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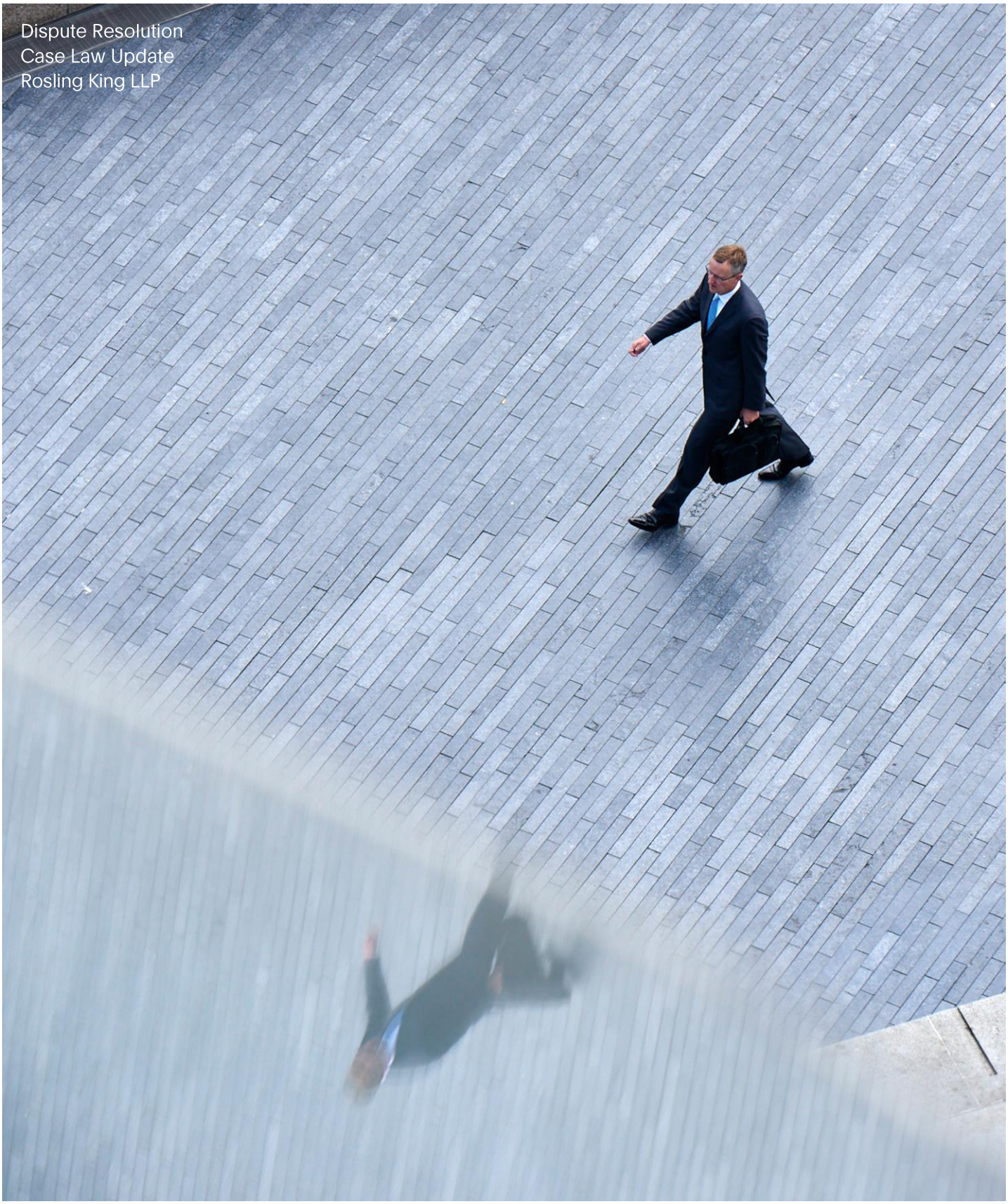
Dispute Resolution
Case Law Update
Rosling King LLP



Case Summary - Sian v Halimeda [2024] UKPC 16

On 19 June 2024, the UK Privy Council handed down an important decision concerning the relationship between liquidation applications and arbitration agreements in *Sian Participation Corp (In Liquidation) (Appellant) v Halimeda International Ltd (Respondent) (Virgin Islands)* [2024] UKPC 16.

The decision has changed the status quo for the treatment of liquidation applications where the underlying debt is subject to an arbitration agreement: no longer can a debtor rely on the existence of an arbitration agreement between it and the creditor to shield it from a liquidation application.

In its judgment, summarised below, the UK Privy Council held that the Court of Appeal decision in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575 ("Salford Estates") was wrongly decided and should not be followed. Notably, this is the first time the Privy Council has exercised its powers to direct the English courts accordingly, and it will be interesting to see how other common law jurisdictions treat this decision.

Background

In September 2020, Halimeda International Ltd ("Halimeda") (the creditor and respondent in the UK action before the Privy Council), applied for the winding up of the Sian Participation Corp ("Sian") (the debtor and the applicant in the UK action before the Privy Council) on the grounds of insolvency.

