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Singapore Court of Appeal Sets Aside Anti-Suit Injunction Granted in Favour of Non-Parties to Arbitration Agreement—*Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] SGCA(I) 8

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INTRODUCTION

Parties to arbitration agreements generally adhere to them. However, when faced with a dispute, a party may consider that their dispute is better heard before a national court and commence litigation either instead of, or in response to, an arbitration. An anti-suit injunction ("ASI") will usually be available from supporting courts to restrain litigation brought in breach of the arbitration agreement. This is straightforward in theory. However, a claimant in the litigation may join respondents who are not parties to the arbitration agreement. On occasion, that joinder may be motivated by the desire to defeat a possible application for an ASI.

In *Asiana Airlines, Inc v Gate Gourmet Korea Co., Ltd.* [2024] SGCA(I) 8, the Singapore Court of Appeal considered whether to uphold ASIs restraining two civil proceedings brought in South Korea. However, one of those proceedings was also brought against directors who were not party to the arbitration agreements. The Court's judgment considered the bases upon which ASIs may be granted with respect to non-parties and ultimately upheld the ASIs, but set aside the ASI made in respect to the claims against the non-parties.

BACKGROUND

The case concerned two contracts entered into by Asiana, a Korean airline, in December 2016: (i) a Joint Venture Agreement ("JV Agreement") with Gate Gourmet Switzerland ("GGS", a Swiss company) relating to their joint-venture, Gate Gourmet Korea ("GGK", a Korean company); (ii) and a Catering Agreement with GGK. Both contracts provided for disputes to be resolved by arbitration.

In 2019, following a disagreement between GGK and Asiana as to the interpretation of the pricing mechanism for GGK's catering services, GGK commenced an International

Chamber of Commerce ("ICC") arbitration against Asiana seated in Singapore. In April 2021, GGK obtained an award in its favour.

Asiana commenced set-aside proceedings on 11 June 2021 to set aside the award. The Court dismissed the set-aside application on 27 May 2022. Asiana appealed the Court's dismissal of its set-aside application, but its appeal was also dismissed on 14 November 2022.

In the meantime, Asiana commenced two sets of proceedings in Korea: (i) proceedings seeking a declaration that the Catering Agreement (and its arbitration agreement) were null and void (Catering Agreement Proceedings); and (ii) proceedings against GGS and its past and present chief executive officers for tortious damages (Compensation proceedings).

In response, GGS, GGK and its directors (collectively referred to as Gate Gourmet) initiated proceedings before the Singapore courts seeking ASIs in respect of both sets of Korean civil proceedings.

The First Instance Judgment

At first instance, Gate Gourmet based their applications for the ASIs on the grounds that the Korean proceedings were: (i) in breach of the arbitration agreement contained in the JV Agreement and Catering Agreement; and (ii) vexatious and oppressive.

The ASIs were granted in favour of all the defendants on the first ground—that the Proceedings were *prima facie* in breach of the JVA and CA arbitration agreements.

Asiana appealed the decision.

The Court of Appeal's Judgment

Asiana brought five different arguments in its appeal: (i) the arbitration agreements in the JV Agreement and Catering Agreements were null and void; (ii) public considerations weigh against the grant of the ASIs because the disputes are non-arbitrable, and the Korean courts are in a better position to rule on matters that would impact the Korean public; (iii) the Catering Agreement Proceedings were not in breach of the arbitration agreement because the Arbitration Act of Korea ("KAA") entitled Asiana to contest the validity of the arbitration agreement; (iv) the Compensation Proceedings were not within the scope of the JV Agreement because they were brought against the officers on account of their own actions, with GGS being only vicariously liable for the act of its officers; and (v) the arbitration agreement in the JV Agreement does not extend to the officers, and the ASI could not cover the Compensation Proceedings against the officers.

The Court of Appeal dealt with the first four arguments in relatively short order.

On the first issue, the Court held that it was not open to Asiana to contend that the arbitration agreements were null and void at all. This was primarily because Asiana had had several opportunities to challenge the validity of both arbitration agreements but had failed to do so. Having failed to do so, the Court concluded that "*it is an abuse of process for Asiana to attempt to raise this argument belatedly before us*".

