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THE LAST TRUMP: INSOLVENCY V ARBITRATION

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KEY POINTS

- For the last ten years companies have routinely avoided being wound up if there was an arbitration clause in their contracts, even where there was clearly no real answer to a creditor's claim.
- A recent decision of the Privy Council means that arbitration no longer trumps the usual rule that a petition debt must be disputed on genuine and substantial grounds.
- This decision also means that exclusive jurisdiction clauses will not prevent courts with insolvency jurisdiction over a debtor from making a winding-up order.

SIAN IN THE PRIVY COUNCIL

On 19 June 2024 the Privy Council handed down judgment in, *Sian Participation Corp (In Liquidation) (Appellant) v Halimeda International Ltd (Respondent)* [2024] UKPC 16 *(Sian)*.

In December 2012 Halimeda loaned Sian US$140m. The loan agreement contained an arbitration clause providing that "any claim, dispute or difference of whatever nature arising under, out of or in connection with" it was to be referred to arbitration. The loan was not repaid and the sum claimed as due by December 2020, with interest, was a little over US$226m.

In September 2020 Halimeda made a liquidation application in the BVI against Sian, the equivalent of a winding-up petition in English law. Sian sought to dispute Halimeda's debt on the basis of a cross-claim and/or set-off. At first instance the judge held that Sian had not shown that the debt was disputed on genuine and substantial grounds and ordered the company to be put into liquidation and appointed liquidators.

The Eastern Caribbean Appeal Court dismissed Sian's appeal. On Sian's further appeal, the Privy Council heard argument on how the court should exercise its discretion to make a winding-up order, where the debt on which the application is based is subject to an arbitration agreement but is not disputed on genuine and substantial grounds. Lord Briggs and Lord Hamblen gave the judgment of the Board dismissing the appeal.

ENGLISH CASES BEFORE SIAN

In England the recent legal history of the main issue in *Sian* begins with *Rusant Ltd v Traxys Far East Ltd* [2013] EWHC 4083 (Comm) *(Rusant),* in which the author of this article acted for the unsuccessful creditor. Warren J found in *Rusant* that the petition debt was not disputed on genuine and substantial grounds but nevertheless restrained advertisement of the petition because "the arbitration agreement, it seems to me, trumps the decision which I would otherwise have made" *(Rusant at [31]).* The "dispute" was held to involve a "claim" subject to the arbitration agreement or, if it did not, the court would in any case exercise its discretion to "leave the debt to be established in the forum which *the parties have agreed is the appropriate place".* The following year in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575 *(Salford Estates)* the Court of Appeal adopted the second limb of the reasoning in Rusant as the basis of its decision to grant a discretionary stay. This then remained the position, at least in England, until *Sian.*

In the BVI, however, the courts continued to require a genuine and substantial dispute to be shown, arbitration agreement or no arbitration agreement.

THE PRIVY COUNCIL'S DECISION

Sian argued that *Salford Estates* should be followed in the BVI. The Privy Council have decided not only that it should not be but also that the decision of the Court of Appeal in *Salford Estates* was wrong and should no longer be followed in England, by way of a direction under *Willers v Joyce* (No 2) [2016] UKSC 44.

WHY *SALFORD ESTATES* WAS WRONGLY DECIDED

The first step of the reasoning of the Board in *Sian* was that a creditor's winding-up petition (or, in the BVI, a liquidation application) does not trigger a mandatory stay of court proceedings under applicable arbitration legislation, in England under s 9 of the Arbitration Act 1996. It had been accepted this was the case in *Salford Estates.* This is because *a winding-up petition does not seek to, and does not, resolve or determine anything about the petitioner's claim to be owed money by the company.* Nor is the existence or amount of the debt a matter or issue for resolution in those proceedings (*Sian* at [88]). The only issues are whether the company is insolvent and whether it should be wound up.

The next was that, as no mandatory stay applied, the policy behind imposing a stay did not apply either. This policy was identified as being to enforce arbitration agreements but only with respect to a "matter" subject to that agreement, which it was held do not include a creditor's petition or any of the issues raised by a petition. The Court of Appeal in *Salford Estates* had made an "impermissible and unexplained jump of reasoning" when it concluded that the "legislative policy

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embodied in the 1996 Act" required any proceedings to be stayed which fell outside the scope of the mandatory stay provision (Sian at [94]-[95]). The true position was in effect a binary one: an arbitration agreement either absolutely prevented proceedings being brought or continued or had no effect on them at all.

Seen in that way, there was no conflict between the policy of arbitration legislation and the ordinary exercise of the court's discretion to stay or dismiss insolvency proceedings. A winding-up or liquidation order based on a debt not disputed on genuine and substantial grounds does not offend the general objectives of arbitration legislation. For a court with insolvency jurisdiction to *require a creditor to go to arbitration in the absence of a genuine and substantial dispute simply adds delay, trouble and expense for no good purpose* (*Sian* at [92]).

