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Winding up vs arbitration – stay of creditor's winding up proceedings refused by Privy Council

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The inter-relationship between disputed debts, arbitration agreements and winding up proceedings has come up again this time before the Privy Council in *Sian Participation Corp (In Liquidation) v Halimeda International Ltd* [2024] UKPC 16. In delivering this important judgment, the Privy Council looked closely at the dividing line between two areas of public policy, namely insolvency and arbitration.

Background

The appeal was against the decision of the BVI Commercial Court, as affirmed by the Eastern Caribbean Court of Appeal, to place the appellant into liquidation pursuant to a liquidation application brought by the respondent, Halimeda International Ltd.

Pursuant to a facility agreement, the respondent advanced a term loan of USD 140 million to the appellant. The loan has not been repaid. As of 15 December 2020, the total sum claimed was over USD 226 million.

The facility agreement included a generally worded arbitration agreement 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 or LCIA.

The Privy Council upheld the first instance court's decision, refusing to stay the winding up proceedings in favour of arbitration.

Key takeaways

In considering the correct test for the court to apply in respect of the exercise of its discretion to make an order for the liquidation of a company where the debt on which the application is based is subject to an arbitration agreement and is said to be disputed and/or subject to a cross-claim, the Privy Council explored, amongst others, the following issues.

Does the mandatory stay provision apply to creditor's winding up petition?

Section 18 of the BVI Arbitration Act 2013 gives direct effect to article 8 of the Model Law which provides: *"A court before which* ***an action*** *is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."*

It is common ground that a creditor's winding up petition is not an "action" within the meaning of section 18. The mandatory stay provisions therefore do not apply to the liquidation application. This distinguishes the present case from the recent Privy Council decision of *FamilyMart China Holding Co Ltd v Ting Chuan* [2023] UKPC 33 in which it was not disputed that applications to wind up a company on the just and equitable ground were "legal proceedings" falling within the mandatory stay provisions of the equivalent Cayman Islands statute.

What is a disputed debt?

The English Court of Appeal decision in *Salford Estates (No 2) v. Altomart* [2014] EWCA Civ 575 has been at the centre of the longstanding debate in respect of the test to apply when a

winding up petition is based on a debt that is subject to an arbitration agreement. Where a supposed dispute about the debt is raised between parties to an arbitration agreement, the English Court of Appeal refused to consider whether there is a genuine dispute in respect of such debt on substantial grounds. This decision stood for the proposition that a winding up petition brought based on a disputed debt subject to an arbitration agreement ought to be stayed or dismissed, save in "wholly exceptional circumstances".

The BVI Court had in *Jinpeng Group Ltd v Peak Hotels and Resorts Ltd* BVIHCMAP2014/0025 (8 December 2015) refused to follow *Salford Estates*.

In the present case, the appellant submitted that the courts of the BVI should have followed *Salford Estates* and accordingly should have dismissed or stayed the respondent's liquidation application.

Of significance is the Privy Council's approval of the decision in *Jinpeng*, together with its confirmation that the approach in *Salford Estates* was incorrect. The Privy Council considered that *Salford Estates*, and the cases which have followed it, were wrong to introduce a discretionary stay of creditors' petitions where an insubstantial dispute about the creditor's debt was covered by an arbitration agreement.

Accordingly, to disable the creditor from seeking a winding up or liquidation order on the insolvency ground, the disputed debt must be the subject of a genuine dispute on substantial grounds.

The policy argument

The Privy Council further observed that there is nothing anti-arbitration in its conclusion. A creditor's winding up petition does not seek to resolve or determine anything about the petitioner's claim to be owed money by the company.

None of the general objectives of arbitration regime are offended by allowing a winding up to be ordered where the unpaid debt is not genuinely disputed on substantial ground. 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. Indeed, such an approach may deter lenders from including arbitration agreements in their contractual documents.