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PRIVY COUNCIL REJECTS THE ENGLISH POSITION REGARDING THE TEST FOR INSOLVENCY PETITIONS WHERE THERE IS AN ARBITRATION AGREEMENT

The Privy Council in *Sian Participation Corp (In Liquidation) v Halimeda International Ltd* [2024] UKPC 16 has held that the proper test when the court is deciding whether to make an order for the liquidation of a company is whether the debt on which the application is based is genuinely disputed on substantial grounds. In so deciding, the Court held that the English case of *Salford Estates*, on which the English position is premised, was wrongly decided, and that the courts of the British Virgin Islands and England should therefore not follow it.

In this briefing, we examine the repercussions of the decision and compare the position in other major common law jurisdictions.

Key issues

- The Privy Council has rejected the English approach toward insolvency petitions where there is an arbitration agreement.
- The court must be satisfied that the debt on which the petition is based is genuinely disputed on substantial grounds in order for the petition to be stayed.
- This approach represents a shift away from the position under *Salford Estates* in England, under *Re Guy Lam* in Hong Kong, and under *VTB Bank* in Singapore.
- Parties need to carefully consider the drafting of their dispute resolution clause during contract negotiation if they wish to preserve the right to invoke the court's bankruptcy or insolvency jurisdiction.

INTRODUCTION

There has long been an inherent tension between the public policy considerations engaged by insolvency and arbitration. The difficult task of balancing between the two was recently taken up by the Privy Council ("**PC**") on appeal from the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands) ("**BVI**") in the case of *Sian Participation Corp (In Liquidation) v Halimeda International Ltd* [2024] UKPC 16 ("***Sian v Halimeda***").

Where a creditor seeks to ground a winding-up petition on a disputed debt, the common position adopted by courts around the world is that whether the winding-up petition should be stayed depends on whether the debt is genuinely disputed by the company on substantial grounds. But where a disputed debt is covered by an agreement to arbitrate, the prevailing position under English law has been that, generally speaking, if the creditor wishes to pursue a claim for payment then he must arbitrate rather than make a claim in court if the debt is denied (or even not admitted).

Over the past decade, courts across various common law jurisdictions, including Hong Kong, Singapore, and England and Wales, have grappled with the appropriate test to be applied in such a case. In particular, the position under Singapore and English law has been aligned with the decision by the English Court of Appeal in *Salford Estates (No. 2) Ltd v Altomart Ltd (No. 2)* [2014] EWCA Civ 1575; [2015] Ch 589 ("***Salford Estates***").

In *Sian v Halimeda*, the PC declined to follow the established English position, holding that *Salford Estates* was wrongly decided and should therefore not be followed. As a result of this decision, the position in the BVI and in England and Wales is now markedly different as compared to the position in Singapore, Hong Kong, and the previously-established position in England and Wales (see table at the end of this briefing).

The PC held that the direction that there should not be a stay or dismissal of a winding-up petition unless the debt is genuinely disputed on substantial grounds applies where there is a "generally worded" arbitration agreement or exclusive jurisdiction clause. Accordingly, parties should bear this and any other difference in relevant jurisdictions in mind when entering into arbitration agreements. For example, when drafting an arbitration clause, parties may wish to consider the rights that they may wish to preserve, such as the right to invoke the arbitration agreement in situations of default of debt, so as to avoid potential complications which may arise from any attempt to enforce such rights. Should parties wish for an arbitration agreement to apply even to liquidation applications, then this should be expressly provided for within the arbitration agreement. Following *Sian v Halimeda*, these same considerations would, at least as a matter of BVI and English law, apply equally to an exclusive jurisdiction clause.

BACKGROUND

The respondent was a wholly-owned subsidiary of Far-Eastern Shipping Co PJSC ("**FESCO**"), which was the parent company of a large Russian transportation and logistics group. The appellant was part of a corporate structure through which just under 50% of the shares in FESCO were held.

The respondent and appellant entered into a Facility Agreement, under which the respondent advanced a term loan of USD 140m to the appellant. Within this Agreement, there was an arbitration agreement which provided that "any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement" would be referred to arbitration at the London Court of International Arbitration.

The appellant failed to repay the loan, and the respondent subsequently sent a letter demanding payment of the debt, which stood at more than USD 226m at the time. Thereafter, the respondent applied to have liquidators appointed over the appellant on the basis that it was both cash flow and balance sheet insolvent. The appellant initially sought to dispute that the debt was due and payable on the basis of a cross-claim. However, by the time the case came before the PC, the appellant was no longer arguing that the dispute was based on genuine and substantial grounds.