THE SIGNIFICANCE OF *SIAN* IN INSOLVENCY

In addition to giving the author a degree of personal satisfaction that the creditor's arguments in Rusant have been upheld, even if ten years after the fact, the Privy Council's decision is of practical importance in England and in other jurisdictions which had followed *Salford Estates* or had factored it into their judicial approach to this issue.

In England and Wales creditors' petitions will no longer be trumped by trumped up references to arbitration. Debtors will once more need to be able to show a genuine and substantial dispute of the petition debt to avoid liquidation, even if any dispute has been agreed to be referred to arbitration.

One reason why it has now been held that a standard arbitration clause does not prevent the commencement of insolvency proceedings is that it involves no promise not to invoke that right (*Sian* at [89]). This is not to say that the parties cannot agree that they will not do so or that the courts will not enforce such an agreement by staying or dismissing proceedings brought in breach of it. Whether or when it may be wise to do so is another question. Where the contract is one of loan, the lender is likely to be the potential creditor and is also likely to have the whiphand in determining the scope of any exclusion of recourse to insolvency remedies (*Sian* at [93]). Preserving access to those remedies will be something most lenders would wish to do.

If it is intended that insolvency proceedings are to be excluded either completely or pending arbitration of questions of fact, including whether there is a genuine and substantial dispute, that should be made clear in the terms of the contract.

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THE JUDGMENT IN *SIAN* COVERS EXCLUSIVE JURISDICTION CLAUSES TOO

A contractual exclusive jurisdiction clause normally requires all "disputes" to be resolved in the courts of a nominated jurisdiction.

Courts in England and elsewhere will normally enforce that choice of forum as a matter of policy, for example by granting an anti-suit injunction against a party who begins foreign proceedings or by granting a stay of domestic proceedings brought in in breach of the jurisdiction agreement. Does that mean that insolvency proceedings should also be stayed?

English law on this point before *Sian* had been unclear. In *BST Properties Ltd v Reorg-Apport Penzugyi RT* [2001] EWCA Civ 1997 (*BST*) the Court of Appeal had held that the presence of an exclusive jurisdiction clause in favour of Hungary did not preclude the Companies Court in England from deciding whether a debt created by a contract which included the exclusive jurisdiction clause was genuinely disputed on substantial grounds (*Sian* at [69]). *BST* had been regarded in some first instance decisions as overruled by *Salford Estates* but not in others (*Sian* at [79]).

The correctness of *BST* has now been firmly re-established: an exclusive jurisdiction clause in usual form will not oust the court's insolvency jurisdiction and the usual test of a genuine and substantial dispute of the debt founding the petition will apply.

INTERNATIONAL IMPACT OF *SIAN*

The likely impact of *Sian* in other jurisdictions will depend on the extent to which they had followed *Salford Estates* or applied the Court of Appeal's reasoning in that case.

As noted above, the BVI courts had not done so. In *Sian* at first instance and on appeal the decision of the Eastern Caribbean Appeal Court in *Jinpeng Group Ltd v Peak Hotels and Resorts Ltd* BVIHCMAP2014/0025 (8 December 2015) had been followed, where it was held that a genuine and substantial dispute was required even where disputes had been agreed to be referred to arbitration. At the other extreme, *Salford Estates* had been followed in Malaysia and Singapore (*Sian* at [80]).

The *Salford Estates* principle had ultimately been adopted in the leading Hong Kong decision, *Guy Kwok-Hung Lam v Tor Asia Credit Master Fund LP* [2023] HKCFA 9 (*Guy Lam*) in relation to an exclusive jurisdiction clause but only subject to additional requirements and safeguards. The *Guy Lam* multi-factorial approach had recently been extended by the Hong Kong courts to arbitration clause cases (*Sian* at [81]).

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It is to be expected that Malaysia, Singapore and Hong Kong will now be likely to follow *Sian* in both arbitration clause and exclusive jurisdiction clause cases and will jettison an approach based on the now overruled *Salford Estates* decision.

A WIN FOR CREDITORS, WITH WIDER IMPLICATIONS FOR PARTIES TO COMMERCIAL CONTRACTS AND THOSE WHO DRAFT THEM

The Board has adopted a narrower and more pragmatic approach to the effect of the inclusion of arbitration clauses and exclusive jurisdiction clauses, which may have wider implications. It will obviously be likely to benefit creditors seeking to put debtors into liquidation where there is no genuine or substantial dispute of the debt.

By exposing the limitations of each type of clause when it comes to insolvency, *Sian* invites those drafting commercial contracts to consider whether their scope can or should be expressly expanded to counter the effect of that decision.

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