Insolvency and Arbitration: A Clash of Concepts

Introduction

Suppose that A and B enter into a contract pursuant to which A lends B the sum of US$ 140M. Suppose further that B fails to pay back the loan when it is due, such that A, having first taken the appropriate procedural steps, seeks the appointment of a liquidator or the winding up of B, which petition B asks the court to dismiss or stay on the basis that, while the existence of the debt is not genuinely disputed, there is a clause in in A and B's contract which states that any "claim, dispute or difference of whatever nature arising under, out of or in connection with this contract shall be settled by arbitration". What, when confronted with B's contention, ought the court to do in those circumstances? The judgment of the Privy Council in *Sian Participation Corp (In Liquidation) v Halimeda International Ltd* [1] now assists in answering the question stated.

The difficulty

As the Privy Council pointed out,[2] resolving the question stated above throws light on the dividing line between two areas of public policy – insolvency and arbitration – which do not often come into conflict. Courts in the BVI have found the dividing line rather easier to draw. They have consistently required the existence of the alleged debt to be "genuinely disputed on substantial grounds before a creditor's application can be dismissed or stayed because of an agreement to arbitrate".[3] By contrast, in England, the Court of Appeal's decision in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)*[4] had held that, in circumstances where the debt was simply not admitted, the court had a discretion whether to grant a stay, which discretion it would, "save in wholly exceptional circumstances", exercise in favour of granting said stay of the petition. [5]

In essence, therefore, the Privy Council had to determine which of these approaches was correct, first as a matter of the law of the BVI and then, if the need arose, as a matter of English law.

The resolution

In its determination, the Board held that *Salford Estates (No 2)* and the English authorities which had followed it were "wrong to introduce a discretionary stay of creditors' petitions (or, in the BVI, liquidation applications) where an insubstantial dispute about the creditor's debt is raised between parties to an arbitration agreement".[6] In essence, the Privy Council's reasoning could be summarised in the following way: there is nothing anti-arbitration in allowing a (putative) creditor to wind up or liquidation of a party who fails to pay the debt alleged to be due. After all, a winding up petition or an application for the appointment of a liquidator is not a "claim" which engages the mandatory stay provision in arbitration legislation.[7] Given that it is not a claim, the bringing of the petition or application does not infringe a party to an arbitration agreement's negative obligation, viz: not to seek resolution of the dispute in court, and so does not infringe the general policy that those who agree to arbitrate disputes ought to be held to that agreement.[8]

Reaching that decision necessarily meant, from the Board's perspective, that the reasoning underpinning the decision in *Salford Estates (No 2)* was incorrect. In consequence, the Privy Council was required to consider the question of whether, in this instance, to issue a *Willers v Joyce*[9]

[1] [2024] UKPC 16 (on appeal from the Court of Appeal of the Eastern Caribbean). The case itself was, at first instance, heard in the courts of the BVI.
[2] *Sian Participation,* [1].
[3] *Ibid,* [5]. See, in this respect, the decision of the Court of Appeal of the Eastern Caribbean on appeal from the BVI in *Jinpeng Group Ltd v Peak Hotels and Resorts Ltd* BVIHCM-AP2014/0025
[4] [2014] EWCA Civ 1575; [2015] Ch 589.
[5] *Salford Estates (No 2) Ltd, [39].*
[6] *Sian Participation,* [88].
[7] In England, Section 9 of the Arbitration Act; in the BVI, Section 18 of the Arbitration Act 2013 in the BVI.
[8] See, generally, *Sian Participation* [89 - 93].
[9] [2016] UKSC 44; [2018] AC 843

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direction, meaning that S*alford Estates (No 2)* ought "no longer be followed in England and Wales, and that this decision of the Board, so far as it holds that *Salford Estates (No 2)* was wrongly decided, now represents the law of England and Wales".[10]

In the finish, the Privy Council determined that it ought make such direction, for the simple reason that the conclusion that the judgment in *Salford Estates (No 2)* was incorrect was not merely a decision about the law of the BVI but, rather, was a decision about English law. As a result, and to be clear, the upshot of *Sian Participation* is that *Salford Estates (No 2)* no longer represents the law of England and Wales.[11]

[10] *Sian Participation,* [124].

[11] Ibid.

The consequences

The conclusion of the Board on the substantive issue was, it is submitted, correct, as was the decision to issue a *Willers v Joyce* direction. There is, as the Board stated, nothing contrary to the letter or spirit of arbitration policy in allowing a creditor to make an application for winding up / the appointment of a liquidator, at least in principle. That said, certain practical points flow from the decision in *Sian Participation,* of which it will pay to be aware.

In the first place, and most obviously, the discretion, exercised by the Companies Court, to stay or dismiss a creditor's winding up petition on the ground that the petitioner's debt is covered by an arbitration clause, without being shown to be genuinely disputed on substantial grounds, will now cease. As well as having an influence on the way in which matters are resolved in the Companies Court, therefore, the decision in *Sian Participation* may have a knock-on effect on either the way in which arbitration agreements (or exclusive jurisdiction clauses, for the Board said that its reasoning was equally applicable to both) are drafted or, indeed, on the decision whether to include such clauses in commercial arrangements at all.

And that first point leads onto the second point. The Board was explicitly clear that, in spite of what it had concluded regarding the generally worded arbitration agreement before it (and, indeed, generally worded jurisdiction clauses), "different considerations would arise if the agreement or clause was framed in terms which applied to such a liquidation application".[12]The Board was obviously less clear about what those "considerations" would be but this carve out will be of interest to those charged with drafting arbitration agreements or jurisdiction clauses, especially in circumstances where there is an incentive to keep matters out of the Companies Court and in front of an arbitrator.

[12] Ibid, [99].

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