THE PRIVY COUNCIL'S DECISION

On appeal, the key issue before the PC was the correct test that ought to be applied by the BVI courts in exercising its discretion to make an order for the liquidation of a company. Specifically, the issue was the test that was

applicable in circumstances where the debt in question was subject to an arbitration agreement and was disputed and/or subject to a cross-claim, notwithstanding that such a dispute was not on genuine and substantial grounds.

The PC began by considering the respective public policies underlying the insolvency and arbitration regimes. It noted that for insolvency proceedings in the courts, the BVI and England shared the same position, in that a debt had to be the subject of "a genuine dispute on substantial grounds" for a winding-up petition to be dismissed. However, it recognised that differences arose between BVI and English law at the intersection between insolvency and arbitration.

Turning to consider the English position on this point as laid down in *Salford Estates*, the PC noted that the reasoning in *Salford Estates* was underpinned by the court's interpretation of the legislative policy in relation to the English Arbitration Act 1996 (the "**1996 Act**"), namely that (i) it extended to prohibit the continuation of proceedings which were not caught by the mandatory stay provision under the 1996 Act; and (ii) exercising a discretion to wind up in such a case would be permitting parties to bypass their arbitration agreement, and this would go against the legislative policy as embodied by the 1996 Act.

Thereafter, the PC considered developments in other common law jurisdictions, noting that the courts of Malaysia and Singapore had largely followed *Salford Estates* without adding to the reasoning of the case. See our note comparing the approaches of different jurisdictions here.

The PC noted the existence of divergent decisions in Hong Kong, and went on to consider the case of *Re Guy Kwok-Hung Lam* [2023] HKCFAR 119 ("*Re Guy Lam*"), as well as two recent decisions by the Hong Kong Court of Appeal endorsing the approach in *Re Guy Lam*. See our briefing on these cases here.

Having considered the reasoning of case law doubting the approach in *Salford Estates*, as well as academic criticism of the same, the PC held that *Salford Estates* and the cases following it had been wrongly decided. As reasoned by the PC, the correct starting point, as acknowledged even in *Salford Estates*, was that a creditor's winding up petition would not trigger the mandatory stay under either Article 8 of the UNCITRAL Model Law or section 9 of the 1996 Act. This was because such an application did not involve, and did not seek to involve, the resolution or determination of the petitioner's claim to be owed money by the company. Accordingly, there was no "dispute" in such a case, and a winding up petition thus did not offend the petitioner's negative obligation under an arbitration agreement to not have disputes resolved by any court process.

Moreover, the PC observed that the broad considerations underlying arbitration legislation, such as efficiency, party autonomy, and non-interference by the courts, were not offended by allowing a winding-up to be ordered where a creditor's debt was not genuinely disputed on substantial grounds. Conversely, requiring a creditor to go through arbitration, where there was no genuine or substantial dispute to speak of, would add unnecessary delay and expense for the parties. The PC further noted that such an approach was in fact consistent with promoting certainty in arbitration, as a party would be more likely to agree to include an arbitration clause where the inclusion of such a clause would not impede liquidation where there was no genuine or substantial dispute about the debt.

With this in mind, the PC held that the reasoning in *Salford Estates* was wrong insofar as the Court of Appeal there had taken an impermissible and unexplained leap in reasoning by assuming that the policy considerations inherent in the 1996 Act went beyond the ambit of the mandatory stay provision under section 9 of the 1996 Act. Rightly construed, the legislative policy was simply that all claims or matters within the scope of an arbitration agreement should be resolved by arbitration and not via court proceedings; it did not extend to winding up or liquidation proceedings in court, which did not involve any claim or dispute in respect of a debt. The PC also noted that the concerns expressed by the Court of Appeal, in relation to bypassing the need for litigation about disputed debts in ordinary claims in court and to the applying of improper pressure by a creditor, were already concerns which were well-known to the Companies Court, and could be dealt with by orders for indemnity costs on the errant party.

CONCLUSION

To be clear, the decision in *Sian v Halimeda* settles not only the position at law within the BVI, but within England and Wales as well. This is because the Supreme Court in *Willers v Joyce* [2016] UKSC 44; [2018] AC 843 recognised that a decision by the Judicial Committee of the Privy Council could be directed to represent the law of England and Wales. In *Sian v Halimeda*, the PC expressly noted the practice of following *Salford Estates* by the courts in England and Wales, and directed for this practice to cease.

