil Appeal No.10 of 2002), which is now settled law in the BVI, the Court held that it was not the role of the Companies Court to construe contractual terms in an agreement which are clearly relevant to the issue of whether the debt is disputed on genuine and substantial grounds unless the language is capable of only one interpretation, which supports the existence of the debt.

Having concluded that the Company's arguments on contractual interpretation and the construction of the indemnity clause were not specious or frivolous, and that the debt was disputed on genuine and substantial grounds, the Court went on to revisit the issue of the relevance of the arbitration clause in the SHA.

Referring to the discretion afforded under section 167(1)(b) of the BVI Insolvency Act 2003, the Court went on to state that if it was wrong in its conclusion that the debt was disputed on genuine and substantial grounds, it would nevertheless have refused to appoint liquidators over the Company in the circumstances of this case because the parties had expressly agreed to resolve all of their disputes through the process of arbitration and not through the draconian step of applying to wind up the Company. Recognising that the BVI has now moved into the international arena as 'a new and emerging centre for international arbitration', the role of the Courts to decide disputes caught by an arbitration agreement 'have proportionately been diminished and limited' and in the view of the Court 'it behoves the Courts, including this Commercial Court, to support this process and not to hinder, in any way, its development and concretization, except in the most clearest of circumstances, which this case is not'.

Conclusion

The BVI Arbitration Act has been in force for just over a year, and this judgment clearly signifies the BVI's emergence as a centre for international arbitration. Although the decision is not authority for the proposition set out in *Saltford Estates*, namely that an application to appoint liquidators over a company must be stayed in every case where the dispute is governed by an arbitration clause save in exceptional circumstances, it has nonetheless confirmed that, except in the clearest of circumstances, the Court will exercise its discretionary powers to stay or dismiss a winding up petition in order to uphold the parties' bargain to arbitrate. This is a welcomed approach from the BVI Courts.

Mourant Ozannes acted on behalf of the successful Company.

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