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UK Privy Council Overturns Longstanding English Position Regarding Test For Staying Liquidation Proceedings In Favour Of Arbitration

Sian Participation Corp (In Liquidation) v Halimeda International Ltd **[2024] UKPC 16**

19 July 2024

LEGAL UPDATE

In this Update

In *Sian Participation Corp (In Liquidation) v Halimeda International Ltd* [2024] UKPC 16, the UK Privy Council overturned longstanding English authority on the interplay between insolvency and arbitration, by unanimously holding that where a dispute about a debt is covered by an arbitration agreement, liquidation proceedings in respect of the debt should not be stayed or dismissed in favour of arbitration, unless the debt is disputed on "genuine and substantial grounds".

This update discusses the practical implications of this Privy Council decision.

INTRODUCTION

Where a dispute is alleged about the underlying debt in a liquidation application which is covered by an arbitration agreement, when should the application be stayed or dismissed in favour of arbitration? This question necessitates an examination of where the line between insolvency and arbitration should be drawn, which has been the subject of inconsistent judicial treatment and prolific academic commentary worldwide. This discord stems from these two areas of law being undergirded by seemingly conflicting public policy perspectives. On the one hand, certain courts take the position that liquidation proceedings should be stayed or dismissed in favour of arbitration, as long as the debt is simply not admitted. On the other hand, certain courts take the view that liquidation proceedings should not be stayed or dismissed in favour of arbitration, unless the debt is genuinely disputed on substantial grounds.

In the seminal decision of *Sian Participation Corp (In Liquidation) v Halimeda International Ltd* [2024] UKPC 16 ("***Sian Participation***"), the Judicial Committee of the Privy Council in the UK ("**Privy Council**") overturned longstanding English authority in this regard. It unanimously held that liquidation proceedings should not be stayed or dismissed in favour of arbitration unless the underlying debt is disputed on "genuine and substantial grounds".

This update discusses the practical implications of this Privy Council decision.

BACKGROUND

The respondent, Halimeda International Ltd ("**Halimeda**"), advanced a term loan of USD 140m to the appellant, Sian Participation Corp ("**Sian**"), pursuant to a Facility Agreement dated 7 December 2012 ("**Facility Agreement**"). The Facility Agreement contained an arbitration agreement which provides for disputes to be resolved by arbitration in accordance with the London Court of International Arbitration Rules.

Sian failed to repay the loan. In September 2020, Halimeda applied in the British Virgin Islands ("**BVI**") courts to have liquidators appointed in respect of Sian on the basis that Sian was both cash flow and balance sheet insolvent. As of December 2020, Halimeda claimed an outstanding debt of over USD 226m. Sian disputed that the debt was due and payable on the basis of a cross-claim and/or set-off.

Wallbank J allowed Halimeda's liquidation application, ordering Sian to be put into liquidation. In doing so, Wallbank J applied the prevailing test in the BVI regarding making an order for liquidation where the debt on which the application is based is subject to an arbitration agreement (*ie* that the debt must be disputed on genuine and substantial grounds before the

application can be dismissed or stayed because of an agreement to arbitrate), and held that Sian had failed to show that the debt was disputed on genuine and substantial grounds. On appeal, the Eastern Caribbean Court of Appeal upheld Wallbank J's decision.

Dissatisfied, Sian obtained leave to appeal to the Privy Council. In its appeal, Sian argued that the BVI courts should have followed the decision of the English Court of Appeal in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575 ("***Salford Estates***"), pursuant to which the liquidation application should be stayed or dismissed on the ground that the debt is covered by an arbitration clause, without any requirement to show that the debt was genuinely disputed on substantial grounds. Notably, Sian did not challenge the BVI courts' finding that the debt was not genuinely disputed on substantial grounds, and instead took the position that Halimeda had to first establish its debt by an arbitral award.

THE PRIVY COUNCIL'S DECISION

The Privy Council dismissed Sian's appeal.

KEYPOINT

The Privy Council held that in liquidation applications, where a debtor disputes a debt which is subject to an arbitration agreement, the application will not be stayed or dismissed unless the debt is disputed on "genuine and substantial grounds".

In arriving at its decision, the Privy Council held that the BVI courts should not follow the approach taken by the English courts as set out in *Salford Estates*, which effectively introduced a discretionary stay of liquidation applications even where an insubstantial dispute about the creditor's debt is raised between parties to an arbitration agreement. The Privy Council took this position for the following reasons.

