

Sian of the Time: Privy Council Rejects Salford Estates Approach to Arbitration and Insolvency

In *Sian Participation Corp v Halimeda International Ltd* [2024] UKPC 16, a Privy Council Board comprising Lords Briggs, Hamblen, Burrows, Reed and Lloyd-Jones considered the issue of whether insolvency proceedings should be stayed in circumstances where the subject debt was covered by an arbitration agreement.

By its decision, the Board rejected the longstanding approach in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575 (the "Salford decision"), where the English Court of Appeal held that winding up proceedings should be stayed in favour of arbitral proceedings save for exceptional circumstances. In so finding, the court held that *"none of the general objectives of arbitration legislation... are offended by allowing a winding up to be ordered where the creditor's unpaid debt is not genuinely disputed on substantial grounds. To require the creditor to go through an arbitration where there is no genuine or substantial dispute as the prelude to seeking a liquidation just adds delay, trouble and expense for no good purpose"*.

Factual Background

The respondent, Halimeda International Ltd ("Halimeda"), is a subsidiary of a Russian transportation and logistics group, and the appellant, Sian Participation Corp ("Sian"), is part of the corporate structure through which a minority shareholding in the group was held. Halimeda advanced a term loan of US\$140 million to Sian

under a facility agreement. The loan was not repaid in accordance with its terms and Halimeda issued a demand in the sum of US\$226 million as of December 2020. Sian disputed the debt on the basis of a cross-claim and / or set-off, alleging, among other things, that Halimeda had participated in a corporate raid against the appellant's shareholding in the group, backed and instigated by the Russian State. Halimeda denied the existence of, and its involvement in, the corporate raid.

On 29 September 2020, Halimeda applied to have liquidators over the affairs of Sian on the basis that it was both cash flow and balance sheet insolvent. Sian opposed the application and sought a stay or dismissal of the BVI proceedings on the ground that the facility agreement contained a widely drawn arbitration clause in favour of the London Court of International Arbitration (LCIA). The application was heard by Wallbank J, who held that Sian had failed to show that the debt was disputed on genuine and substantial grounds, and therefore appointed liquidators. After an unsuccessful appeal to the Eastern Caribbean Court of Appeal, Sian applied for leave to appeal to the Privy Council, which was granted on the basis the case raised an arguable point of law of great general or public importance.

Judgment

The Privy Council dismissed the appeal and upheld the decisions of the courts below. The main issue before the Board was whether the courts below should have followed the Salford decision, which held that a creditor's winding up petition should be dismissed or stayed where the debt relied on was subject to an arbitration agreement and was not admitted by the company, even if it was not genuinely disputed on substantial grounds. The Board concluded that the Salford decision was wrongly decided and that it was therefore correct for the courts of the BVI not to follow it.

The Board's reasoning was based on the following considerations:

- (a) The public policies underlying the insolvency and arbitration regimes in the BVI (and in England and Wales) are not in conflict, as a creditor's winding up petition (or liquidation application, in the BVI) does not trigger the mandatory stay provisions of the arbitration legislation, nor does it breach the negative obligation not to commence proceedings in respect of matters covered by the arbitration agreement.
- (b) A petition does not require or involve any pursuit or adjudication of the creditor's claim to be a creditor, either as to liability or quantum, and the court's order does not create any *res judicata* or affect the creditor's right to prove for the debt in the liquidation.
- (c) The court proceeds to make a winding up order only on a provisional assumption that the company is insolvent, which may turn out to be untrue, without that invalidating the liquidation process.
- (d) The court's powers on the hearing of a liquidation application are discretionary, and a creditor with an unpaid debt that is not genuinely disputed on substantial grounds is in substance entitled to an order, as a statutory right, *ex debito justitiae*.
- (e) The legislative policy embodied in the arbitration legislation is that claims or matters

within the scope of an arbitration agreement should be resolved in arbitration and not by the court, but nothing about a debt covered by an arbitration agreement is resolved in winding up or liquidation proceedings in court.

- (f) To require the creditor to go through an arbitration where there is no genuine or substantial dispute as the prelude to seeking a liquidation order would add delay, trouble and expense for no good purpose, and would not promote a pro-arbitration policy.
- (g) None of the additional reasoning in the Salford decision remedies the lacuna as to the supposed extent of the legislative policy, and the concerns expressed about the temptation to bypass an arbitration agreement or the use of an improper threat to present a petition are well-known in the insolvency court and can be treated as types of abuse of process.

The Board also made a *Willers v Joyce* direction, namely that the Salford decision should no longer be followed in England and Wales, and that this decision of the Board, so far as it holds that the Salford decision was wrongly decided, now represents the law of England and Wales. The Board considered that such a direction should be given, as its conclusion that the Salford decision was wrongly decided was a conclusion about English law, and that it was the current practice of the Companies Court in England and Wales to follow the assumed precedent set by it. The Board's view was that this should cease and it so directed. The Board also stated that this direction applies where there is a generally worded arbitration agreement or exclusive jurisdiction clause, and that the presence of such a clause should not lead to the stay or dismissal of the petition unless the debt is genuinely disputed on substantial grounds.

Comment

The judgment of the Privy Council is a significant development in the law of both the BVI and England and Wales, as it clarifies the relationship between insolvency and arbitration in the context of

creditors' petitions for winding up. The judgment reaffirms the traditional approach that a creditor with an undisputed debt is entitled to invoke the collective remedy of liquidation, regardless of whether the debt is subject to an arbitration agreement or an exclusive jurisdiction clause. The judgment also rejects the reasoning and outcome of the Salford decision, which had introduced a discretionary stay of creditors' petitions where an insubstantial dispute about the debt was raised between parties to an arbitration agreement. The judgment brings the position in England and Wales into line with that already in place in the BVI and aligns it with the approach taken in Hong Kong by the Court of Final Appeal.

The judgment is likely to have important implications for creditors and debtors who are parties to arbitration agreements or exclusive jurisdiction clauses, as well as for insolvency practitioners and arbitrators. The judgment restores the creditor's right to seek a liquidation order as a statutory remedy, without having to prove exceptional circumstances or to go through an arbitration where there is no genuine or substantial dispute.

Further Assistance

If you need assistance with a recent claim, our Dispute Resolution & Insolvency team have unparalleled experience providing in-depth, pragmatic and commercial advice with cross-office cooperation and support on all litigation matters.

For further information, please reach out to your usual Maples Group contact or any of the persons listed below.

British Virgin Islands

Matthew Freeman

+1 284 852 3011

matthew.freeman@maples.com

Scott Tolliss

+1 284 852 3048

scott.tolliss@maples.com

Stuart Rau

+1 284 852 3018

stuart.rau@maples.com

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