UPDATE

JULY 2024

mourant

Privy Council Resolves Question of Interplay between Liquidation Proceedings and Arbitration Agreements

Update prepared by Eleanor Morgan, Shane Donovan, and Sophie Christodoulou (British Virgin Islands).

The Privy Council endorsed the Commercial Court's approach in the British Virgin Islands (**BVI**) in staying insolvency proceedings, even when faced with a pre-existing arbitration agreement, only when a debt is genuinely disputed on substantial grounds.

Introduction

In the recent Privy Council decision of *Sian Participation Corp (In Liquidation) v. Halimeda International Ltd* [2024] UKPC 16 (***Re Sian Participation***), the Board addressed the longstanding issue of whether liquidation proceedings should be stayed or dismissed due to the existence of an arbitration agreement between the parties.

In the BVI, which mirrors the position in England and Wales, the Arbitration Act 2013[1] stipulates that if a dispute arises between parties that is subject to a valid arbitration agreement, any court proceedings should be stayed to allow the dispute to be resolved by an arbitral tribunal, in accordance with the parties' pre-existing contractual arrangement.

In respect of insolvency, it is in the public interest to have a straightforward means to place a company into liquidation when the company is unable to pay its debts as they fall due.

How these two areas of public policy fit together has varied across common law jurisdictions.

In England and Wales, the position has been that where the debt in question is covered by the arbitration agreement, whether or not it is disputed on genuine or substantial grounds, the courts will stay or dismiss winding up proceedings so the dispute can be determined by arbitration. This position was set forth in the Court of Appeal decision of *Salford Estates (No 2) Ltd v. Altomart Ltd (No 2)*.[2] In that case, Sir Terence Etherton C confirmed that the mandatory stay provisions contained in the English equivalent of section 18 of the BVI Arbitration Act 2013 do not apply to winding-up proceedings. However, he stated that "the Court should, save in wholly exceptional circumstances…exercise its discretion [to wind up a company] consistently with the legislative policy [to stay proceedings where a valid arbitration agreement exists between parties] embodied in the 1996 [English Arbitration] Act".[3] This effectively created a mandatory stay of liquidation proceedings where the company disputed the debt on any grounds, whether those grounds were genuine or not.

[1] Section 18

[2] [2015] Ch 589

[3] Ibid. at [39]

In the BVI, the position is different. As set out in *Jinpeng Group Limited v Peak Hotels and Resorts Limited*,[4] it is only when the company can demonstrate that a debt is subject to an arbitration agreement, *and* the debt is disputed on genuine and substantial grounds, that the BVI Court should exercise its wide discretionary powers to dismiss or stay the liquidation application in favour of arbitration. A creditor need not prove that there are 'wholly exceptional circumstances'.

Re Sian Participation

The company in *Re Sian Participation* argued that the ECSC Court of Appeal should have followed the English position in *Salford Estates*, asserting that there is no difference between England and the BVI concerning public policies on liquidation proceedings and enforcing arbitration agreements.

The Board determined that *Salford Estates* had been wrongly decided. It held that it was implicit in Sir Terence Etherton C's judgment that "the discretion to wind up would be virtually illusory where the debt relied upon by the petitioner was merely not admitted, even if not genuinely disputed on substantial grounds" leading to "virtually a mandatory stay of the petition".[5] The Board ruled that *Salford Estates* was "wrong to introduce a discretionary stay of creditors' petitions… where an insubstantial dispute about the creditor's debt is raised between parties to an arbitration agreement".[6] Their reasons were as follows:

1. Liquidation applications are not subject to the mandatory stay provisions contained in section 18 of the Arbitration Act 2013, as they do not resolve anything about the petitioner's claim to be owed money by the company.
2. An arbitration agreement is an agreement between parties to resolve a dispute by arbitration, or not to have it resolved by the courts. Liquidation proceedings fall outside the boundaries of this agreement.
3. The policies underlying the Model Law (which the BVI Arbitration Act is based on) are not offended by a party seeking the liquidation of a company that has failed to pay a debt. Where a dispute genuinely exists, that should be resolved first.

The Board concluded that:

"*…as a matter of BVI law, the correct test for the court to apply to 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 or an exclusive jurisdiction clause and is said to be disputed is whether the debt is disputed on genuine and substantial grounds. This conclusion applies to a generally worded arbitration agreement or exclusive jurisdiction clause. Different considerations would arise if the agreement or clause was framed in terms which applied to such a liquidation application*".[7]

Conclusion

In conclusion, the *Re Sian Participation* decision by the Privy Council clarifies and reaffirms the BVI's stance on the interplay between arbitration agreements and liquidation proceedings. It underscores the necessity for a genuine and substantial dispute over the debt in question for a stay of liquidation proceedings in favour of arbitration.

[4] BVIHCMAP2014/0025 (8 December 2015) at paras [45]-[49], which is a decision of the Court of Appeal of the Eastern Caribbean Supreme Court (**ECSC**)

[5] *Re Sian Participation* at paras [74]-[75]

[6] Ibid. at para [88]

[7] Ibid. at para [99]

Contacts

Eleanor Morgan
Partner
Mourant Ozannes
+1 284 852 1712
eleanor.morgan@mourant.com

Shane Donovan
Partner
Mourant Ozannes
+1 284 852 1731
shane.donovan@mourant.com

Sophie Christodoulou
Counsel
Mourant Ozannes
+1 284 852 1702
sohpie.christodoulou@mourant.com

2021934/250742933/1