Kluwer Arbitration Blog

Sian v Halimeda: Privy Council Revisits Intersection Between Insolvency and Arbitration

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On 19 June 2024, the Privy Council issued its decision in *Sian Participation Corp (In Liquidation) v Halimeda International Ltd* [2024] UKPC 16, holding that winding up proceedings should not be automatically stayed or dismissed by the court where the disputed debt is subject to an arbitration agreement. Instead, the correct test to be applied by the court in the exercise of its discretion is whether the relevant debt is disputed on genuine and substantial grounds.

In so doing, the Privy Council overruled the leading English authority *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575 ("*Salford Estates*") on this issue. Although Privy Council decisions are not binding precedents upon the English courts and are of persuasive authority only, in this case, the Privy Council exceptionally gave a direction under *Willers v* Joyce (No 2) [2016] UKSC 44, whereby it directed the English courts to adopt the new approach in *Sian* instead.

This blog post sets out the factual and procedural background to the decision, an analysis of the *Salford Estates* and *Sian* approaches, and the practical implications of the decision (for a discussion on the impact of the decision on Hong Kong and Singapore laws, see our previous coverage here).

Factual and Procedural Background

The present dispute arose out of an unpaid debt incurred by Sian Participation Corp ("Appellant") to Halimeda International Ltd ("Respondent"). Pursuant to a facility agreement dated 7 December 2012 ("Facility Agreement"), the Respondent advanced a term loan of USD 140 million to the Appellant.

The Facility Agreement contained a widely drawn arbitration agreement, which provided that "any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement" shall be referred to arbitration (the "Arbitration Agreement").

The Appellant failed to repay the loan. The Respondent demanded repayment of USD 226 million ("Debt"), which the Appellant disputed was payable. The Respondent made an application for liquidators to be appointed over the Appellant, which was granted by Wallbank J on the basis that the Appellant had failed to show that the Debt was disputed on genuine and substantial grounds.

Having failed in an appeal to the Eastern Caribbean Court of Appeal, the Appellant sought leave to appeal to the Privy Council. The key issue to be determined by the Privy Council was the correct test that should be applied by the court in exercising its discretion in making an order for the liquidation of a company, where the disputed debt is subject to an arbitration agreement.

The *Salford Estates* Approach

Under the *Salford Estates* approach, winding-up proceedings were automatically stayed or dismissed in favour of an arbitration agreement where the relevant debt is disputed.

Salford Estates concerned unpaid expenses under a lease which contained a wide and comprehensive arbitration agreement. Although the lessor had obtained an arbitration award in respect of unpaid expenses under the lease, it claimed further sums from the lessee, alleging that they were due based on the reasoning of the award. Upon the lessee's failure to repay these sums, the lessor presented a winding-up petition, which the lessee applied to strike out or stay based on section 9 of the English Arbitration Act 1996 ("1996 Act"). Section 9 of the 1996 Act contains a mandatory stay provision which requires the court to stay legal proceedings brought, whether by way of a claim or cross-claim, in respect of a "matter" that is subject to an arbitration agreement.

The English Court of Appeal held in favour of the lessee. As a starting point, it held that section 9 of the 1996 Act did not apply because a winding-up petition is not a "claim" for repayment of the disputed debt within the meaning of the 1996 Act. The disputed debt was simply evidence that the debtor may be insolvent.

This was, however, not the end of the matter. Consistent with the legislative policy embodied in the 1996 Act to exclude the court's jurisdiction to give summary judgment, the court held that it is "entirely appropriate" that it should, save in wholly exceptional circumstances, order an automatic stay or dismissal of winding up proceedings pursuant to its discretion to wind up a company under section 122(1) of the English Insolvency Act 1986. The court was concerned that to hold otherwise would encourage parties to bypass the arbitration agreement between them and the 1996 Act by presenting a winding-up petition.