First, a liquidation application does not seek to, and indeed does not, resolve or determine anything about the creditor's claim that it is owed money by the debtor. Hence, a liquidation application does not offend the negative obligation embodied in an arbitration agreement not to seek resolution of a dispute in court.

Secondly, a party to an arbitration agreement seeking the liquidation of a debtor which fails to pay the debt does not offend any of the policies underlying the arbitration legislation implementing the UNICTRAL Model Law on International Commercial Arbitration ("**Model Law**"). There is a policy of insolvency that liquidation should not be pursued against a company which genuinely disputes the debt on substantial grounds – where there is such a dispute, the creditor should first establish his claim

by having that dispute resolved in its favour through court or arbitration proceedings. This is entirely consistent with the policy of arbitration under the Model Law providing for the stay of any court process to refer disputes covered by an arbitration agreement to arbitration.

Thirdly, none of the general objectives of arbitration legislation, namely efficiency, party autonomy, *pacta sunt servanda* and non-interference by the courts, are offended by allowing liquidation to be ordered where the creditor's unpaid debt is not genuinely disputed on substantial grounds. This is because requiring the creditor to arbitrate where there is no genuine or substantial dispute about the debt before seeking a liquidation adds delay and expense for no good purpose. Further, party autonomy and *pacta sunt servanda* are not offended when liquidation is ordered, as a creditor does not promise not to seek liquidation. Finally, a court does not, by ordering liquidation, interfere with any potential arbitration, since liquidation does not resolve anything about the debt.

Fourthly, there is nothing "anti-arbitration" about the approach requiring a debt to be disputed on "genuine and substantial grounds" before a liquidation application is stayed in favour of arbitration. Creditors are more likely to agree to include an arbitration clause if it does not impede a liquidation where there is no genuine or substantial dispute about the debt.

Significantly, the Privy Council went one step further to direct that *Salford Estates* should no longer be followed in England and Wales. The Privy Council also held that the same test applies to situations where the debt is subject to an exclusive jurisdiction clause, since the underlying policy in relation to arbitration clauses and exclusive jurisdiction clauses are the same.

COMMENTARY

The Privy Council's decision in *Sian Participation* effectively imposes a higher threshold for debtors in the BVI, and indeed in England and Wales, seeking to defeat a liquidation application where an arbitration agreement or exclusive jurisdiction clause is present. Nevertheless, the Privy Council was careful to emphasise that its decision is consistent with and balances the policies underlying insolvency and arbitration.

The development is significant because it overturns a decade of settled English law on the interplay between insolvency and arbitration, which has largely been endorsed by the Singapore Courts as well as courts in other jurisdictions such as Malaysia. It remains to be seen how the courts in these jurisdictions will react to the decision in *Sian Participation* when the issue subsequently arises for determination. Generally, there is something to be said for the harmonisation of laws across all jurisdictions. For instance, Singapore's adoption of the UNCITRAL Model Law on Cross-Border Insolvency in 2017, as part of Singapore's push to internationalise

its restructuring and insolvency regime, was a welcome move towards co-operation and co-ordination between jurisdictions in the insolvency landscape. However, such uniformity across all jurisdictions may not be necessary as regards the interplay between insolvency and arbitration, so long as an appropriate balance is ultimately struck between the various policies underlying these regimes.

In Singapore, the Courts have adopted the lower *prima facie* standard of review favoured in *Salford Estates*, but have critically introduced the doctrine of abuse of process as a control mechanism against abusive conduct by debtors. Based on existing caselaw, the Singapore Courts will grant a stay or dismissal of liquidation proceedings in favour of arbitration as long as there is a valid arbitration agreement between the parties and the dispute falls within the scope of the arbitration agreement, provided the dispute is not being raised by the debtor in abuse of the Court's process: see the Singapore Court of Appeal decision in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158. This test is consistent with the broadly "pro-arbitration" stance taken by the Singapore Courts, while concurrently addressing with precision concerns about the potential abuse by debtors of arbitration stays. This test will continue to apply to all liquidation proceedings in Singapore, unless and until the Singapore Court of Appeal revisits this issue in a future case (in light of *Sian Participation*).

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