



House of Lords Ruling on Public Policy Conflict in Commercial and Insolvency Law

In a recent judgment of *Sian Participation v Halimeda* on June 19, 2024, the House of Lords addressed the conflict between two significant public policies within civil commercial and winding-up laws. The case highlights the tension between:

1. the need for a straightforward process to place insolvent companies into insolvency proceedings, ensuring their assets are fairly distributed among creditors without undue delay; and
2. the principle that parties who have agreed to resolve their disputes through arbitration should adhere to that agreement, free from court interference.

This ruling highlights the balance courts must maintain between facilitating efficient insolvency proceedings and upholding arbitration agreements.

In many jurisdictions like the courts of the BVI (see *Jinpeng Group Ltd v Peak Hotels and Resorts Ltd* BVIHMAP2014/0025 (8 December 2015) ("**Jinpeng**"), the determination of whether a debt is disputed, thus removing it from the category of unpaid debts that can justify a winding-up petition, hinges on whether the dispute is genuine and based on substantial grounds. If the dispute of unpaid debt is genuine and based on substantial grounds and an agreement to arbitrate covers the dispute, the creditor must pursue arbitration rather than court action when the debt is denied or not admitted. The arbitrator, rather than a judge, will then decide on the genuineness of the grounds for the dispute.

In other jurisdictions like the courts of England and Wales (see the decision of the Court of Appeal in *Salford Estates (No 2) Ltd v Altomart Ltd* (No 2)[2014] EWCA Civ 1575; [2015] Ch 589) ("**Salford Estates**"), if a company simply does not admit a debt, without providing genuine or substantial grounds for the non-admission, the creditor's winding-up petition will likely be dismissed or stayed pending arbitration.

Other countries take a more nuanced approach, balancing these extremes. Before the decision in *Sian Participation v Halimeda*, Hong Kong courts issued divergent rulings on the above public policy conflict. In *In re Southwest Pacific Bauxite (HK) Ltd* [2018] HKCFI 426 ("**Lasmos**"), Harris J followed the *Salford Estates* analysis but added that the company must have initiated arbitration proceedings to obtain a stay. Similarly, *But Ka Chon v Interactive Brokers LLC* [2019] HKCA 873, a company failed to have a winding-up petition stayed due to not commencing arbitration. The Hong Kong Court of Final Appeal in *Guy Kwok-Hung Lam v Tor Asia Credit Master Fund LP* [2023] HKCFA 9 ("**Guy Lam**") adopted a similar stance for exclusive jurisdiction clauses, with some exceptions endorsed by two recent Court of Appeal decisions: *In re Simplicity & Vogue Retailing (HK) Co Ltd* [2024] HKCA 299 and *In re Shandong Chenming Paper Holdings Ltd* [2024] HKCA 352. However, in *Dayang (HK) Marine Shipping Co Ltd v Asia Master Logistics Ltd* [2020] HKCFI 311, William Wong SC, sitting as a deputy judge, rejected the so-called "*Salford Lasmos*" approach.

¹ *Sian Participation Corp (In Liquidation) v Halimeda International Ltd (Virgin Islands)* [2024] UKPC 16



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Newsletter

Arbitration in the BVI is governed by the Arbitration Act 2013, effective from 1 October 2014, which is largely based on the UNCITRAL Model Law. Under section 18(4) of the Arbitration Act 2013, if the court refers parties in an action to arbitration, it must stay the legal proceedings. The equivalent in England and Wales is section 9 of the Arbitration Act 1996.

In *FamilyMart China Holding Co Ltd v Ting Chuan* [2023] UKPC 33; [2024] Bus LR 190 ("**FamilyMart**"), a key issue was defining a "matter" referred to arbitration. According to *FamilyMart*, a "matter" is a substantial issue relevant to a claim or defence, capable of being resolved by an arbitrator as a separate dispute (para. 61). Determining a "matter" is not a mechanical exercise and it requires judgment and common sense. It is not enough to simply point out that an issue could be a dispute covered by an arbitration agreement. It must be evaluated for its substantiality and relevance to the outcome of the legal proceedings in question (para. 65).

A creditor's winding-up petition is not considered an "action" under section 18 of the 2013 Act or a "claim" under section 9 of the 1996 Act. In such petitions, non-payment of a specific debt is used as evidence that a company cannot pay its debts as they become due, rather than as a claim for debt payment. The Arbitration Act does not intend to require creditors to obtain an arbitration award before enforcing an undisputed debt in court. Creditors can resist a mandatory stay by demonstrating that the debt is not genuinely disputed on substantial grounds. If there is no claim, there is no breach of the exclusive arbitration clause, and thus no basis for a stay. The case *Sian Participation v Halimeda* [2024] held that *Salford Estates* was incorrectly decided, and a *Willers v Joyce* direction was issued, indicating that *Salford* should no longer be followed in England.

As a result, under *Sian Participation v Halimeda*, a debtor company can no longer simply stay a winding-up petition when an arbitration agreement is present. Instead, it must demonstrate that the debt is disputed on genuine and substantial grounds for the petition to be stayed for arbitration.

The question remains whether *Sian Participation v Halimeda* is binding on the Hong Kong courts. This question arises particularly in light of the Hong Kong Court of Final Appeal's ruling in *Guy Lam*, which held that, barring compelling reasons such as the risk of insolvency affecting third parties and the debtor's reliance on a frivolous defence or an abuse of process, parties should adhere to their contractual obligations, specifically, the exclusive jurisdiction clause. The persuasive effect of a decision of the House of Lords is contingent upon various factors, including the nature of the issue and the similarity of any relevant statutory or constitutional provisions. Notwithstanding *Sian Participation v Halimeda*, the decision in *Guy Lam*, being one from the Hong Kong Court of Final Appeal, is still authoritative as of the date of this newsletter and binding on lower courts in Hong Kong. As the apex court in Hong Kong's judicial hierarchy, Hong Kong Court of Final Appeal has the discretion to depart from its own previous precedents. However, such departures are considered with caution, particularly to avoid disrupting established rights. This authority is exercised with utmost restraint (see *A Solicitor v Law Society of Hong Kong* [2008] 2 HKLRD 576).



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Date: 27 June 2024

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