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Commercial

27 June 2024

Privy Council redraws the boundary between arbitration and insolvency in *Sian Participation v Halimeda International Ltd* [2024] UKPC 16

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Weishi Yang examines the recent Privy Council decision in *Sian Participation Corp (In Liquidation) v Halimeda International Ltd* [2024] UKPC 16, in which the court held that winding up petitions will no longer be subject to an automatic stay where the disputed debt is subject to an arbitration clause or exclusive jurisdiction clause.

BACKGROUND

1. Pursuant to a Facility Agreement dated 7 December 2012, Halimeda International Ltd (the "**Respondent**") advanced a loan of USD 140 million to Sian Participation Corp (the "**Appellant**"). The loan was not repaid, and by December 2020, the outstanding debt was over USD 220 million (the "**Debt**").

2. The Respondent applied in the BVI courts to have liquidators appointed in respect of the Appellant, on the basis that the Appellant was both cash flow

and balance sheet insolvent. On hearing the application, Wallbank J held that the Debt was not genuinely disputed on substantial grounds. That finding has not been challenged by the Appellant.

3. The English courts have held that where the disputed debt is subject to an arbitration agreement, the winding up petition will be stayed, regardless of whether the debt is genuinely disputed on substantial grounds. In this case, the Facility Agreement contained an arbitration agreement at clause 14.1, referring *"any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement"* to arbitration in accordance with the LCIA Rules.

4. Thus, the key issue before the Privy Council was:

> *"As a matter of BVI law, what is the correct test for the court to apply to the exercise of its discretion to make an order for the liquidation of a company where the debt on which the application is based is subject to an arbitration agreement and is said to be disputed and/or subject to a cross-claim (notwithstanding that dispute is not on genuine and substantial grounds)?"* (*Sian Participation*, [26(1)])

SALFORD ESTATES

5. Prior to this decision, the leading authority in England and Wales was *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575 (*"**Salford Estates**"*), wherein the claimant sought to recover service charges under a lease which contained an arbitration clause. The lessee company failed to pay, and the claimant presented a winding up petition. The debt was not genuinely disputed on substantial grounds. Nonetheless, the lessee applied for the petition to be stayed under section 9 of the Arbitration Act 1996 (the "**1996 Act**").

6. Section 9 of the 1996 Act requires the court to stay legal proceedings where the claim (or counterclaim) subject to the proceedings is to be referred to arbitration:

> *"(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.* [...]
>
> *(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.*"

7. The Court of Appeal in *Salford Estates* held that a winding up petition did not fall within the meaning of *'claim'* in section 9 of the 1996 Act. In particular, the Court drew a sharp distinction between (i) a claim to recover the unpaid debt, and (ii) a creditor's winding up petition, where the unpaid debt was merely evidence of the debtor's insolvency (*Salford Estates*, [26]-[38]).

8. However, the Court of Appeal held that, in the exercise of its discretion under section 122(1) of the Insolvency Act 1986, the court should either dismiss or stay any winding up petition where the disputed debt is subject to an arbitration agreement, regardless of any genuine and substantial dispute as to the debt, and save for *"wholly exceptional circumstances"* (*Salford Estates*, [39]). The Court of Appeal reasoned that to stay liquidation proceedings in these circumstances would be to *"exercise its discretion consistently with the legislative policy embodied in the 1996 Act"* (*Salford Estates*, [39]).

9. Following the decision of *Salford Estates*, first instance English courts will generally stay winding up proceedings where the disputed debt is subject to an arbitration agreement, regardless of any genuine and substantial dispute

as to the debt (*Sian Participation*, [77]-[78]). This approach has been followed in other common law jurisdictions, including Malaysia and Singapore, and has been recently endorsed in Hong Kong (*Sian Participation*, [80]-[85]).

JUDGMENT

10. The Privy Council in *Sian Participation Corp (In Liquidation) v Halimeda International Ltd* [2024] UKPC 16 ("***Sian Participation***"), consisting of Lords Reed, Lloyd-Jones, Briggs, Hamblen, and Burrows, found that *Salford Estates* had been wrongly decided and held that, regardless of the existence of an arbitration agreement, the test was whether the debt was disputed on genuine and substantial grounds.

11. Lords Briggs and Hamblen, giving the only judgment of the Privy Council, agreed that winding up petitions did not fall within section 9 of the 1996 Act (*Sian Participation*, [88]). However, they also held that the 1996 Act's legislative policy did not require that a winding up petition should be stayed pending arbitration where the debt was not genuinely disputed on substantial grounds:

    i. An arbitration agreement consists of both a positive and a negative obligation. The positive obligation is to refer disputes to arbitration for resolution. The negative obligation is to not have disputes resolved by any court process. However, a winding up petition does not resolve or determine the petitioner's claim that it is owed money by the company. It is therefore not contrary to that negative obligation (*Sian Participation*, [88]-[89]).

    ii. None of the general objectives of arbitration – efficiency, party autonomy, *pacta servanda*, and non-interference by the courts – are offended by winding up of a company where the debt in question not genuinely disputed on substantial grounds. On the contrary, requiring a

creditor to arbitrate where there is no genuine or substantial dispute adds delay and expense with no good purpose (*Sian Participation*, [92]).

iii. This decision is not *"anti-arbitration"*. Creditors are more likely to agree to including arbitration clauses where doing so does not impede a liquidation where there is no genuine or substantial dispute about a debt (*Sian Participation*, [93]).

12. As a result, the Privy Council held that the Court of Appeal in *Salford Estates* had taken an *"impermissible and unexplained leap in* [...] *reasoning"* to assume that the legislative policy of the Arbitration Act 1996 required winding up proceedings to be stayed where the disputed debt is subject to an arbitration agreement (*Sian Participation*, [94]). The Privy Council held that this also applied to debts subject to exclusive jurisdiction clauses (*Sian Participation*, [126]).

13. However, the Privy Council noted that this would depend on the content of the arbitration agreement or exclusive jurisdiction clause. Where, for example, an arbitration agreement or exclusive jurisdiction clause was framed in terms which applied to a winding up petition, different considerations would arise (*Sian Participation*, [127]).

WIDER RELEVANCE

14. While a decision on BVI law, the Privy Council expressly held that this decision was also one on English law, and directed that *Salford Estates* should no longer be followed in England and Wales:

> *"Our conclusion that Salford Estates was wrongly decided was not merely a conclusion about the law of the BVI. It was a conclusion about English law, even though informed in its reasoning by the study of overseas decisions and academic writings, as decisions about English law often are. The Board is aware that it is the current practice of the Companies Court in England and*

> *Wales to follow Salford Estates in exercising a supposed discretion to stay or dismiss a creditors' winding up petition on the ground that the petitioner's debt is covered by an arbitration clause, without being shown to be genuinely disputed on substantial grounds. The Board's view is that this should cease and it so directs."* (*Sian Participation*, [125])

15. It is also expected that *Sian Participation* will have a significant impact in other common law jurisdictions, such as Malaysia and Singapore, which currently follow the *Salford Estates* approach to winding up petitions.

CONCLUSION

16. The result of this decision is that winding up petitions will no longer be subject to an automatic stay where the debt is subject to an arbitration agreement or exclusive jurisdiction clause. Where the relevant debt is disputed, the correct test for the English and BVI courts to apply is whether the debt is genuinely disputed on substantial grounds.

17. The full judgment can be found here.

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27 June 2024