The debt in question arose out of a US$ 140 million loan facility advanced by Halimeda to Sian. The loan was not repaid and following a liquidation hearing in May 2021, the BVI Judge held, amongst other issues, that Sian had failed to show that the debt was disputed on genuine and substantial grounds. The Judge consequently ordered that the company be put into liquidation.

However, this was not the end of the litigation. The loan agreement contained an arbitration clause which required "*any claim, dispute or difference of whatever nature arising under, out of or in connection with* [the facility]" be referred to arbitration.

Sian unsuccessfully appealed the insolvency decision in the BVI, however in November 2023 the Judicial Committee of the Privy Council granted the company permission to appeal in respect of the liquidation application and arbitration agreement issue, and two other discrete legal issues.

This article focuses on the interplay between the liquidation application and the arbitration

agreement, including the Privy Council's analysis of the Court of Appeal's decision in Salford Estates.

Legal test and principles

The UK Privy Council was asked to determine what test the BVI court should apply when exercising its discretion to make a liquidation order where the debt on which the application is based is subject to an arbitration agreement and is said to be disputed (notwithstanding that dispute is not on genuine and substantial grounds).

This case engages key principles of public policy in arbitration and insolvency. First, it is public policy that parties who mutually agree to resolve their disputes by arbitration should be permitted to do so without interference from the courts and, as the Privy Council noted in its decision, there is broad international consensus that the approach to the interpretation of arbitration agreements should be pro-arbitration and expansive. Second, it is in the public interest to wind-up a company which is insolvent without undue delay and in accordance with the *pari passu* principle between all creditors. Generally, in insolvency matters, the court will not allow a winding-up petition where the debt is the subject of a genuine dispute on substantial grounds. However, this position can be complicated by the existence of an arbitration agreement between the parties and the question of whether a liquidation application of winding-up petition constitutes a 'matter' captured by the arbitration agreement.

When considering the test and overarching principles, the Privy Council examined the leading decision of the Court of Appeal in Salford Estates, which was the first occasion when the (by then) principles discussed above collided. This decision has largely been followed in other common law jurisdictions, such as Malaysia and Singapore, although see, for example, *But Ka Chon v Interactive Brokers LLC* [2019] HKCA 873 in which the Hong Kong Court of Appeal dismissed an appeal to set aside a statutory demand and made obiter comments on the circumstances in which a winding-up petition would be set aside where the parties to a contract had agreed to arbitration. See also the useful guidance on how to define and identify 'matters' which give rise to a stay of legal proceedings in favour or arbitration - *FamilyMart China Holding Co Ltd v Ting Chuan* [2024] Bus LR 190, [2023] UKPC 33.

The Privy Council's decision in *Sian v Halimeda*

Departing from Salford Estates, the Privy Council held that the correct starting point is that a creditor's winding-up petition does not trigger a mandatory stay under Article 8 of the UNCITRAL Model Law, or the relevant statutory provision which implement it in the BVI and the UK (the BVI Arbitration Act 2013 and the Arbitration Act 1996, respectively). The Privy

Council also looked at the specific arbitration clause between the parties, and whilst it was drafted in broad terms to cover a wide range of disputes, it was held that it did not seek to bar ancillary legal proceedings.

The Privy Council further commented on the nature of arbitration agreements. In simple terms, it explained that arbitration agreements are concerned with dispute resolution. They resolve disputes between the parties through the arbitration tribunal's determination of disputed rights and obligations and the focus is on substantive issues which are capable of being determined by the arbitral tribunal (i.e. what is arbitrable). Notably, it emphasised that unless an arbitration agreement provides otherwise, it is not the policy of the statutory provisions to require a creditor to obtain an arbitration award before enforcing a debt which is completely undisputed, by a claim in court.

The Privy Council went on to say that a winding-up petition or liquidation order based on a non-disputed debt does not offend the general objective of arbitration legislation because it is not concerned with the underlying dispute and is not seeking to determine any substantive issues about the debt. Nor does it offend the parties' choice to arbitrate because it is not a 'matter' subject to that agreement. In other words, seeking a liquidation is simply not something the creditor has promised not to do.

The Privy Council concluded:

- as a matter of BVI law, the correct test for the court to apply in exercising its discretion to make a liquidation order in circumstances where there is an arbitration agreement between the parties is whether the debt is disputed on genuine and substantial grounds. The BVI court had applied the correct test and Sian's appeal was dismissed.
- the decision (and underlying reasoning) also applies to exclusive jurisdiction clauses.
- The Privy Council directed that Salford Estates should not be followed in England and Wales and its decision in the present case now represents the Law of England and Wales.

Commentary

This decision is an important development for the international insolvency community and will no doubt be considered carefully across multiple jurisdictions.

It provides welcome clarification and will be of particular interest to any creditors that may be contemplating a liquidation application (or equivalent insolvency proceedings) against a debtor for an unpaid debt where there is an arbitration agreement between the parties. Of course, conversely, any debtor in the relevant circumstances should take heed.

It is worth noting that the Privy Council commented that different considerations would arise if the agreement or arbitration clause was framed in terms which applied specifically to a creditor's winding up petition. Therefore, as always, the parties to a contract should pay close attention to the explicit wording of the arbitration clause, or exclusive jurisdiction clause.

Should you wish to discuss this in more detail, please do not hesitate to contact Lauren Pardoe or the Partner with whom you usually deal.