Nevertheless, the PC was keen to stress that its decision was applicable only to a "generally worded arbitration agreement or exclusive jurisdiction clause", and that different considerations would be in play where the agreement or clause was framed in terms which applied to a liquidation application. The PC therefore implied that should parties wish for an arbitration agreement to apply even to liquidation applications, this could be expressly provided for within the arbitration agreement (although it is fair to say this sort of requirement does typically not form part of the standard considerations at the time of drafting the arbitration agreement.)

Nevertheless, this decision will be welcome by creditors, insofar as it limits the use of frivolous disputes as a defence against winding-up petitions, thereby giving creditors greater certainty that their arbitration agreement will not unnecessarily hinder any subsequent attempts at enforcement.

Until such time as *Sian v Halimeda* is addressed by the Singapore Court of Appeal, the decision of the PC is not binding in Singapore, and the lower courts will, for the time being, continue to be bound by the decisions of the Singapore Court of Appeal in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2020] 1 SLR 1158 and in *BWG v BWF* [2020] 1 SLR 1296, which endorse the English position as laid down in *Salford Estates*. However, *Sian v Halimeda* may yet prove consequential in shaping the future development of law in this area as it experiences significant development and undergoes future change.

This case serves as a timely reminder of the importance and far-reaching implications of dispute resolution clauses. In adopting an appropriate dispute resolution clause, parties should be clear as to the rights, if any, that they wish to preserve, such as the right to invoke the arbitration agreement in situations of default of debt, so as to avoid potential complications which may arise from any attempt to enforce such rights.

Moreover, parties to intended or pending insolvency proceedings should always consider whether there is any potential dispute over the debt giving rise to the petition. Where there is a dispute or potential dispute which is subject to an arbitration agreement, parties should consider whether such a dispute is frivolous or can be readily substantiated, as well as the applicable test applied by courts within the relevant jurisdiction.

SUMMARY OF THE EFFECT OF ARBITRATION CLAUSES ON INSOLVENCY PETITIONS IN MAJOR COMMON LAW JURISDICTIONS

	Hong Kong	**Singapore**	**England & Wales** **(previously established position)**	**British Virgin Islands; England & Wales (new position)**
Leading case authority	***Re Simplicity & Vogue Retailing (HK) Co., Limited*** [2024] HKCA 299 ***Arjowiggins HKK 2 Limited v Shandong Chenming Paper Holdings Limited*** [2024] HKCA 352	***AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)*** [2020] 1 SLR 1158 ***BWG v BWF*** [2020] 1 SLR 1296	***Salford Estates (No. 2) Ltd v Altomart Ltd (No. 2)*** [2014] EWCA Civ 1575 ***Telnic Ltd v Knipp Medien Und Kommunikation GmbH*** [2020] EWHC 2075 (Ch)	***Sian Participation Corp (In Liquidation) v Halimeda International Ltd*** [2024] UKPC 16
Approach adopted by each jurisdiction	Where the underlying dispute surrounding the petition debt is subject to an arbitration clause, the Hong Kong court will decline insolvency jurisdiction. However, where there are "countervailing factors" giving rise to "wholly exceptional circumstances", the court might exercise discretion not to decline insolvency jurisdiction. Such factors include situations where the dispute over the debt borders on the frivolous or constitutes an abuse of process. The court must also be satisfied of the genuine intention to	The court applies a *prima facie* standard of review. The debtor company must show, on a *prima facie* basis, that: (i) there is a valid arbitration agreement between the parties; (ii) the dispute over the debtor's indebtedness falls within the scope of the arbitration agreement; and (iii) the dispute is genuine, before the Singapore court will stay or dismiss the winding up petition. The court will not grant a stay (notwithstanding that the *prima facie* standard has been met) if the application for a stay	Where the debtor satisfies the court that: (i) the petition debt is disputed or not admitted; and (ii) the dispute is subject to an arbitration agreement, the court should exercise its discretion to stay or dismiss the winding up proceedings save in wholly exceptional circumstances.	The debtor company must show that: (i) the petition debt is subject to an arbitration agreement; and (ii) the petition debt is disputed on "genuine and substantial grounds", before the courts of the British Virgin Islands will stay or dismiss the winding up petition.

	arbitrate, so as to hold the parties to their agreed dispute resolution mechanism. This is to deter a debtor from merely raising an arbitration clause as a tactical move to stave off winding up or bankruptcy.	amounts to an abuse of process.		
Applies to cross-claims?	Yes	Yes	Uncertain	Yes

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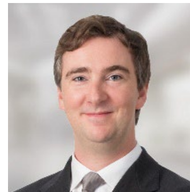

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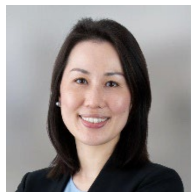

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