Liquidation applications and arbitration agreements: Sian v Halimeda test increasingly followed in common law jurisdictions.

By Tessa-Jade Heise[1] and Arran Dowling-Hussey[2]

For some years following the decision *Salford Estates*, *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575, English courts would dismiss (or stay) winding-up petitions, in any case, where the underlying debt was subject to an arbitration agreement, even if it could not be shown that there was a dispute on genuine and substantial grounds. Several common law jurisdictions, including Singapore, Malaysia and Hong Kong followed this decision in whole or part. However, notably the BVI courts refused to follow *Salford Estates*: in the decision of the Eastern Caribbean Court of Appeal in the BVI case of *Jinpeng Group Ltd v Peak Hotels and Resorts Ltd* BVIHCMAP2014/0025 (8 December 2015), as followed by the court at first instance and on appeal in *Sian v Halimeda* BVIHCMAP2021/0017 (11 November 2022) itself. On an appeal from the British Virgin Islands, via the Eastern Caribbean Court of Appeal, the Privy Council decided in *Sian v Halimeda* [2024] UKPC 16 that the judgment of the English Court of Appeal in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575 was wrong, and directed the English courts to no longer follow it in doing so exercising their powers to make such a direction for the first time. The Privy Council opined that in there was no engagement of Arbitration Act 1996 s.9 concerning mandatory stays of legal proceedings, as winding up petitions (BVI – liquidation applications) do not by their nature determine or resolve issues of the underlying debt. Further, the Board acknowledged the delay and expense, without good purpose, when requiring parties to first determine 'insubstantial' disputes via arbitration.

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In January, 2026 the Irish High Court has now considered *Sian v Halimeda* in the decision of *San Leon Energy PLC v Brightwaters Energy Ltd* [2026] IEHC 1 (Kennedy J), providing clarity for domestic (and international) businesses and creditors on how the Irish legal landscape treats the interaction of arbitration clauses with statutory insolvency remedies. San Leon Energy PLC had a commercial interest in Energy Link Infrastructure (Malta) Ltd (ELI), the owner of a Nigerian pipeline project. Brightwaters Energy Ltd, the construction contractor, was under a Nigerian consent judgment owed a substantial sum. Efforts to refinance the wider project and progress construction, saw San Leon, in October,2023 enter into an agreement with Brightwaters which was governed by Nigerian law. San Leon undertook to pay USD $16,652,608 within four business days on ELI's behalf. The agreement also contained an arbitration clause requiring disputes to be resolved under the International Chamber of Commerce Rules. A separate refinancing transaction with a third-party funder was expected to generate sufficient funds to meet San Leon's financial obligation but no payment was made. Brightwaters debt remained outstanding in to 2025 although there were repeated assurances that payment was imminent. Brightwaters indicated its intention to present a winding up petition. San Leon responded by applying for an injunction restraining presentation of the petition. It relied on three core arguments:

- its payment obligation had not crystallised;
- there was therefore a bona fide and substantial dispute;
- and that bona fide and substantial dispute fell within the scope of the ICC arbitration clause and therefore had to be referred to arbitration.

Mr. Justice Kennedy refused the injunction. On a first principles basis the court was not satisfied that there was a genuine dispute on substantial grounds as to whether the debt was due. Where payment had not been made for over a year and no credible dispute had been established, Brightwaters was entitled to invoke the statutory insolvency regime. San Leon argued that, even if Brightwaters had a prima facie debt, the existence of an ICC arbitration clause required the dispute to be resolved through arbitration and justified restraining the winding up petition in the interim. The court rejected that submission, adopting *Sian Participation*. An arbitration clause does not, of itself, prevent a creditor from presenting a winding-up petition; the determinative question is whether the debt is genuinely disputed on real and substantial grounds. As Kennedy J observed, a winding-up petition does not resolve or finally adjudicate the underlying debt and therefore falls outside the scope of arbitration clauses. Nigerian law governed the interpretation of the contract, including the arbitration clause, but Kennedy J determined that the question as to whether there was a real and substantial dispute justifying the restraint of presentation of the petition, was a matter of Irish law.

On the facts, San Leon failed in establishing that there was a genuine dispute as to whether its payment obligation had arisen. Where there was no real and substantial dispute, there was no basis to restrain Brightwaters from presenting its petition. Mr Justice Kennedy also noted that there was unchallenged prima facie evidence of insolvency — failure to file accounts for three years, suspension of the company's listing on the 'junior' London Stock Exchange's market -AIM, and importantly no averment of solvency. In light of the foregoing the court indicated that it would have been disinclined to restrain the petition on foot of the arbitration clause even if it had held that there was a real and substantial dispute in existence.

Conclusion

Mr. Justice Kennedy's decision, which as it follows *Sian v Halimeda* would be repeated in several other jurisdictions on similar facts establish that arbitration is not a shield against insolvency. Courts, whether in Ireland or elsewhere who follow *Sian v Halimeda* will not stay or restrain winding-up petitions solely because an arbitration clause is in place and brings the law in line with the position where contracts are subject to an exclusive jurisdiction agreement[3]. There is a necessity for a genuine dispute on substantial grounds that would be subject to the arbitration clause for a petition to be restrained. Insolvency proceedings sit outside arbitration clauses: Winding-up petitions do not determine the underlying debt and therefore do not breach or fall within the scope of typical arbitration clauses. Where insolvency indicators exist, courts will be slow to restrain a petition. Ireland now joins an increasing list of international jurisprudence, including the Hong Kong Court of Appeal's decision in *Hyalroute Communication Group Ltd v ICBC (Asia) Ltd*, in holding that tactical use of arbitration to frustrate insolvency should cease.

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[3] The English Court was not precluded from determining whether a debt was genuinely disputed on substantive grounds by the presence of an exclusive jurisdictional clause in favour of a foreign court - *Properties Ltd v Reorg-Apport Penzugyi RT [2001] EWCA Civ 1997*