The *Salford Estates* approach has been broadly followed in other common law jurisdictions such as Singapore and Hong Kong. Notably, the Hong Kong Court of Appeal in the recent decisions of *Simplicity & Vogue Retailing (HK) Co Ltd* [2024] HKCA 299 and *In re Shandong Chenming Paper Holdings Ltd* [2024] HKCA 352 clarified that the court should order an automatic dismissal or stay of winding up proceedings where the disputed debt is subject to an arbitration clause, subject only to exceptions where (i) there was a risk of prejudice to other creditors, or (ii) the supposed dispute about the debt bordered on the frivolous or abusive.

The *Sian* Approach

In *Sian*, the Privy Council unanimously dismissed the appeal and held that *Salford Estates* was wrongly decided. Regardless of the existence of an arbitration agreement, or an exclusive jurisdiction clause for that matter, the correct test to be applied by the court in exercising its discretion in respect of a winding-up petition is whether the relevant debt is disputed by the debtor

on genuine and substantial grounds.

The Privy Council agreed with *Salford Estates* that, as a starting point, a winding up petition is not a "claim" caught by statutory provisions implementing Article 18 of the Model Law, such as section 9 of the 1996 Act, which provides for a mandatory stay of legal proceedings commenced in respect of a "matter" which is subject to an arbitration agreement.

However, the Privy Council disagreed that the legislative intent behind the 1996 Act required the court to exercise its discretion to stay or dismiss a winding-up petition where the relevant debt is not disputed on genuine and substantial grounds:

- First, there is no conflict between a winding-up petition and the obligations contained in an arbitration agreement, which consist of a positive obligation to refer disputes to arbitration for resolution and a negative obligation not to have them resolved by any court process. The negative obligation is not offended by the presentation of a winding-up petition as the court does not resolve a petitioner's claim in a winding-up petition.
- Second, the policies underlying the arbitration legislation which implement the Model Law (such as the 1996 Act) are not offended by a party to an arbitration agreement seeking the liquidation of a debtor party that fails to pay the debt. Under insolvency legislation, there is a policy that the liquidation route should not be pursued or even threatened against a debtor company which genuinely disputes the debt on genuine and substantial grounds.
- Third, none of the general objectives of arbitration legislation, i.e. efficiency, party autonomy, *pacta sunt servanda* and non-interference by the courts, are offended by allowing a winding up to be ordered where the relevant debt is not genuinely disputed on substantial grounds. Quite the opposite, to require a creditor to go through an arbitration process as the prelude to seeking a liquidation only "adds delay, trouble and expense for no good purpose". Moreover, the creditor has not promised to refrain from seeking a liquidation, thus respecting party autonomy.

The Privy Council emphasised that there was nothing "anti-arbitration" in its decision. In particular, a creditor in a loan agreement is much more likely to agree to an arbitration clause if it does not impede a liquidation where there is no genuine or substantial dispute about the debt.

Further, the Privy Council held that the English Court of Appeal's concerns in *Salford Estates* were misplaced, and that there was "an impermissible and unexplained leap" in its reasoning as to the extent of the legislative policy behind the arbitration legislation. In particular:

- Although an arbitration agreement excludes summary judgment as a means to resolving a matter subject to such an agreement, the summary judgment procedure undertaken by the court in assessing whether a debt is disputed on genuine and substantial grounds does not fall within such an exclusion, as it does not resolve a claim by final resolution in a judgment.
- The concern that parties would be tempted to bypass an arbitration agreement or improperly threaten to present a winding-up petition as a means of pressuring a company to pay its debts is treated as an abuse of process, which the courts are familiar with and routinely deal with by ordering indemnity costs against the abusive party.

Conclusion

The Privy Council decision in *Sian* provides welcome clarification on the difficult issues arising

out of the intersection between insolvency and arbitration under English law. Significantly, this decision aligns the English law approach towards both arbitration agreements and exclusive jurisdiction clauses, such that winding up proceedings could only proceed where the relevant debt subject to such agreements or clauses is disputed on genuine and substantial grounds.

This decision is also likely to have wider ramifications on the law in other jurisdictions, such as Singapore and Hong Kong, which have taken a similar approach to *Salford Estates*. The real impact of *Sian* remains to be seen.

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