Arbitration and Insolvency - Where a Genuine Dispute Matters

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In June 2024, the Judicial Committee of the Privy Council ("**Privy Council**") made a decision which will change the way in which the English Courts approach arbitration clauses when resolving disputes involving insolvent parties. *Sian Participation Corp v Halimeda International Ltd [2024] UKPC 16 ("**Sian v HIL**")* decided that a winding-up petition for a disputed debt, which is subject to an arbitration agreement, will only be stayed or dismissed when there is a genuine dispute over the debt on substantial grounds. *Sian v HIL* was an appeal to the Privy Council from the British Virgin Islands ("**BVI**") on a matter of BVI law and traditionally, would not have been strictly binding on the English Courts, however the Privy Council decided that the decision would also be binding on English Courts.

The Facts

The respondent, Halimeda International Ltd ("HIL") advanced a US$140 million loan to Sian Participation Corp ("SPC") in December 2012. Under the facility agreement, the parties agreed that "*any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement*" shall be referred to arbitration at the London Court of International Arbitration. Importantly, this was defined by the Privy Council, as a "*generally worded arbitration agreement*".

In September 2020, following SPC's failure to repay the loan, HIL applied to have liquidators appointed over SPC pursuant to the BVI Insolvency Act 2003. In response, SPC claimed that the debt was disputed because it had a cross claim against HIL in other ongoing proceedings and that it was entitled to set-off its liability for the debt against the sums allegedly due under the cross claim. SPC claimed that because the debt was disputed, the winding-up petition should be dismissed or stayed in line with the decision in *Salford Estates* (see below).

The Previous Position Under English law

In a landmark decision, *Salford Estates (No. 2) Limited v Altomart Limited [2014] EWCA Civ 1575* ("***Salford Estates***"), the English Court of Appeal decided that a winding-up petition should be stayed or dismissed in favour of arbitration, as long as the debt is not admitted. The Court of Appeal held that save in "wholly exceptional circumstances", a stay of the creditor's petition should be granted in favour of arbitration and that it would then be for the relevant arbitral tribunal to determine the validity of the debt.

This principle would apply as long as the debt was disputed. Importantly, it did not matter whether the debtor could demonstrate that it was disputing the debt on genuine grounds or not (e.g. a debtor could simply refuse to admit liability for tactical reasons). In *Salford Estates*, this approach was adopted because a contrary decision may encourage parties to tactically circumvent a mandatory agreement to arbitrate by presenting a winding up petition. The case arguably prioritised arbitration by deciding that courts should first consider the parties' agreement to arbitrate, before

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evaluating whether to exercise its discretion to wind up a company under the Insolvency Act 1986 using traditional insolvency measures where a debt is said to be disputed without substantial grounds.

The Privy Council Decision

In May 2021, Mr Justice Wallbank, the first instance judge in the BVI, delivered judgment, following the traditional insolvency law approach and holding that SPC had failed to show that the debt was disputed on genuine and substantial grounds, and therefore ordered SPC to be put into liquidation. SPC was granted permission to appeal to the Privy Council (having unsuccessfully exhausted the domestic appeals process), on the basis that Mr Justice Wallbank should have followed *Salford Estates* and simply dismissed or stayed the petition in favour of arbitration once SPC had disputed the debt.

The Privy Council dismissed the appeal, overruled *Salford Estates*, but also directed that it should no longer be followed by the English Courts. Traditionally a Privy Council decision would not be binding on English Courts, however, following the Supreme Court ruling of *Willers v Joyce (No.2) [2016] UKSC 43,* the Privy Council can, in an appropriate case, direct that a decision it has made regarding English law will be binding on the English Courts and that decision could, if so directed, overrule a previous decision to the contrary by the English Court of Appeal, Supreme Court or House of Lords.

Following *Willers v Joyce*, the Privy Council decided that *Sian v HIL* was such a case and ruled that its decision had the effect of reversing many years of settled case law in England and Wales, meaning that the English Courts will be expected to follow this recent decision. As a result, under English law, a winding-up petition for a disputed debt, which is subject to an arbitration agreement, will now only be stayed or dismissed when there is a genuine dispute over the debt on substantial grounds.

The Privy Council considered the decision in *Salford Estates* to be wrong because it assumes that parties intend to include winding-up petitions within the scope of their arbitration agreement, in the absence of clear language to that effect. The Privy Council held that a “generally worded arbitration agreement” such as that used in *Sian v HIL*, both in terms of its ordinary meaning and the parties’ objective intention, is unable to encompass winding-up petitions.

Comment

This is a particularly interesting case because it highlights the complex public policy considerations which must be taken into account when considering insolvency and arbitration law, and how they interact, and sometimes conflict. On the surface, this decision appears to prioritise insolvency law as it allows creditors to proceed with winding up an insolvent company without the delay of conducting an arbitration where there is no genuine dispute, meaning that the company’s assets could be realised much sooner. From an arbitration law perspective, although it might appear otherwise, the decision is actually consistent with the English Court’s pro arbitration position for three reasons:

1. *Sian v HIL* does not remove the court’s ability to grant stays but simply limits their availability to cases where it can be shown that there is a genuine dispute as to the underlying debt on substantial grounds meaning that arbitration, as it should, is still prioritised as a method of resolving genuine disputes, where the parties have agreed to do so.

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2. The Privy Council expressly confirmed that its decision in *Sian v HIL* was specific to "generally worded arbitration agreements" and that different considerations may arise if the arbitration agreement includes creditor's winding up petitions. However, from a practical perspective, *Sian v HIL* is likely to affect creditor strategy when drafting future dispute resolution clauses and may result in fewer "generally worded" arbitration agreements being included in contracts.
3. The Privy Council concluded that its decision was not "anti-arbitration" given that in most agreements, where one of the parties is likely to be a creditor, that party will generally have the stronger bargaining power in negotiating the agreement. It is therefore much more likely that this party would agree to include an arbitration clause if there was no impediment to a liquidation where there is no genuine or substantial dispute about the debt. On the contrary, any other decision would have been more likely to discourage such a party from agreeing to include an arbitration clause as it may serve as a blocker to quickly recovering assets in the future. However, where there is such a dispute on substantial grounds, arbitration will prevail as the means of resolution in accordance with the will of the parties.

In addition, *Sian v HIL* provides an insight into the English courts' likely approach to legal problems sitting at the borderline between insolvency and arbitration. There have been three Supreme Court and Privy Council decisions on the interaction between arbitration and insolvency recently, with *Sian v HIL* has further clarified that courts approach to this complex area of law by: (i) assessing the scope of the arbitration agreement and the parties' intention as to what would fall within it; and (ii) balancing underlying public policies in the respective fields. This clarification provides further guidance to both arbitration and insolvency lawyers who are increasingly required to advise on the interplay between these two areas of law as they wait for the English Courts to provide clarity.

As is common practice, various common law jurisdictions have adopted a similar approach to the decision set out in *Salford Estates,* including Singapore, Hong Kong, and Malaysia. These jurisdictions are not bound by the decision of the Privy Council in *Sian v HIL* but generally consider Privy Council decisions "persuasive". However, in the Hong Kong courts, the first decision since the Privy Council decision in *Sian v HIL* has followed the established Hong Kong approach – i.e. the *Salford Estates* approach. It will be interesting to see if this decision is appealed in light of the Privy Council decision in *Sian v HIL* and whether any other common law jurisdictions choose to follow *Sian v HIL* or continue to apply the long-established approach from *Salford Estates.*

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