PREFACE

by Vakhtangi Giorgadze[*] and Andres Larrea Savinovich[**]

The papers in this section of the Journal look at the interplay between insolvency and arbitration in Singapore, India, Hong Kong Special Administrative Region ('**Hong Kong SAR**') and Malaysia following the landmark decision of the Privy Council in *Sian Participation Corp (In Liquidation) (Appellant) v. Halimeda International Ltd (Respondent) (Virgin Islands)* ('**Sian Participation**').[1]

The relationship between arbitration and insolvency is famously described as 'a conflict of near polar extremes: bankruptcy policy exerts an inexorable pull towards centralisation while arbitration policy advocates a decentralised approach towards dispute resolution'.[2] The papers in this section look at the interaction between the two debt recovery systems where a creditor seeks to commence insolvency proceedings for an unpaid debt despite the existence of an arbitration clause in the underlying contract relating to that debt. In these circumstances, the question for the court is whether it should stay the insolvency proceedings and refer the parties to arbitration as per their arbitration agreement and, if so, in what kinds of circumstances?

The answer to this question is not harmonized across common law jurisdictions. What is apparent on a review of cases from different common law systems is the degree to which courts review the circumstances of the debt and the way in which they balance the competing policies at play in arbitration and insolvency regimes.

On 19 June 2024, the Judicial Committee of the Privy Council handed down the landmark judgment in *Sian Participation*, which sets out the new test to be applied as a matter of British Virgin Islands and English law by

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* Email: vakhtangigiorgadze@siac.org.sg.
** Email: andresfrancisco@siac.org.sg.
1 [2024] UKPC 16.
2 *US Lines Inc.*, 197 F.3d 631, 640 (2d Cir. 1999).

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courts exercising their discretion to stay insolvency proceedings where the relevant contract contains an arbitration clause. The Privy Council held that insolvency proceedings will be stayed in favour of arbitration only if the debt is genuinely disputed by the debtor on substantial grounds.

The implications of *Sian Participation* across common law jurisdictions cannot be overstated because, in so holding, the Privy Council overruled prior authority which has informed the development of the law on this question across common law jurisdictions. In reaching its decision, the Privy Council reviewed and analysed different approaches adopted by the courts in a number of common law jurisdictions including Singapore, Hong Kong SAR, and Malaysia. An indicator of the impact of *Sian Participation* in the common law world is apparent from the fact that it has already, in the short time since the judgment was handed down, been the subject of judicial discussion, including in Singapore and Hong Kong SAR.[3]

Behind the Privy Council's decision is a tension between, at least, two policy considerations: whether the courts should accord primacy to the parties' agreement to arbitrate versus a creditor's right to commence insolvency proceedings for a debt that remains unpaid.

The four papers in this section of the November/December issue of the *Asian International Arbitration Journal* consider the implications of *Sian Participation* in four common law jurisdictions – Singapore, India, Hong Kong SAR, and Malaysia. These jurisdictions were selected on the basis that they represent varying positions on the insolvency-arbitration interplay and have had differing degrees of influence by way of the pre-*Sian Participation* line of authority. The case notes analyse the relevant applicable law and the courts' approaches concerning the stay of insolvency proceedings when the contract contains an arbitration clause, and provide a critical analysis of the impact of *Sian Participation* in these jurisdictions.

The case note on Singapore by Shreya Kittur discusses how the approach taken by Singapore courts is different from *Sian Participation* and questions whether the current prima facie standard applied in Singapore should be revisited. The prima facie standard requires courts in Singapore to stay the insolvency proceedings if the debtor is able to demonstrate the existence of an arbitration agreement, that the dispute falls within its scope, and that the dispute is not raised as an abuse of process. Kittur takes the view that, on balance, the prima facie standard is better aligned with the approach of the courts to uphold arbitration agreements and reinforces the principles of minimal court intervention and respect for party autonomy in arbitration, and so should be maintained.

3 *Re Sapura Fabrication Sdn Bhd and another matter* [2024] SGHC 241 and *Re Mega Gold Holdings Ltd* [2024] HKCFI 2286.

The case note on India by Pranav Budihal explains that there is a distinction in treatment between 'operational' creditors (i.e., supplier of goods or services) and 'financial' creditors (i.e., lender) when considering the interplay between insolvency and arbitration. Indian case law seems to be aligned with *Sian Participation* in the case of operational creditors. However, in the case of financial debts, the courts require the creditor to establish a default before referring the parties to arbitration. Budihal concludes that *Sian Participation* may call for a change in treatment for financial debts, which could potentially reduce the number of frivolous claims before insolvency authorities and increase the attractiveness of arbitration.

The case note on Hong Kong SAR by Justin Ho and Danny Tan raises the issue of whether Hong Kong courts will follow the Privy Council's position in *Sian Participation.* To that end, the author examines Hong Kong jurisprudence to illustrate the evolution of approaches taken by the courts over the years. The author opines that there might be room for welcoming *Sian Participation* in Hong Kong as long as it does not involve a complete departure from the 'multi-factorial' approach currently used by the local courts, pursuant to which an exclusive jurisdiction or arbitration agreement must prevail absent strong reasons otherwise.

Finally, the case note on Malaysia by Will Sen and Emily Ho describes how *Sian Participation* has resulted in a shift in the legal landscape reflecting a more favourable position for creditors vis-a-vis their rights under insolvency legislation. Sen and Ho review a recent judgment of the Malaysian Court of Appeal, in which the Court's focus was on whether there was a *bona fide* dispute between the parties on substantial grounds. Sen and Ho argue that under this new test, which seems to be aligned with *Sian Participation*, the courts in Malaysia are expected to require debtors to demonstrate that the relevant debt is genuinely disputed on substantial grounds before dismissing or staying winding-up proceedings.

While the full impact of *Sian Participation* across common law jurisdictions is yet to be seen, the Privy Counsel's judgment will likely drive a conversation around the use of arbitration in the context of insolvency. This issue of the Asian International Arbitration Journal contributes to the conversation, bringing comparative case studies from Asia into the mainstream debates on the issue of how courts handle the complex interplay between the insolvency and arbitration regimes. Each of these case notes provides a unique insight into the positions taken by Asian courts and whether these positions may be revisited in light of *Sian Participation.* The case notes invite the readers to reflect on the legislative reforms or policy changes that may be needed to better integrate arbitration as an effective mechanism for the resolution of insolvency-related disputes.