Second, the Court held that Asiana had failed to establish that the dispute in the proceedings was non-arbitrable. Further, the Court considered it "*troubling*" that Asiana had "*framed its argument on public policy in broad strokes*". The Court recognized that proceedings involving corporations of a significant size will "*inevitably have some impact on the countries they operate in*", but litigants could not rely on this alone to "*assert that it is against public policy to arbitrate these disputes*".

On the third issue, Asiana failed to adduce any expert evidence substantiating its case that the KAA entitled it to contest the validity of the arbitration agreement in the Catering Agreement. The Court also considered that a natural reading of the KAA did not support Asiana's case.

On the fourth issue, the Court of Appeal considered the broad drafting of the arbitration agreement in the JV Agreement, and held that the claims against both the directors and GGS "*fall within the scope of the JVA Arbitration Agreement*" which had been broadly drafted, providing for all disputes, controversies or claims arising out of or in connection with the JVA to be resolved by arbitration.

However, the fifth issue necessitated closer consideration. The Court acknowledged that "*whether an ASI may be sought by or in favour of a non-party to an arbitration agreement is not straightforward*". In obtaining the ASI in respect of the claims against the directors Gate Gourmet had relied on two grounds: (a) that the ASI *extended* to the claims against the directors because the institution of foreign proceedings was in breach of an agreement between the parties; and (b) that it would be vexatious and oppressive to the directors if the suit were allowed to continue. These two grounds were considered in turn.

Considering the former ground first, the Court acknowledged that this was a "*developing*" area of the law "*in need of clarification*". The Court considered case law across various jurisdictions and ultimately concluded that while "*the court will take a generous approach towards the construction of arbitration agreements*", the starting position when considering ASIs against non-parties is that "*absent plain language to the contrary*", the parties are likely to have considered that an arbitration agreement (or

exclusive jurisdiction clause) "*neither to benefit nor prejudice non-contracting third parties*".

Importantly, the Court did not consider the risk of "*forum fragmentation*" as justifying taking a more expansive approach in applying arbitration agreements to non-parties. This is notable because in doing so, the Singapore Court distanced itself from what it considered were the underpinnings of the English House of Lords decision of *Donohue v Armco Inc and others* [2002] 1 All ER 749. It considered that the approach taken in Donohue was driven by a need to avoid such "*forum fragmentation*"—having a dispute heard in various different forums. The Court considered that "*this risk should not be overstated, especially in the context of arbitration agreements*", because parties agreeing to arbitrate their disputes "*remove such disputes from their natural forum, which are the national courts*".

The Court decided that in order to obtain an ASI against a claim brought against a non-party to an arbitration agreement, the applicant will need to demonstrate either that: (i) the agreement was intended to also cover the non-party; or (ii) the real purpose for suing the non-party was to bypass the arbitration agreement in a manner making the foreign proceedings vexatious and oppressive.

However, the Court clarified that the "vexatious or oppressive" standard is a high one. Such circumstances might include where proceedings are instituted in bad faith, where the proceedings amount to an unlawful attack on the applicant's legal rights, or where the foreign proceedings are duplicative of Singaporean proceedings. The Court considered these instances to speak to the broader underlying principle of unconscionability, "*where the real purpose and effect of suing the party is to frustrate or subvert an existing obligation*".

On this basis, the Court set aside the ASI in relation to the Compensation Proceedings with regard to the claims against the officers (i.e. the non-parties to the JV Agreement): firstly, employing the plain language test, the Court found nothing in the arbitration agreement "*to suggest that it was intended by Asiana and GGS to apply to the directors*"; secondly, nothing in the Compensation Proceedings "*has the effect or even the purpose of frustrating or subverting the operation of the JVA Arbitration Agreement*".

COMMENT

Asiana Airlines continues the robust approach of the Singapore courts in granting ASIs against parties that have commenced litigation in breach of arbitration agreements. The decision sets out the approach that will be taken by the Singapore courts in deciding

whether to grant an ASI restraining claims brought against a non-party to an arbitration agreement (or exclusive jurisdiction clause). This will be of interest to commercial parties as increasing numbers of parties to arbitration agreements seek to involve non-parties in their disputes.

Asiana Airlines also confirms that the Singapore courts will only grant ASI to restrain claims against non-parties to the arbitration agreement in exceptional circumstances.

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